

Senate Standing Committees on Environment and Communications
The Effectiveness of Threatened Species and Ecological Communities' Protection in Australia

8 April 2013

Dear Committee

I recently have previously made a submission to the Threatened Species Inquiry and referred in that inquiry to the story of the Lungfish and the Paradise Dam.

At the time, there were questions on notice pending with Sewpac relating to that issue.

They have since replied (Senate Question 2552)

The Department's responses, which are attached, are an extraordinary expression of extreme indifference to a species listed and ostensibly protected under the Department's legislation.

For instance, they note in question 3 that building a spillway was one of the conditions imposed on the proponents. The fact that it hasn't been operating since 2010 is, in their view, not a breach of conditions, because the conditions don't impose any specific operating requirements. By that logic, there is no requirement that the spillway operate at all – it simply needs to be there.

The Department has taken no position on how often the spillway needs to operate, however, they don't seem concerned at the mortality figures for lungfish reported in the SunWater monitoring reports or the completely inexcusable delays in fixing the spillway.

When the Department was asked (question 8) whether they believed the fishways are operating efficiently enough to ensure the survival of the lungfish – the purpose of the conditions after all, the Department simply notes that there being a fish transfer device they deem the condition satisfied.

When asked what steps they've taken in response to the down time of the spillway and the high mortality rates, the Department again says they simply deem the condition satisfied and no action has been taken.

A similar answer was received in answer to question 12 regarding the adequacy of the design of the spillways.

Despite the high levels of mortality recorded, the Department maintains (question 14) that this was within expected levels of mortality when the project was approved.

Effectively, these answers demonstrate several profound concerns with the Department's response to threatened species. These response make clear that once approval is given and conditions imposed, unless the conditions impose specific monitoring or enforcement requirements, the Department sees its work as being complete, regardless of the status of a species they are charged with protecting.

It demonstrates serious problems with conditions imposed on approvals. The conditions imposed on the proponents were to build infrastructure that was designed to protect the lungfish. Once the building has been done, the Department takes no responsibility for how and when or even if it operates. There is virtually no public enforcement right in the EPBC Act for conditions imposed nor is there an obligation in the Act that conditions imposed are effective in meeting their objectives.

As many submissions to the Committee have noted there is no accountability for decisions taken or

not taken in response to threatened species. In the absence of accountability we are seeing extreme indifference from a Department charged with protecting our country's threatened species.

Recommendations

- Amend the EPBC Act so that conditions imposed on approvals clearly state the purpose and objectives of the conditions;
- Amend the EPBC Act so that those underlying purposes and objectives are enforceable by third parties;
- Amend the EPBC Act so that evidence of failures of conditions to achieve their purposes or objectives must be considered by the Department and reasons give if no action is taken

I would also urge the Committee to recall the Department to provide more detailed responses to the questions that were submitted and any other questions relevant to the Inquiry.

Sincerely

Jeremy Tager

**MINISTER FOR SUSTAINABILITY, ENVIRONMENT, WATER, POPULATION
AND COMMUNITIES**

Senate Question No. 2552

Senator Waters asked the Minister representing the Minister for Sustainability, Environment, Water, Population and Communities, in writing, on 16 November 2012:

With reference to the conditions of approval No. 2001/422, granted under *the Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) for the Paradise Dam on the Burnett River in Queensland, which requires the dam operator to install a fish transfer device that is suitable for the Australian Lungfish, listed as vulnerable to extinction under the EPBC Act: No. 122—20 November 2012 85

1. Is the department aware of the Paradise Dam Upstream Fishway Monitoring Final Report June 2011 and the Paradise Dam Downstream Fishway Monitoring Program Final v.1.1 Report February 2012, written by Fisheries Queensland for Burnett Water Pty Ltd and recently published by SunWater Ltd, which show that: (a) no lungfish, or negligible numbers of lungfish, are using the downstream fishway installed on the dam to move downstream; (b) large numbers of lungfish are being killed or severely injured on the stepped spillway of the dam when attempting to move downstream during flood events; and (c) the cumulative effect of mortalities from passing over the stepped spillway is likely to have a major impact on fish populations in the Burnett River over the longer term, including the lungfish.
2. Does the department agree that the Burnett River lungfish population has low genetic diversity and, therefore, that maintaining connectivity within the breeding population is important for its conservation.
3. Given that Neranjala Fernando, a witness for SunWater Ltd, testified in court that pre-dam water flowed past the dam site 95 per cent of the time, what level of operation of the fishways does the department believe is necessary to ensure sufficient connectivity in the river and sufficient movement of lungfish.
4. Is the department aware that the Paradise Dam upstream fishway and downstream fishway have been operated by SunWater Ltd for less than 30 per cent of the time since the dam commenced operation in December 2005, including no operation from January to December 2011 through to October 2012.
5. Is it correct that both the upstream and downstream fishways are currently broken and will not be repaired until mid-2013.
6. Does the department agree that the condition imposed on the dam operator, to install a fish transfer device that is suitable for the lungfish, has not been satisfied.
7. During periods in which the upstream and downstream fishways have been operating, what percentage of lungfish is estimated to be using the fishways.
8. Does the department believe the fishways are operating efficiently enough to ensure the survival of the lungfish in the Burnett River.
9. What level of mortality is estimated to have occurred as a result of the non-operation of the fishways.

10. Can a list be provided identifying all documents produced by the department in response to the Paradise Dam Upstream Fishway Monitoring Final Report June 2011 and the Paradise Dam Downstream Fishway Monitoring Program Final v.1.1 Report February 2012.
11. Can a list be provided identifying all steps taken by the department in response to the: (a) lack of operational time of the fishways; and (b) lack of effectiveness of the fishways.
12. Given that the above reports indicate that large numbers of adult lungfish are being killed on the stepped spillway of the dam, does the department agree that the current design of the spillway is responsible for high levels of mortality of lungfish; if so, what actions or recommendations have been made by the department to rectify the design flaws; if not, what actions or recommendations have been made by the department to reduce the levels of lungfish mortality resulting from the spillway.
13. Does the department agree that the levels of spillway mortality represent a significant threat to the continued health and viability of the species in the Burnett River.
14. Does the department agree that the findings of the reports satisfy the criteria of section 143(1)(bc) of the EPBC Act, in particular, that the impact of the Paradise Dam on lungfish is substantially greater than the impact that was identified in assessing the action.
15. Has the department considered or recommended that the Minister exercise his powers under section 143 of the EPBC Act to vary the conditions of the approval of the Paradise Dam, or to take any other action in relation to this matter; if so, can a description of the recommendations or considerations be provided; if not, why has the department not recommended: (a) the conversion of the stepped spillway into a smooth spillway and installation of a small weir downstream of the spillway to create a pool at the base; (b) that the downstream fishway be operational whenever water levels in the dam reservoir are above elevation (EL) 62m; (c) that the upstream fishway be operational for at least 95 per cent of each year; and (d) an ongoing monitoring program of the lungfish population in the Burnett River to assess any decline in the population during the remaining period of EPBC Act approval, to 1 January 2052.
16. Can a list be provided identifying any other measures recommended by the department in relation the SunWater Ltd reports.
17. Has the department considered the closure and dismantling of Paradise Dam in light of its impact on lungfish.

Senator Conroy: The Minister for Sustainability, Environment, Water, Population and Communities has provided the following answer to the honourable senator's question:

1. The Department of Sustainability, Environment, Water, Population and Communities (the department) is aware of these reports. They are a requirement of the corresponding state approval. The Queensland Department of Agriculture, Fisheries and Forestry (QLD DAFF) are responsible for monitoring the conditions of the state approval. The department understands that QLD DAFF is working with the proponent regarding the matters identified in the report.

2. The department understands that the Burnett River population of lungfish has been reported to have low genetic diversity and the importance of supporting gene flow between populations of low genetic diversity.
3. The conditions of approval under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) require that the proponent install a fish transfer device on the Burnett River Dam suitable for lungfish. The department is of the view that the fishway does not need to be operable at all times to be suitable for lungfish.
4. The department is aware that the fishway has had periods during which it was not operable. The department is of the view that the fishway does not need to be operable at all times to be suitable for lungfish. This view is supported by the judgement in the Wide Bay Conservation Council Inc (applicant) v Burnett Water Pty Ltd (respondent) (No 8) case in the Federal Court of Australia. In presenting his reasons for judgement, the Hon. Justice John Alexander Logan RFD (Reserve Force Decoration) stated that “.....it is the considered opinion of each of Dr Kind and Dr Mallen-Cooper that the fishway is suitable for the lungfish. Their opinion is, and I find, that the fishway does not need to be operable at all times to be suitable for lungfish.”
5. The department is aware that the upstream and downstream fishways are currently not operational due to damage incurred during 2010 and 2012/2013 flood events. The department understands that the proponent has appointed a project manager to ensure that the flood damaged fishways, are operational as quickly as possible.
6. The department is of the view that EPBC approval condition 3 has been satisfied.
7. Please refer to the Paradise Dam Upstream Fishway Monitoring Final Report June 2011 and the Paradise Dam Downstream Fishway Monitoring Program Final v.1.1 Report February 2012.
8. The conditions of approval under the EPBC Act require that the proponent install a fish transfer device on the Burnett River Dam suitable for lungfish. The department considers that the condition has been satisfied.
9. The department does not collect data relating to lungfish mortality levels in relation to the operation of the fishway.
10. The department did not provide a response to these documents. They are a requirement of the state approvals for this project.
11. The department is of the view that EPBC approval condition 3 has been satisfied. No further action has been taken.
12. The department considers that the proponent's actions to date have been compliant with the conditions of approval under the EPBC Act. No further action has been taken.
13. Consistent with condition 7 of the approval SunWater Ltd, in consultation with the department, will review the health and viability of the species at the completion of the ten year monitoring program in 2016.
14. No.

15. No. Under the EPBC Act the department does not have the power to direct the conversion of the spillway of the dam. The department is of the view that the fishway does not need to be operable at all times to be suitable for lungfish. An assessment of the monitoring program will be reviewed at the completion of the 10 year program in 2016.
16. The department has not recommended any measures in relation to the SunWater Ltd reports.
17. The department has not considered the closure and dismantling of Paradise Dam.