



Mr David Sullivan
Committee Secretary
Senate Foreign Affairs, Defence and Trade References Committee
PO Box 6100
Parliament House, Canberra ACT 2600

Dear Mr Sullivan

As part of its evidence to the 7 April 2016 hearing of the Committee's Inquiry into Contamination caused by fire fighting foams at RAAF Base Williamtown and other sites, the Department undertook to provide information in response to questions taken on notice. These questions relate to the Department's regulatory role under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and actions considered for assessment and approval under the EPBC Act that relate to RAAF Base Williamtown.

This submission addresses the Department's policy and regulatory roles in administering the EPBC Act. The Department will provide a further submission on actions that were considered for assessment and approval under the EPBC Act, as they relate to RAAF Base Williamtown, including the Department of Defence's F-35 Joint Strike Fighter project (EPBC 2010/5747).

Overview

The historical use and geographical movement of perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) within the environment on Commonwealth, State and Territory sites have resulted in complex contamination issues. Different departments and levels of government have different roles and levels of responsibility regarding particular aspects of these issues.

The Commonwealth Environment Minister can only statutorily intervene in environmental matters and make approval decisions in relation to actions that are likely to significantly impact the nationally protected matters under Part 3 of the EPBC Act.

The EPBC Act provides exemptions to the assessment and approval provision under the Act. These exemptions are for actions that were already occurring ('continuing use' exemption) or had previously received environmental authorisation ('prior authorisation'), and are outlined in greater detail below.

Whole of Government Response

The Department of the Environment recognises that there is a high level of community concern regarding contamination of land and water by PFOS and PFOA chemicals in areas including Williamtown, NSW and Oakey, QLD. The Department is collaborating with its Commonwealth and state and territory counterparts as part of a whole-of-government response to legacy contamination from the use of these chemicals.

Australia's federated system means that individual Commonwealth agencies and levels of governments have different direct responsibilities which may affect how PFOS and PFOA are managed in Australia. In particular:

- **Health standards and measures:** The Department of Health and relevant state and territory agencies are considering appropriate health standards and measures associated with PFOS and PFOA contamination.
- **Contamination on Commonwealth land:** Commonwealth landowners, such as the Department of Defence, are responsible for investigating and managing potential contamination on their sites.
- **Contamination on state and territory land:** States and territories are primarily responsible for environmental protection and waste disposal where contamination or waste disposal occurs on state and territory land.
- **Environmental protection regulation policy and standards:** The Department of the Environment and relevant state and territory agencies are considering appropriate standards and measures associated with PFOS and PFOA contamination. In addition, Commonwealth environmental assessment and approval processes will be required when any new action related to PFOS and PFOA is likely to have a significant impact on a nationally protected matter under Part 3 of the EPBC Act, including on Commonwealth land. This include actions that are likely to significantly impact the 'whole of the environment', but only in those instances where the actions affect, or are taken on, Commonwealth land, or are carried out by a Commonwealth agency (actions on Commonwealth land or taken by a Commonwealth agency).

Overarching role of the Department of the Environment

The role of the Department of the Environment is to design and implement the Government's policies and programmes to protect and conserve the environment and heritage and promote climate action. The historical use and geographical movement of PFOS and PFOA within Commonwealth, state and territory sites have resulted in complex contamination issues. The key functions of the Department of the Environment that relate to PFOS and PFOA contamination include development of environmental management guidance, environmental protection measures and environmental risk assessment of chemicals of high environmental concern.

As a key focus, the Department is collaborating with other Commonwealth agencies, including the Department of Defence and Department of Infrastructure and Regional Development, to develop Environmental Management Guidance to assist in managing legacy PFOS and PFOA contamination at Commonwealth sites. If agreed, first by the Commonwealth, second by the states and territories, this will form the basis for a national approach to managing PFOS and PFOA contamination, including setting acceptable levels in surface water, ground water and disposal in landfill.

The Department's actions in contributing to the whole-of-government response to this issue were covered in detail in the Department's submission to Part B of the Committee's Inquiry.

Department's Regulatory Role and Responsibilities

Under the division of powers between the Australian Government and the states and territories under the Australian Constitution, it is the states and territories that have the primary responsibility for environmental protection, such as air quality, noise, odour or general amenity. There are a number of intergovernmental agreements relating to environmental policy and regulation, including the 1997 Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment. These intergovernmental agreements outline the broad approach to the different responsibilities of Commonwealth, State and Territory Governments and agencies in relation to environmental management. The Heads of Agreement preceded the enactment of the EPBC Act, which forms the primary legislative basis for the Commonwealth's role in the regulation of environmental matters.

Requirement for consideration under the EPBC Act

The Commonwealth Environment Minister can only statutorily intervene in environmental matters and make approval decisions only in relation to actions that are likely to significantly impact the following nationally protected matters under Part 3 of the EPBC Act:

- World Heritage properties;
- National Heritage places;
- Wetlands of international importance (often called 'Ramsar' wetlands after the international treaty under which such wetlands are listed);
- Nationally threatened species and ecological communities;
- Migratory species;
- Commonwealth marine areas;
- the Great Barrier Reef Marine Park;
- Nuclear actions (including uranium mining);
- a water resource, in relation to coal seam gas development and large coal mining development; and
- the whole of the environment, but only in those instances where the actions affect, or are taken on, Commonwealth land, or are carried out by a Commonwealth agency.

An 'action' is defined broadly in the EPBC Act and can include a project, a development, an undertaking, an activity or a series of activities, or an alteration of any of these things.

For the purposes of a 'whole of the environment assessment' for where the actions affect, or are taken on, Commonwealth land, or are carried out by a Commonwealth agency, section 528 of the EPBC Act defines 'environment' as:

- a. ecosystems and their constituent parts including people and communities ('ecosystem' is defined in the EPBC Act as 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functioning unit')
- b. natural and physical resources
- c. qualities and characteristics of locations, places and areas
- d. heritage values of places ('heritage value' is defined in the EPBC Act as including 'the place's natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians.' 'Indigenous heritage value' is defined as meaning 'a heritage value of the place that is of significance to Indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history'), and
- e. the social, economic and cultural aspects of a thing mentioned in paragraphs a, b or c above.

Under the EPBC Act, it is the responsibility of the person proposing to take an action to 'self-assess' and consider whether their proposal is likely to have a significant impact on a nationally protected matter and requires referral for approval under the EPBC Act under Part 7 of the EPBC Act. On receipt of the referral, the Commonwealth Environment Minister determines whether the proposed action is likely to have a significant impact on one or more nationally protected matters (including actions on Commonwealth land or taken by a Commonwealth agency) and, if so, that further assessment and approval under Parts 8 and 9 of the EPBC Act is required.

Whilst the onus is on the person taking an action to 'self assess' whether or not their actions are likely to significantly impact on nationally protected matters, the Department examines all allegations of non-compliance with the EPBC Act on a case-by-case basis to ensure that unapproved actions that have had, or are likely to result in, a significant impact on nationally protected matters receive an appropriate compliance response. If it is determined the alleged action may significantly impact a nationally protected matter the Commonwealth Environment Minister may request a person to refer their proposed action (section 70 of the EPBC Act).

It is important to note actions that are not likely to have a significant impact on nationally protected matters, including actions on Commonwealth land or taken by a Commonwealth agency, are not required to be referred under the EPBC Act. Whether or not an action is likely to have a significant impact on nationally protected matters is assessed on a case by case basis, taking into account the circumstances of the proposed activity and the sensitivity of the receiving environment.

There are two specific features of the regulatory framework that are particularly relevant to the Committee's understanding of the relevance and applicability of the EPBC Act to the Terms of Reference for this Inquiry – transitional provisions for activities that pre-date the commencement of the EPBC Act and the handling of split referrals.

Transitional Provisions

The EPBC Act also contains a range of transitional provisions, including sections 43A and 43B, which exempt certain actions from the assessment and approval provisions of the EPBC Act. They apply to lawful continuations of land use that started before 16 July 2000 or actions that were legally authorised before 16 July 2000, the date of commencement of the EPBC Act. There may be circumstances where activities resulting in PFOS and PFOA contamination would not be subject to the EPBC Act because the actions are covered by one of the above transitional provisions. The Department carefully considers whether any referred or alleged activities are subject to the legislative requirements of the EPBC Act on a case by case basis.

These transitional provisions allow for the continuation of activities that were fully approved by state and local governments before the EPBC Act came into force ('prior authorisation'), or otherwise lawful, activities, which commenced before the EPBC Act came into force, and which have continued without substantial interruption ('continuing uses') since 2000.

Under the 'prior authorisation' exemption, assessment and approval under Parts 8 and 9 of the EPBC Act is not required if:

- before 16 July 2000, the action was authorised by a specific environmental authorisation under a law of the Commonwealth, state or a self-governing territory before 16 July 2000; and
- as at 15 July 2000, no further environmental authorisation was necessary to allow the action to be taken lawfully; and
- the specific environmental authorisation remains in force at the time the action is taken (in limited circumstances a renewal may satisfy this requirement).

Environmental authorisation means an authorisation under a law of the Commonwealth, a state or a self-governing territory that is intended to protect the environment and/or promote the conservation and ecologically sustainable use of natural resources.

Specific environmental authorisation means an environmental authorisation that is issued specifically in relation to the relevant action, i.e. it identifies the particular action by reference to acts and matters uniquely associated with that action, or was issued or granted following a consideration of the particular action by reference to acts and matters uniquely associated with the action.

Under the 'continuing use' exemption, assessment and approval under the EPBC Act is not required if:

- the action commenced before 16 July 2000; and
- the use of land, sea or seabed was lawful; and
- the action has continued in the same location without enlargement, expansion or intensification.

Any enlargement, expansion, or intensification of an existing use is not a continuation of that use. If the proposed action is to enlarge, expand or intensify an action it is not covered by this exemption and, if the enlargement, expansion or intensification is likely to have a significant impact on a nationally protected matter, the action must be referred to the Department for assessment and approval. Any change in the location or the nature of the use that results in a substantial increase in its impact is also not a continuation of use.

Split Referrals

Under section 74A of the EPBC Act, the Commonwealth Environment Minister has the ability to request the person proposing to take an action to refer a larger action for consideration. The decision in relation to whether or not the referred action is part of a 'larger action' is a discretionary one, and there are a range of circumstances in which a 'split referral' would be acceptable.

A split referral is where a referred action is part of a larger action that:

- has not been referred;
- has been referred in separate 'lesser referrals' for commercial or other operational reasons;
- will be conducted in progressive stages (also known as 'staged developments').

If accepted by the Commonwealth Environment Minister, a 'split referral' allows a person taking an action to structure their project approvals according to specific requirements. There may, for example, be practical or financial circumstances relating to the design, timeframe or geography of a project that make split referrals a suitable approach for the proponent which is also consistent with the objects of the EPBC Act (section 3).

However, a 'split referral' may mean that all relevant impacts of an action are not assessed, or that the impacts of each individual part of the action are deemed to not be significant, whereas consideration of the action in its entirety would have resulted in the action being found to have a significant impact on a nationally protected matter.

There is, therefore, a risk that a 'split referral' could circumvent the significant impact threshold and expose nationally protected matters to impacts which should have been subject to assessment and approval requirements. Section 74A is designed to provide a discretionary capacity to examine the circumstances of a proposal to determine whether a thorough assessment of all of the relevant impacts of the referred action is possible.

Conclusion

I hope the above information, in conjunction with the Department's written submission and testimony given at the hearing on 7 April 2016, assists with the Committee's understanding of the roles and responsibilities of the Department in relation to the Terms of Reference for Part B of the Committee's Inquiry.

The Department is preparing a further submission to provide the Committee with more detailed information in relation to specific actions associated with RAAF Base Williamtown that have been referred for consideration under the EPBC Act. I understand that the Committee's report is due to be handed down on 11 May 2016, and will seek to provide the relevant information to the Committee as soon as it is available.

Yours sincerely

Dean Knudson
Deputy Secretary

21 April 2016

