



# Conservation Council SA

Statutory Authorities Review Committee  
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June 17, 2011.

Attn: Mr Gareth Hickery

Secretary to the Committee

## Re: Inquiry into the Environment Protection Authority

As the peak conservation body for South Australia, the Conservation Council of South Australia (CCSA) welcomes the opportunity to make a submission to the Inquiry into the Environment Protection Authority (EPA).

CCSA is an independent, non-profit and strictly non-party political organization representing over 50 of South Australia's environment and conservation organizations and their 60,000 supporters.

CCSA developed, in 2009, a comprehensive view of environment policy in "South Australia in a Changing Climate: A Blueprint for a Sustainable Future" (<http://www.conservation.sa.gov.au/blueprint.html>) This document sets out, at a strategic level, policy positions in six key environmental areas. CCSA's Blueprint explicitly refers to the role of the Environment Protection Authority (EPA) at numerous points and, in particular, proposed changes to its role and some of the policy settings that inform its role.

CCSA believes that every South Australian has a stake in a healthy environment and is therefore a strong supporter of measures that ensure that this environment is maintained and restored. A strong and effective EPA is one such measure – responsible for the effective protection of air and water quality, and the control of pollution, waste, noise and radiation. So too is a strong voice for the community – and this is highlighted in our submission.

Our submission draws from the Blueprint referred to above and highlights five major points of concern (see Part 1 (attached) for detail)):

- Resources for the EPA
- Information Access for the community
- The Site Contamination processes of the EPA
- Providing a Voice for the Community
- Coverage of the EPA

In addition, the submission highlights (in Part 2 (attached) for detail) a number of suggestions for improvements to the Act should legislative change to the Act be considered by the Inquiry.

I would welcome the opportunity to meet with the Committee to expand on our submission. CCSA would also be happy to assist the Government in an advisory capacity to develop the changes proposed in this submission.

Yours sincerely

A handwritten signature in black ink that reads "Tim Kelly". The signature is written in a cursive, slightly slanted style.

Tim Kelly

Chief Executive

cc Minister for Environment and Conservation

Chair, Environment Protection Authority

Chief Executive, Environment Protection Authority

# Conservation Council of South Australia Submission on the Inquiry into the Environmental Protection Authority.

## PART 1: Major Points of Concern

### 1.1 Resources for the EPA

CCSA believes that the current role undertaken by the EPA requires additional resources.

The SA Government describes one of the characteristics of the State, in many of its documents, as being “clean and green”. Use of the “South Australia. A Brilliant Blend” logo, for example, refers to this brand value. And there are many other references. Similarly, in the SA Strategic Plan, there are numerous targets that depend in large measure on a healthy environment – exports (T1.14), losing no species (T3.1), healthy South Australians (T2.4) to name three.

Ensuring this “clean and green” environment requires intensive monitoring and regulation – as provided by the EPA.

The task of the EPA is arguably much larger than at the formation of the Act (1993): the awareness in the community of environmental issues is now much greater e.g. the topics of marine conservation and marine parks, climate change and greenhouse gas emissions, and uranium mining in the context of Roxby Downs have all been in the public discourse in the last few weeks. The massive expansion of the mining industry in the State now underway poses a real challenge in ensuring that South Australians have a livable and viable environment into the future. The recent site contamination incident at Edwardstown has also highlighted this demand and expectation clearly.

Of particular concern are contaminated sites which are “orphan sites” – those for which there is no responsible party able to be identified or with the resources to effectively deal with site or water contamination. In many cases the Government itself becomes ultimately responsible for those sites.

CCSA notes that the staff complement at the EPA appears to have reduced between 2008-09 and 2009-10 (as outlined on page 69 in the 2009-10 Annual Report). A further tightening of staffing between 2009-10 and 2010-11 is evident in the 2010-11 Budget papers, Paper Number 4, Portfolio Statement Volume 4, page 11.43 where salary costs in 2010-11 were predicted to fall to \$15.9 million from \$16.1 million in the previous year. However, CCSA believes that a substantial **increase** in funding to the EPA is required to go some way towards meeting the challenges required in ensuring a healthy environment. As a guide, an increase of approximately 25% or \$10 million pa, ongoing, is an indication of the amount proposed to cover:

- A substantial uplift in monitoring, management and public reporting of site contamination, plus an allocation to fund site remediation of orphan sites;
- A much greater focus on mining and major developments and the impacts of such developments on air, water, land, ecosystems and fauna and flora;
- A presence in marine environments to match the development of marine protected areas;

- A fuller provision of information for the community on all matters within its control; and
- Support for a community voice in the work of the EPA.

## **1.2 Information Access for the Community**

CCSA believes that the adequate and timely provision of information is essential for the community to have confidence that South Australia is being managed for a healthy environment.

CCSA acknowledges the good work that has been undertaken by the EPA in providing information to the community on its website and through various publications and fact sheets but believes that this needs to be substantially expanded.

CCSA believes that the public register of the EPA (created under Section 109 of the Act) should be available on the Internet for no charge, and be searchable using a range of search keys. The data in the Register and available for searching should include the full extent of the information required under s.109, without significant limitation such as could arise from exercising the discretion of the Authority (as in Section 109 (3) (a)).

Further, the community should be able to access current data on all licence holders, and contaminated sites and water bodies, via a map interface, for no cost. As an example, the Atlas of South Australia provides substantial information on South Australia in a way that can be customized by each user by activating the layers of information of interest (see [www.atlas.sa.gov.au](http://www.atlas.sa.gov.au)).

Using this type of technology, community members should be able to designate an area of interest by means of a graphical map interface, then see the locations of licence holders and contaminated sites and water bodies within that area; and be able to "click" on those locations to extract more detailed information.

The data to implement such an expanded service exists within the EPA, and the technology is already in current use in the Government, with information products available at no cost. CCSA believes that this should be an early priority for the EPA.

## **1.3 The Site Contamination management processes of the EPA**

A consequence of the past and even more recent industrial uses of sites in South Australia is that some may be contaminated. This contamination may remain within the bounds of the site or spread to other sites e.g. contaminated groundwater can move offsite.

CCSA acknowledges that the processes associated with the management of site (or groundwater) contamination are complex and take time: for example, there can be considerable time periods which elapse between the actions which cause site contamination and becoming aware that a site may be contaminated, then conducting tests to establish the amount and extent of the contamination and, finally, remediating a site. During the course of this process, the levels of certainty about the scope and impact of the contamination will change markedly.

However, lack of complete knowledge is not a reason to avoid advising the community about potentially contaminated sites. CCSA, as an organization

representing the community, believes that the community is entitled to know about site contamination in a timely way and proposes two new approaches in this regard:

- First, that the expanded information service referred to above should be one of the vehicles to communicate this information. CCSA acknowledges that it may be appropriate to ascribe suitable qualifiers or gradations of certainty to data where information is not complete. Thus, if the EPA is advised of, or becomes aware of a possible contaminated site, information to this effect should be promptly advised to the community members likely to be impacted, and also be accessible through the proposed EPA Internet information service. As further information becomes available, the status of the site should be updated promptly;
- Second, that the EPA develop a risk communication protocol to provide more detailed guidance to its own officers, but also to local government, auditors and consultants, on how to communicate effectively with affected communities in relation to site contamination matters. There is considerable experience with respect to the development and use of such a protocol in other countries (e.g., Canada and the UK) and there has been some investigation of these approaches recently by CRC CARE, based at the University of South Australia. It should be possible for the EPA to produce a risk communication protocol relatively easily, and thereby provide clearer guidance as to when and how to engage in community consultation on site contamination matters.

CCSA understands that agencies other than the EPA may also be involved in site contamination processes – e.g. in the case of groundwater contamination, Health SA and the Department for Water. CCSA proposes that their advice to the community also be recorded (and be searchable) through the Internet information service.

#### **1.4 Providing a Voice for the Community**

The EPA presently holds an annual EPA Roundtable where it meets with its stakeholders and debates topics of interest.

CCSA believes that this mechanism and its frequency are insufficient to meet the community's needs for information and review. In particular, the Roundtable provides little real opportunity for the South Australian community to be engaged in the vital task of protection of the environment: two hours per annum for a handful of community members is not enough.

CCSA suggests that a more effective mechanism would be for a Board-sponsored Community Consultation Committee, meeting quarterly, to provide advice to the Board on community concerns (including, but not limited to, contaminated sites). The Committee could also act as a focal point for issues raised by the community to be directed and then dealt with. Proceedings of this Committee should be published on the EPA website to provide transparency.

## **1.5 Coverage of the EPA**

CCSA notes that certain activities are exempt – either in full or partially – from oversight by the EPA. These can include, for example, projects which are the subject of Indenture Acts and certain activities which operate under the Mining Act.

CCSA believes that the EPA is an independent statutory authority established with the purpose of overseeing activities with the potential to cause environmental harm. Consequently, CCSA proposes that the Authority should have regulatory responsibility for all such activities regardless of who is undertaking them, where they are undertaken and under what legislation and circumstances.

## **PART 2 : Improvements to the Environment Protection Act**

### **2.1 Third party rights to bring civil enforcement actions**

The Act presently provides, in Section 104, for a third party to lodge applications with the Court for civil remedies in respect of actions which involve breaches of the Act. However, there are significant obstacles within Section 104 to the exercise of this right, which is now commonly found in environmental legislation across Australia,

First, unlike the Development Act, this right is not extended to “any person” but is instead limited under Subsections (7) and (8), whereby the Court must grant leave for an action to be brought by parties other than the EPA or whose interests have been affected. It is submitted that this right should be available to any person, without the limitations imposed by sub-ss (7) and (8).

Second, Subsection (17) allows for an applicant to be required by the Court to provide security for costs or an undertaking as to damages, each of which orders is likely to prevent a citizen-based action from proceeding. These requirements are not appropriate to this context and should either be removed from the Act or only able to be applied where the Court considers there is no genuine public interest element involved in the action.

Third, and most seriously of all, sub-section 18 allows for an award of damages against an applicant should their action fail. This is a virtual deterrent to almost all applicants contemplating proceedings under s.104 and goes well beyond any requirement applicable under the common law. This sub-section should be repealed.

Finally, whilst sub-s(23) allows the court, in deciding whether to award costs against an unsuccessful applicant, to consider various factors including the public interest aspects of the action, this affords no comfort or guarantee to an applicant contemplating an action under s.104 that costs will not be awarded against them should their action fail. It is submitted that a provision should be inserted in s.104 to allow for an application to be made to the Court for a protective costs order before the action is heard, so as to enable prospective applicants to know in advance the extent to which they will be exposed to a costs order should their action ultimately fail.

CCSA believes that the health of the environment is such an important issue for the ongoing security of South Australia, that the law as it now stands should be changed to remove the existing cost and damages barriers – particularly in applications that deal with matters of public interest or raise significant issues with the administration of the Act.

## **2.2 Third Party Rights to Appeal**

The Act provides, in Section 106, for rights of appeal in a number of defined circumstances by persons who are the subject of decisions by the EPA.

CCSA is concerned that there are no rights for third parties to bring appeals against EPA's decisions, in particular with respect to the grant of environmental authorisations and the conditions attached thereto. CCSA believes that these types of decisions involve matters of broader public interest or significant issues with the administration of the Act where a provision for third parties to appeal would be appropriate. If some safeguard is felt appropriate in this situation concerning vexatious appeals, there could be provision, as under the Development Act, for such third-party appeals to be brought only by those who have made submissions to the EPA in relation to the relevant decision.

## **2.3 Public notice of changes to licence conditions**

The Act provides, in subsection (1) (b) of s. 46 for public notice to be given with respect to proposed changes to the conditions of an environmental authorisation, but ss(4) excludes this requirement where the change does not relax the relevant conditions.

CCSA submits that this section should be removed, as it is in situations where public complaints may have led to an increase in licence conditions that the public should be entitled to have notice of the EPA's proposed response. In short, CCSA believes that any change to a licence should involve a consultation process – not just when conditions are relaxed.

## 2.4 The Objects of the Act

CCSA views the Objects of the Act (Section 10) as being out-of-step with current thinking. Since 1993, when the Act was brought into operation and 2011, attitudes to the environment in South Australia and the types of challenges being faced have changed substantially. The Objects of the Act are largely silent on many of the issues which are of current concern including:

- climate change and the role of greenhouse gases as pollutants.
- the impact of the Native Title legislative regime at both Commonwealth and State levels and recognition of the role of traditional knowledge and the rights of traditional owners in our dealings with land and water.
- the services that a healthy environment brings to the community (ecosystem services). These include the ability to grow crops and wild food including seafood, freshwater for drinking, carbon sequestration and climate regulation, waste decomposition, purification of air and water, crop pollination and seed dispersal, and cultural and recreational use.
- the importance of the marine environment.

CCSA proposes that the Objects of the Act should be substantially revamped to reflect these more contemporary understandings and emphasizes on a healthy environment. Some sections of the Act and EPA policies may also require alteration to reflect the new Objects.