

Environment Victoria

Submission on the Draft Scoping Requirements for the Hazelwood Rehabilitation Project

Environment Victoria welcomes the opportunity to make comments and recommendations for amendments to the draft scoping requirements for the Hazelwood Mine Rehabilitation Project (**the project**) environmental effects statement (**EES**).

Environment Victoria has worked closely with the Latrobe Valley community for decades to advocate for environmental justice for the region in a post-coal economy.

After nearly a century of mining and burning coal, the rehabilitation of the first of three brown coal mines is a significant undertaking. Rehabilitation measures of the Hazelwood mine will have consequences for the Latrobe Valley community and environment in perpetuity. We appreciate that the project is subject to an EES. The high level of uncertainty of effects and complexity of the project warrants rigorous scrutiny.

We make the below comments and recommendations for amendment of the draft scoping requirements in the context of wanting to see the EES process result in assisting the Victorian community, including government and decision-makers, to comprehensively understand and appreciate the effects of the project. Our overarching concern is that the scoping requirements, once settled, facilitate the preparation of an EES that thoroughly scrutinises the project and potential alternatives to the project, rather than simply support the proponents desired course of action.

General commentary on the draft scoping requirements

We make the following general comments on the draft scoping requirements:

1. The scoping requirements do not address how the environmental effects of the project will change or be exacerbated by climate change. The scoping requirements should reference data and information the Department requires the proponent to use to assess likely climate change scenarios (for example, independent CSIRO reports), where “potential” or “future” climate change scenarios are mentioned, to avoid outdated data being used as best available science.
2. As currently drafted, the scoping requirements do not require the proponent to prepare technical information to inform future planning. Rather they adopt the language of the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (**MRSD Act**) to plan for the post-closure period, but not explicitly what the likely impacts of the project could be longer term. We are concerned that this will have potential future consequences for the Victorian taxpayer to bear the cost of longer-term environmental effects. Therefore the final scoping requirements must



include an obligation on the proponent to assess the effects of the project well into the future.

3. The draft scoping requirements do not account for the environmental impacts of the proponent's coal mining activities to date or accept the current state of the environment as the baseline for 'no net loss'. The proponent must be required to assess the project based on the current state of the environment and aim to restore the environment to achieve an environmental and community net benefit, rather than aim for 'not net loss' from now. Our suggested approach accords with the International Principles and Standards for the Ecological Restoration and Recovery of Mine Sites.¹
4. The scoping requirements do not consider First Nations values beyond the *Aboriginal Heritage Act 2006*, and therefore do not require the proponent to assess First Nations peoples' social, spiritual, economic and cultural interests in water and land, or First Nations' rights to maintain their distinctive relationships to any affected lands and waters. Nor do they require any consideration of First Nations people's human rights, international rights and native title rights. Meaningfully and genuinely engaging with the impacts of this project on First Nations people is crucial. Consultation with First Nations communities must facilitate free priori and informed consent.
5. There is an alarming paucity of publicly available information that outlines thorough technical analysis of other options for mine rehabilitation that do not require water be made available from the environment. The EES for this project is one of the only opportunities the Latrobe Valley and Victorian communities have available to them to learn all options for rehabilitation of the Hazelwood mine. We strongly encourage the Department to ensure that the scoping requirements provide this opportunity in the EES and ensure that transparency regarding options is central to the objects and general approach of the EES.
6. Whilst the applicable law, policies and strategies are required to be identified in Part 3.6 (see below), the scoping requirements should include how the project will comply with the principles of ecological sustainable development (**ESD**) as outlined in the MRSD Act. Given the evaluation objective is to avoid or minimise land use effects, a description of how the project will comply with ESD is necessary, including:
 - How community wellbeing and welfare is enhanced by following a path of economic development that safeguards the welfare of future generations;²
 - Intergenerational equity;³

¹ Society for Ecological Restoration (2022). International Principles and Standards for the Ecological Restoration and Recovery of Mine Sites. See: <https://www.ser.org/page/mining>.

² Mineral Resources (Sustainable Development) Act 1990 (Vic) (**MRSD Act**) s. 2A(2)(a).

³ MRSD Act s. 2A(2)(b).

- Protection of biological diversity and maintenance of ecological integrity;⁴
- Recognition of the need to develop strong, growing, diversified and internally competitive economy that can enhance the capacity for environment protection;⁵
- The long and short term economic, environmental, social and equity considerations that must be integrated into the project;⁶
- The precautionary principles;⁷ and
- Decisions and actions that provide for community involvement in issues that affect them.⁸

Land use effects is guided by integrated decision making, in the terms set out in clause 72.01 of the Victorian Planning Provisions, by which decision-makers and planners must achieve a net community benefit and sustainable development for present and future generations. Other statutory schemes, such as the Water Act 1989, which is of notable relevance here, is founded on the principles of sustainability.

Clear evidence on ESD principles is lacking in the draft scoping requirements. In our view, the overarching evaluation objective for the project should be the protection and enhancement of the health and wellbeing of the Latrobe Valley community by facilitating a safe, healthy, sustainable and biodiverse environment.⁹ This project must be an exemplar of these outcomes on the world stage and provide a model of mine rehabilitation from carbon to post-carbon outcomes. We therefore urge the Department to frame each evaluation objective for the project in the context of the principles of ESD.

Commentary and recommendations on Part 3.5 and Part 3.6

Part 3.5 Project alternatives

The *Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978 (Ministerial Guidelines)* provides that an EES should investigate and document the environmental effects of relevant alternatives for a project.¹⁰ Alternatives may be design or process alternatives, where one of several approaches could be applied.¹¹

⁴ MRSD Act s. 2A(2)(c).

⁵ MRSD Act s. 2A(2)(d).

⁶ MRSD Act s. 2A(2)(f).

⁷ MRSD Act s. 2A(2)(g).

⁸ MRSD Act s. 2A(2)(i).

⁹ This form of drafting derives from the work of the United Nations Special Rapporteur on Human Rights and the Environment. See: <https://www.ohchr.org/en/special-procedures/sr-environment>.

¹⁰ Available at: https://www.planning.vic.gov.au/__data/assets/pdf_file/0033/95487/DSE097_EES_FA.pdf.

¹¹ Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978 (2006) (*Ministerial Guidelines*), p 15.



Assessing the feasibility of alternative rehabilitation methods

A 2022 report prepared by the Centre for Science in Public Participation considered found that the full pit lake option was the cheapest, easiest option for the proponent.¹² It recommended that the proponent investigate other options that would leave the community and the government with a more positive legacy that requires less active management.

In its referral of the project under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**),¹³ the proponent indicated that a lake landform is the ‘only feasible outcome’ for the Hazelwood mine pit. However, six viable mine rehabilitation options were modelled during the 2015-2016 Hazelwood Mine Fire Inquiry.¹⁴ Two options, a full and a partial pit lake half-filled with solids, were found to be the most viable at the time *pending further investigations into the availability of water in the Latrobe River system* (including tributaries and groundwater).¹⁵

There is scientific evidence about the significant stress of the Latrobe River System and the Gippsland Lakes from water shortages and climate impacts, including:

- the Latrobe Valley Regional Rehabilitation Strategy, which found that mine rehabilitation cannot rely on water from the Latrobe River system;¹⁶
- the Federal Government’s Office of Water Science found that the Latrobe River system is under significant stress from water shortage. Future projections of water availability in the Latrobe River system indicates there will be insufficient water available to meet environmental demands as well as insufficient water available for the volumes required to meet demands for filling the mine void over 15-20 years. Downstream water assets, particularly the Gippsland Lakes will likely be impacted by the reduced availability of freshwater flows from the Latrobe River;¹⁷
- new studies into the vulnerabilities of the Gippsland Lakes to climate change impacts;¹⁸ and

¹² Centre for Science in Public Participation, *Re: Comments on the Hazelwood Mine Closure Proposal* (26 July 2022). Available at: <https://envirojustice.org.au/wp-content/uploads/2022/09/Hazelwood-mine-closure-report-David-Chambers.pdf>.

¹³ Available at: <https://epbcpublicportal.awe.gov.au/all-referrals/project-referral-summary/project-decision/?id=823dd886-6211-ed11-b83d-00224818a6aa>.

¹⁴ Hazelwood Mine Fire Inquiry Report, Volume IV, p 79 and 82.

¹⁵ Emphasis added.

¹⁶ Earth Resources Regulator, Latrobe Valley Regional Rehabilitation Strategy Alternative Water Factsheet. Available at: https://www.water.vic.gov.au/_data/assets/pdf_file/0030/477057/LVRRS-Alternative-Water-factsheet.pdf.

¹⁷ Australian Government, Department of Climate Change, Energy, the Environment and Water, Statement of Reasons for a Decision on Controlled Action Under the Environment Protection and Biodiversity Conservation Act 1999 (**Statement of Reasons**), p 15. Available at: <https://envirojustice.org.au/wp-content/uploads/2023/04/Water-Trigger-Statement-of-Reasons-Federal-Government.pdf>.

¹⁸ Kirono, Dewi; Hopkins, Mandy; Melbourne-Thomas, Jess; Biswas, Tapas; Dunlop, Michael; Round, Vanessa; Sheppard, Marian; Joehnk, Klaus; Briggs, Peter. *Vulnerability of the Gippsland Lakes Ramsar Site and its catchment to bushfire and climate change: Final Report submitted to the Department of Agriculture, Water and the Environment*. Melbourne: CSIRO; 2022. csiro:EP2022-1720. <https://doi.org/10.25919/5gn0-p026>.

- the Victorian government's Central and Gippsland Region Sustainable Water Strategy released in 2022.¹⁹

The proponent's EES referral form dated March 2020 states that the proponent had considered three possible options for rehabilitation of the site: an empty void, a partial mine lake and a full mine lake.²⁰ The proponent's Concept Master Plan document, dated June 2019, states that it produced a detailed Options and Strategies document in 2017 which explored possible options for the site.²¹ Other rehabilitation options, including those assessed in the 2015-2016 Hazelwood Mine Fire Inquiry, and referred to in Engie's EES Referral and 2017 Options and Strategies document, should be assessed as alternatives to the project as part of the preparation of the EES.

It is crucial that the Victorian government and community are aware of the technicalities, and the costs and impacts (adverse and beneficial), of all alternative rehabilitation options, in order to confidentially assess the appropriateness and effect of a full pit lake scenario. The government and community need to know why alternative options were ruled out by the proponent and why, in the proponent's view, the pit lake option is the most feasible option with an acceptable impact on the environment. We note that this is particularly crucial assessment aspect of this proposal sits within the context of the impacts of using water and the unavailability of water in the region for this purpose, and the potential that water will be unavailable for other uses in the region.

To ensure the technical feasibility of alternative rehabilitation options transparently occurs, the Department must amend the draft scoping requirements to explicitly require the proponent assess the technical feasibility of, at a minimum, each of the six options assessed during the 2015-2016 Hazelwood Mine Fire Inquiry. This technical assessment must address the matters set out in Section 4 of the scoping requirements and include a scenario prohibiting use of water from the Morwell and any other river for the purposes of filling the mine pit.

Rehabilitation needs to occur, one way or another. The proponent must assess the technical feasibility of all alternative rehabilitation options we mention above, regardless of whether the proponent has already deemed those options feasible or not.

Recommendation: Assessing the feasibility of alternative rehabilitation methods in Part 3.5 be amended to include:

- investigate and document the likely environmental, social and economic effects of mine rehabilitation alternatives, particularly where these offer a potential to achieve beneficial environmental, social and economic outcomes and are capable of meeting the objectives of the project. The technical feasibility study should address the matters set out in Section 4 of the scoping requirements.

¹⁹ Available at: <https://www.water.vic.gov.au/planning/long-term-assessments-and-strategies/central-gipps-sws>.

²⁰ Engie EES Referral Form, p 14. See: https://www.planning.vic.gov.au/_data/assets/pdf_file/0020/552224/Hazelwood-EES-Referral-form.pdf.

²¹ Engie, *Hazelwood Concept Master Plan* (June 2019), p 9.

Assessing the feasibility of alternatives within the proposed project

There is significant community, expert and government concern about the impacts of the proposal on the region's water quality and availability, and on the Gippsland Lakes. The Latrobe Valley Regional Water Study determined that water availability could be almost halved by 2050, and the Latrobe Valley Regional Rehabilitation Strategy (LVRRS) found that 'because of this, mine rehabilitation cannot rely on water from the Latrobe River system.'²² The LVRRS found that alternative sources of water have the potential to provide a regular and reliable source of water, even in dry years, which would also have the effect of providing greater certainty and hastening the rate of rehabilitation progress.

Community expectation is that the proponent is required to investigate existing and potential future alternative water sources for mine rehabilitation purposes, and alternatives to flooding the HARA coal ash site. It is crucial that the scoping requirements are prescriptive in this area, so the government are guaranteed being left with the full picture of possible future alternatives after the EES has been prepared.

Recommendation: Assessing the feasibility of alternative rehabilitation methods in Part 3.5 be amended to include:

- assess options for integrated water management and treatment across all three brown coal mines to minimise long term costs and community burden.
- assess the technical feasibility of current available and future alternative water sources for filling the pit, addressing the matters set out in Section 4 of the draft scoping requirements.
- investigate and document the likely environmental, social and economic effects of using alternative water sources for pit fill.

3.6 Applicable legislation, policies and strategies

The draft scoping requirements do not identify and list relevant legislation, policies, guidelines and standards. We note that it appears to be common practice that scoping requirements list relevant laws, policies, guidelines and strategies, presumably to assist a proponent in the preparation of their EES and bring their attention to laws, policy, standards and guidelines a proponent must comply with. At a minimum the scoping requirements should list the main legislation and policies relevant to the project and note that the list is not exhaustive or complete.

Recommendation: Applicable legislation, policies and strategies at Part 3.6 should list relevant legislation, policies, guidelines and strategies with a caveat that the list is not exhaustive or complete.

²² LVRRS, Alternative Water Factsheet. See: https://earthresources.vic.gov.au/_data/assets/pdf_file/0011/558794/LVRRS-Alternative-Water-factsheet.pdf.

Commentary and recommendations on Part 4

Part 4.1 Water Resources and Environmental Values

We are concerned at the lack of prescription contained in the draft scoping requirements regarding the type of water quality modelling must be undertaken for the EES. We appreciate that there are many ways in which to go about undertaking water quality modelling and various inputs that can be used to inform modelled scenarios. However given the very long-term nature of the effects water sources and environmental values of the project our view is that the scoping requirements must provide more detail for the proponent as to how impacts on water sources and their environmental values should be modelled and the inputs required for a range of modelled scenarios.

Evaluation objectives

Decades of coal mining activities in the Valley has had a negative impact on Gippsland's groundwater and river system. The closure and rehabilitation of the three coal mines presents an opportunity to heal and restore the health of these systems.

As currently drafted the evaluation objective of Part 4.1 applies a three-step offset hierarchy (avoid, minimise, offset), a process-based approach to environmental assessment. Evaluation objectives should identify desired outcomes consistent with other parts of the draft scoping requirements including Parts 3.7 and 4.2. The common outcome objective associated with a three-step offset hierarchy of 'no net loss' is inappropriate in these circumstances, where the proponent is proposing to 'rehabilitate' existing environmental harm caused by the substantive coal mining project.

Recommendation: Evaluation objectives of Part 4.1 be amended to: *Achieve a landform, in an environmentally sustainable way, that is projected to be safe and sustainable in perpetuity, and that protects public safety, current and planned infrastructure, and supports proposed outcomes for land use well into the future.*

Existing environment

This project is required to be reviewed by the Independent Expert Scientific Committee for Coal Seam Gas and Large Coal Mining Developments (**IESC**). The IESC require that proponents provide certain types of information, studies and assessments outlined in Information Guidelines. Currently, Part 4.1 of the draft scoping requirements does not require the proponent to prepare specific studies and assessments required by the IESC Information Guidelines.²³

Recommendation: Existing environment in Part 4.1 be amended to include:

- Undertake assessments required by the IESC Guidelines.
- Clearly identify impacts to water resources and water-dependent assets from existing coal mining operations and from the proposed rehabilitation, as required by the IESC Guidelines.

²³ Information guidelines for proponents preparing coal seam gas and large coal mining development proposals, p 6. Available at: <https://www.iesc.gov.au/sites/default/files/2022-07/iesc-information-guidelines-may-2018.pdf>.

- Identify and characterise the area's hydrology and hydrogeology before coal mining and the impact coal mining has had on the Gippsland Region's water.
- Characterise existing surface water and groundwater quality inside and outside the mine licence boundary, including aquifers, in the Morwell River, in the Latrobe River, in the Gippsland Lakes and the water currently inside the mine void.
- Provide a hydrological characterisation (i.e. a model) of the current allocation, extractions and uses of surface water and groundwater in the broader area, including in the Morwell River, Latrobe River, Eel Hole Creek and the Gippsland Lakes, including under the water allocation framework outlined in the Central and Gippsland Region Sustainable Water Strategy.
- Identify and characterise minimum flow requirements in the Latrobe River needed to protect the lower Latrobe River and Lake Wellington and the Gippsland Lakes system.
- Identify and characterise the relevant surface water and groundwater environments, including the protected beneficial uses and values, existing drainage functions and behaviours and catchments, including that of the Gippsland Lakes Ramsar site.
- Assess why the existing clay liner below the HARA was insufficient in preventing leaching of incident precipitation into groundwater.
- Determine if chromium or other metals have leached into groundwater beneath the asbestos dumps.
- Determine the present vertical and horizontal extent of the contaminated groundwater plume from PFAS, all coal ash contaminants, and chromium from asbestos landfills, and project plume characteristics under current, flooding and filled lake capacity under scenarios with HARA left in place or relocated;
- Identify and quantify water availability and sources for the cumulative impacts from a pit lake at Hazelwood as well as at the other mines in the Latrobe Valley that will also consider pit lake rehabilitation options, considering aridification, rising air and surface water temperatures, evaporation, and groundwater seepage.
- Describe presence of introduced fish species in Hazelwood pondage and avoidance measures to prevent introduced species entering into Morwell River and further downstream.

Likely effects

As currently drafted the scoping requirements do not explicitly require the proponent to assess water quality and environmental values in a scenario where coal ash from the HARA ash dump is excavated and landfilled appropriately elsewhere on the site. The EES must provide the Latrobe Valley community with an understanding of the effects of all potential water quality and environmental values, including effects of removal of known contamination from the mine before the mine put is flooded.

Recommendation: Likely effects in Part 4.1 be amended to include:

- Changes to surface and groundwater quality if the HARA ash dam is excavated and the coal ash landfilled at a more appropriate site elsewhere.



- Demonstrate how water levels in any pit level fill will be maintained in perpetuity (accounting for evaporative loss).
- Identify and analyse impacts on other water users, future water users and implications for the implementation of the Central and Gippsland Region Sustainable Water Strategy.
- For other feasible rehabilitation options considered, the impact of the proposed pit lake option should be compared to the impact of other options that involve returning water historically used for coal mining activities and proposed to be used for the purposes of mine rehabilitation back to the river system.

Mitigation

Recommendation: Mitigation in Part 4.1 be amended to include:

- Methods of protecting all water users and the environment in dry times to ensure any access to a water supply for the rehabilitation of the mine void can be adaptive, depending on future climate trends, well informed and subject to conditions that protect all water users and the environment in dry times.

Performance

Recommendation: Performance in Part 4.1 be amended to include:

- Needs to include up to at least 100 years.
- Evaluate the future liabilities for water contamination, water shortages, availability and long-term maintenance of water levels.
- Evaluate the extent to which recreation opportunities would be impacted by water contamination.

Part 4.2 Landform Safety and Stability

Part 4.2 should generally be amended to reflect the ongoing nature of the effects and impact of the project.

The Victorian government and community must, as a consequence of the EES, understand the safety and stability risks to landform safety and stability at different pit fill levels. The LVRRS states that there will be long periods where the lake cannot be filled using freshwater.²⁴ Our understanding is that water levels in the Latrobe River system have significantly decreased over time and will continue to decrease in a drying climate. Given the likelihood of this scenario it is prudent to expect ongoing and increasing difficulties in keeping a mine pit fill of water after the proponent has returned the land to the Crown.

Evaluation objective

²⁴ Available at: https://earthresources.vic.gov.au/_data/assets/pdf_file/0011/558884/Latrobe-Valley-Regional-Rehabilitation-Strategy.pdf.

The evaluation objective reflects the wording of the MRSD Act of 'post-closure', however it should be amended to reflect the ongoing nature of this project, well beyond the projected full fill date. The objective of the project should be a pit lake/rehabilitation plan that can be sustainable in perpetuity or well into the future, not merely a project for a lake that once full is safe, but will slowly become unsafe and more environmentally unsustainable over time due to climate change and an inability to offset the enormous annual evaporation rates.

Recommendation: Evaluation objective of Part 4.2 be amended to: *Achieve a landform, in an environmentally sustainable way, that is projected to be safe and sustainable in perpetuity, and that protects public safety, current and planned infrastructure, and supports proposed outcomes for land use well into the future.*

Existing environment

Recommendation: Existing environment of Part 4.2 be amended to include:

- Characterise the environment surrounding the mine void, particularly the Princes Freeway and the town of Morwell.
- Characterise the horizontal and vertical groundwater pressures impacting the mine void, including on the mine void floor and coal blocks.

Likely effects

Recommendation: Likely effects of Part 4.2 be amended to include:

- Characterise the requirements to achieve weight balance within the mine void at different water levels.
- Assess the potential impacts of groundwater extraction and rebound on local and regional land use subsidence during the rehabilitation, post-closure phases of the project, and well into the future.
- Characterise how the water table may be raised with the pit lake and the impact on the likelihood of batter collapse.
- Assess the site-specific engineering characterization, design, and implementation of mine batter composition, structure, and rehabilitation prior to, during, and after filling.
- Assess the potential for horizontal coal batters sliding or moving as the water level fills.
- Quantify the stability of the HARA and HARA Embankment, clay liner, rubble under the liner, and cap, both during and after pit filling (including from wave erosion). Evaluate settling, heaving, swelling, and/or rupture of the existing clay layer and any presumptive cap components as the zone of water saturation migrates upward into the HARA.
- Assess the impact of groundwater connectivity on the ability of adjacent mine to dewater and depressurise concurrently.

Part 4.3 Biodiversity and ecological values

Evaluation objectives

The evaluation objective for Part 4.3 is a three-step offset hierarchy (avoid, minimise, offset), a process-based approach to environmental assessment. Evaluation objectives should identify desired outcomes consistent with other parts of the draft scoping requirements including Parts 3.7 and 4.2.

Further, the outcome that is ordinarily sought to be achieved by a three-step offset hierarchy is “no net loss” (for example, in the Victorian Native Vegetation Guidelines²⁵), however the evaluation objective in Part 4.3 doesn’t include the “no net loss” principle. The consequence of not including an outcome-based objective, is that the scoping requirements do not place a requirement on the proponent to achieve no net loss, rather they only require Engie to engage in the process of applying the three-step hierarchy.

The “no net loss” principle should be included as an evaluation objective because:

- a. There is an identified gap between policy and practice with regards to the three-step hierarchy, in that it leads to the increased use of offsetting; and
- b. It is inappropriate to use offsets in circumstances such as these, where the potential impacts of the proposed project are dispersed over a very large area that is ecologically unique in character, such as the Gippsland Lakes.

Recommendation: Evaluation objectives for Part 4.3 be amended to include:

- an outcome-based objective for Part 4.3.
- an outcome of “no net loss”.

Key issues

Recommendation: Key issues for Part 4.3 be amended to include:

- biodiversity impacts in the context of climate change.
- assess potential impacts on the ecological character of the Gippsland Lakes as a Ramsar site, and corresponding international obligations, to comply with obligations under the Ramsar convention.

Existing environment

The scoping requirements require either literature reviews/desktop assessments or on-ground-surveys. There is a lack of scientific certainty regarding the state of the Gippsland Lakes and on-the-ground surveys are necessary in this case, particularly due to the scale and severity of potential implications of this project. Literature reviews/desktop assessments are insufficient.

Recommendation: Existing environment for Part 4.3 be amended to include:

- Describe the existing impact of climate change on biodiversity and species loss in the project boundary and downstream.

²⁵ Available at: <https://www.environment.vic.gov.au/native-vegetation/native-vegetation-removal-regulations>.

- Identify populations or habitat of indigenous species of flora or fauna of conservation significance within the project area and waterways.
- Characterised habitat that could be impacted should include direct and indirect impacts.
- Existing threats to biodiversity values should also include climate change.

Likely effects

As currently drafted the 'likely effects' section of Part 4.3 is insufficient to allow the Federal government to make a full assessment of potential impacts to matters of national environmental significance, including the Gippsland Lakes, threatened species and migratory species and flora and fauna.

When deciding whether the matter was a controlled action and which controlling provisions apply, the Federal government sought internal advice from the Office of Water Science about whether there is a real chance or possibility that the project will result in the following matters:²⁶

- a. areas of the wetland being destroyed or substantially modified;
- b. a substantial and measurable change in the hydrological regime of the wetland;
- c. the habitat or lifecycle of native species dependent upon the wetland being seriously affected;
- d. a substantial and measurable change in the physico-chemical status of the wetland; and
- e. an invasive species that is harmful to the ecological character of the wetland being established or encouraging the spread of existing invasive species.

The Federal government concluded that in the absence of detailed information, including on suitable alternatives to the use of freshwater, surface and groundwater impacts and mitigation strategies, there is a real possibility for adverse impacts on the ecological character of the Gippsland Lakes Ramsar site as a result of the proposed action. However, the matters considered by the Federal government are not covered by the scoping requirements, and should be included to ensure a thorough assessment of the project, for the purposes of both the Victorian Planning Minister and the Federal Environment Minister's assessment.

We further note that as currently drafting the scoping requirements require the proponent to identify species, rather than habitat relied upon by species. There are species that rely on the health of the river system and the Gippsland Lakes, i.e. habitat, and surveys should include habitat in addition to target species.

Recommendation: Likely effects for Part 4.3 be amended to include:

- Assess the impact of climate change on native flora and fauna, EPBC Act and FG Act listed communities, other protected species, populations or habitat of indigenous species of flora and fauna of conservation significance and biodiversity values, including projecting whether potential impacts on these values will be exacerbated by climate change.

²⁶ Statement of Reasons, above n 1, p 9.

- Identify where loss or degradation of native vegetation and listed communities/flora and fauna includes serious or irreversible damage.²⁷
- Identify potential changes in ecological character of the Gippsland Lakes Ramsar site, and how the ecological character of the Ramsar site will be preserved (as required by the Ramsar Convention).²⁸
- Identify impacts on geomorphology that is not habitat (e.g. loss of reed beds and fringing vegetation; erosion of shorelines).
- Impact of contamination and ongoing bioaccumulation of contaminants, including the cumulative impact, on adjacent or nearby habitat that may support listed species or communities, native vegetation or native species, including but not limited to the Morwell River, Latrobe River, Eel Hole Creek and Gippsland Lakes Ramsar Site.
- An assessment of impacts of the Morwell River connectivity in the context of river diversion, including on aquatic species.
- Identify habitat in addition to species.

Part 4.4 Cultural heritage

The draft scoping requirements require an assessment of Aboriginal cultural heritage under the *Aboriginal Heritage Act 2006 (Vic)*. An assessment of Aboriginal cultural heritage and values to Aboriginal heritage law alone is restrictive and inappropriately confining. The scoping of the EES must be framed in a manner beyond Aboriginal heritage requirements.

Arguably, such an approach is a matter of law and norms set under international instruments. Under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* Aboriginal persons and communities enjoy distinct cultural rights which broadly concern connection to Country. Assessment of relevant effects of the project must be, in addition to the question of heritage, framed in terms of rights. To the extent this rights framework aligns with international norms, notably those under the UN Declaration of the Rights of Indigenous Peoples, those norms also frame this assessment process.

Recommendation: Subject to the views and opinions of affected First Nations people, Part 4.4 be amended to include:

- Identification and assessment of effects on the exercise and enjoyment of rights by Aboriginal people provided for under section 19 of the *Charter of Human Rights and Responsibilities Act 2006*.
- Identification and assessment of effects on norms and principles established under international law including, but not necessarily limited to, the exercise of First Nations' (Indigenous peoples') right to free, prior and informed consent in relation to development affecting their Country.²⁹

²⁷ See the precautionary principle in section 391(2) of the EPBC Act.

²⁸ See: <https://www.dcceew.gov.au/water/wetlands/publications/australias-obligations-under-ramsar-convention-legislative-support-wetlands-fact-sheet>.

²⁹ See UN Declaration on the Rights of Indigenous Peoples, Art 32(2).

- Identification and assessment of effects on First Nations' authority to speak for and negotiation on behalf of Country, whether this is viewed as an extension of the exercise and enjoyment of cultural rights, a matter of 'social, spiritual, economic and cultural interests',³⁰ or otherwise.
- Identification and assessment of native title rights and interests under the *Native Title Act 1993* (Cth).
- Identification and assessment of interests arising under the *Traditional Owner Settlement Act 2010* (Vic) and Joint Management framework.
- Identification of First Nations peoples' social, spiritual, economic and cultural interests in water and land, and on First Nations' rights to maintain their distinctive relationships to any affected lands and waters.

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³⁰ Ministerial Guidelines, above n 2, p 17.

