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Mr Shayne Watson
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NSW Department of Planning and Infrastructure
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By email: assessmentsystems@planning.nsw.gov.au

Dear Mr Watson

Comments on Draft State and Regional Development SEPP 2011

The Environmental Defender's Office (Ltd) NSW („**EDO**") welcomes the opportunity to comment on the draft *State and Regional Development State Environmental Planning Policy* („**Draft SEPP**").

The EDO is a not-for-profit community legal centre specialising in public interest environmental law. We help individuals and community groups who are working to protect the natural and built environment. EDO NSW has an active program of casework, education and law reform. In addition, we provide free initial legal advice to the community.

In the time available for consultation we have provided brief comment on a limited range of issues.[1] We hope these comments assist in finalising the Draft SEPP, in a way that complements the changes underway to repeal Part 3A of the *Environmental Planning and Assessment Act 1979* („**EP&A Act**"), and provides for transparency, objectivity and accountability for development and infrastructure of state or regional significance.

Welcome certain proposed amendments

The EDO notes the Draft SEPP provides an opportunity to update certain provisions in the *SEPP (Major Development) 2005* („**2005 MD SEPP**"). The EDO welcomes particular changes such as:

- narrowing of objects in the Draft SEPP compared to the 2005 MD SEPP (clause 3)
- removal of reliance on the Minister's opinion in relation to the identification of State significant development (clause 8)
- removal of marinas as State Significant Development (Schedule 1)
- removal of a range of sites declared as State Significant Development (Schedule 2).

[1] The Draft SEPP was on exhibition from 18 Aug – 2 Sept 2011 via http://www.planning.nsw.gov.au/Development/Onexhibition/tabid/205/ctl/List/mid/1081/TypeID/1/language/en-AU/Default.aspx.

The EDO also welcomes certain policy changes which will affect the application of the Draft SEPP. Some of these will be given effect under the *Environmental Planning and Assessment Amendment (Part 3A) Repeal Act 2011* („**Part 3A Repeal Act**"). Welcome changes include:

- clearer prescriptions around the Planning Minister"s power to approve or refuse State Significant Development, including for modification of developments, and regarding wholly prohibited development[2]
- the requirement to consider s 79C of the EP&A Act when determining State Significant Development applications[3] (however, we strongly believe the exclusion of Development Control Plans undermines these benefits, as outlined below)
- the extension of minimum public exhibition periods from 30 to 45 days over school holiday periods
- commitments to publication of, and public access to, information on developments.

Need for general review clause

The EDO recommends a clause be added to the Draft SEPP, requiring the Minister to ensure the review of the SEPP"s provisions one year after its commencement, and at regular intervals thereafter. This could be similar to the provisions in cl 15 of the 2005 MD SEPP.[4]

Such a clause may have been omitted from the Draft SEPP due to the wider ongoing review of the planning system. However, we believe a review clause is an important mechanism of accountability, and demonstrates the Government"s commitment to ongoing review and update of such significant instruments.

[2] Eg, the Minister has a clear discretion to modify and place conditions on developments. Consent cannot be granted if the development is "wholly prohibited" in an EPI but it may be granted if it is partially prohibited. See Part 3A Repeal Act, s 89E.

[3] Given effect by s 89H of the Part 3A Repeal Act.

[4] **15 Review of Policy** *[note the Draft SEPP proposes to repeal this clause, presumably as part of the staged amendment and repeal of the 2005 SEPP]*

(1) The Minister must ensure that the provisions of this Policy are reviewed:

(a) as soon as practicable after the first anniversary of the commencement of Part 3A of the Act, and

(b) at least every 5 years thereafter,

to ensure that the provisions continue to be appropriate for identifying Part 3A projects consistently with sections 75B and 75C of the Act.

(2) Any such review is to consider whether identified projects meet one or more of the following criteria:

(a) the development is of regional or State economic importance in terms of a particular industry or infrastructure sector,

(b) the development is of strategic significance in achieving State or regional planning, service delivery or economic development objectives,

(c) the development is likely to set a precedent or is an emerging industry of strategic importance to the State,

(d) the development is of region-wide or State-wide community interest,

(e) the development is in need of an alternative consent authority arrangement:

(i) for added transparency because of potential conflicting interests, or

(ii) because more than one local council is likely to be affected or is the consent authority.

Part 2 – State Significant Development („SSD")

Exclusion of Development Control Plans from consideration for SSD (clause 11)

We note the proposal that DCPs "do not apply to State significant development." (clause 11) This is perhaps the EDO"s most significant concern with the Draft SEPP. The exclusion of DCPs:

- will avoid the need to "take into consideration" local planning considerations which may be relevant, reflecting previous criticisms of Part 3A which the Government has committed to overcome (eg, that Part 3A removed local communities" and councils" ability to control or influence planning decisions);
- undermines the positive intent of ensuring s 79C of the EP&A Act applies – including consideration of "the provisions of… any environmental planning instrument" – when considering State Significant Development (as noted above).[5]

Partial state significant development (cl 8)

The EDO is concerned at the breadth of the proposal in the Draft SEPP that, if development is only partly State Significant Development (as declared under Schedules 1 or 2), "the remainder of the development is also declared to be State Significant Development", subject to any contrary determination by the Director-General of Planning.

From the current draft it appears possible, for example, that a proposed development for a hospital, which includes a subdivision for seniors living surrounding the hospital, could be considered in its entirety as State Significant Development – despite the subdivision alone not being State significant in an objective sense. The EDO suggests there is a need for clearer limits around clause 8(2), to ensure only projects (or project parts) of genuine state significance fall into the „SSD" category.

Role of private certifiers (eg clauses 10 and 18)

The EDO is concerned about the potential scope of reliance on the discretion of private certifiers in relation to subdivision certificates for State Significant Development and Infrastructure.

We note that the EP&A Act enables the Draft SEPP to place restrictions on private certifiers" role in this regard:

> *(1A) For the purposes of subsection (1) (d) (iv), an environmental planning instrument that identifies subdivision in respect of which a subdivision certificate may be issued by an accredited certifier may place restrictions on the issue of such certificates by accredited certifiers.*

Without limiting options for such restrictions, the EDO suggests there is a need to ensure certification details are made publicly available and easily accessible on the Planning Department"s website.

[5] Section 89H of the Part 3A Repeal Act states: "Section 79C applies, subject to this Division [Part 4, Div 4.1], to the determination of the development application.

Schedule 1 to Draft SEPP, "State significant development – general"

Development for the purpose of petroleum production – Sch 1, cl 6, "Petroleum (oil and gas)"

The Draft SEPP changes the type of petroleum production developments[6] that would be State Significant Development – formerly captured by Part 3A through the 2005 MD SEPP. For example, the old definition[7] includes thresholds such as minimum capital investment (over $30 m) or employment; or location in particular local government areas.

In general, by removing these capital investment and geographic thresholds, the Draft SEPP is likely to expand the range of petroleum projects captured as State Significant Development; and apply the law more consistently across the State's local government areas. It is presumed that the exclusion of stratigraphic boreholes and monitoring wells is intended to exclude less significant developments.[8]

The EDO has elsewhere noted the need for reform of mining and coal seam gas regulation, and that efficient resource extraction should not come at the expense of adequate and comprehensive environmental assessments.[9]

On balance, the EDO believes the broader coverage of petroleum production under the Draft SEPP may enable better environmental assessment than the alternative, in the current regulatory circumstances, under Part 5 of the EP&A Act.[10]

In saying this, we note our reservations regarding aspects of the SSD and SSI regime that perpetuate problems under Part 3A – such as in relation to appeal rights, requirements for consistent approvals, and limiting concurrence or input from other agencies.[11]

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[6] We note 'petroleum production' is given the same meaning as in the *SEPP (Mining, Petroleum Production and Extractive Industries) 2007*, cl 3. i.e. In brief, 'petroleum production' means obtaining (etc) petroleum under a production lease or production licence (under the NSW *Petroleum (Onshore) Act 1991* or the *Petroleum (Submerged Lands) Act 1982*, respectively); and includes construction, operation, decommissioning of associated petroleum related works; drilling and operation of wells; and rehabilitation of land affected by petroleum production.

[7] *SEPP (Major Development) 2005*, Schedule 1, cl 6, "Petroleum (oil, gas and coal seam methane)".

[8] The EDO understands that the two types of drill holes excluded from the Draft SEPP are essential to proper hydrogeological investigations, and generally pose a low risk. At a minimum they should be installed in accordance with the Land and Water Biodiversity Committee's *Minimum Construction Requirements for Water Bores in Australia* (2nd ed., 2003).

[9] See EDO NSW, *Mining law in NSW – Discussion Paper* (June 2011), available at http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf.

[10] Development consent is generally not required for exploration, although certain CSG projects are a notable exception. As a consequence, the environmental assessment obligations for most mineral and petroleum exploration titles fall on the relevant authority (usually the Department of Primary Industries) in accordance with Part 5 of the EP&A Act. The authority has a statutory duty to examine and take into account the likely impacts of any exploration on the environment (EP&A Act, s 111). This is usually done through a review of environmental factors and potentially an environmental impact statement if impacts are likely to be significant. See further EDO NSW, *Mining law in NSW – Discussion Paper* (June 2011), noted above, pp 20-21.

[11] In particular, limited merits appeal rights for objectors (Part 3A Repeal Act, s 98(5)); the requirements that environment protection licences and other approvals be granted consistently with the SSD or SSI consent (ibid, s 89K for SSD [similar to s 75V], and s 115ZH for SSI); and the limited role for other Government agencies in the planning process. However, we welcome restoration of certain enforcement powers under the Part 3A Repeal Act (eg, to issue stop work orders under the *National Parks and Wildlife Act 1974* and *Threatened Species Conservation Act 1995*, as well as environment protection notices under the *Protection of the Environment and Operations Act 1997* in relation to SSD. These restrictions still exist for critical SSI (s 115ZG(3)).

In noting the breadth of the petroleum production clause, we also reinforce the importance of forthcoming amendments to the EP&A Regulation 2000 (yet to be seen). The regulations will be central to providing for effective environmental assessment and public participation rights under the new SSD regime.[12]

Extractive industries (Sch 1, cl 7)

We note the minimum tonnage of annual extraction for a development to qualify as SSD has been raised from 200,000 to 500,000 tonnes.

Under the Draft SEPP, extractive industry developments "located in an environmentally significant area of state significance" will be SSD. The EDO notes the increased potential for significant environmental harm where extraction takes place adjacent to such sensitive areas, or where the resource itself is extracted from such areas. We recommend this clause refer to development that "is located in *or adjacent to, or extracts from*" those sensitive areas. We note the existing 2005 MD SEPP refers to "*extracts from* an environmentally sensitive area".

Part 3 – State Significant Infrastructure („SSI")

Identification of State significant infrastructure: section 115U(2) (Draft SEPP, cl 14)

Clause 14(2) gives special provision for development that is "only partly" SSI in some circumstances.[13] The Draft SEPP needs to provide clearer rules and less discretion around whether parts of a development are "not sufficiently related" to State Significant Infrastructure to warrant these special provisions applying. At present, clause 14(2) provides for the Director General to make this determination, without further guidance or instruction.

The EDO suggests there is a need for clearer limits in cl 14(2), or clearer wording than "not sufficiently related", to ensure only infrastructure of genuine state significance is declared as „SSI".[14] This is particularly so given the breadth of discretion for fast-tracked approval under the SSI regime generally (see Part 3A Repeal Act).

Exclusion of certain exempt development (cl 17)

Clause 17 of the Draft SEPP provides that, if development would otherwise be SSI, but an EPI declares it is „exempt development" (among other things), the development is not SSI. Under section 76 of the EP&A Act, 'exempt development may be carried out without the need for development consent under Part 4 of the Act, or for assessment under Part 5 of the Act. The EDO is concerned that the blanket exclusion in cl 17 does not provide for adequate assessment of „exempt development" that would otherwise be SSI. For example, exempt development under the *SEPP (Infrastructure) 2007*,[15] such as electricity substations, would be more appropriately assessed as SSI under the new Part 5.1.

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[12] See Part 3A Repeal Act, s 89G.

[13] The clause allows for "the remainder of the development" to be carried out without development consent under Part 4 of the EP&A Act, and be declared SSI – except where the remainder of the development is SSD; or the Director-General determines it is "not sufficiently related" to the original SSI.

[14] Similar to the 'partial SSD' provisions noted above (Draft SEPP, cl 8).

[15] Infrastructure SEPP, cl 20A, Exempt development carried out by public authorities for purposes in Schedule 1: *Development for a purpose specified in Schedule 1 is exempt development if:*

(a) it is carried out by or on behalf of a public authority, and

(b) it meets the development standards for the development specified in Schedule 1, and

(c) it complies with clause 20.

Draft SEPP Schedule 6

Schedule 6 of the Draft SEPP amends two SEPPs (*No. 14 – Coastal Wetlands* and *No. 26 – Littoral Rainforests*) by inserting a note in each, stating under „Application of Policy":

> ***Note.*** *This Policy does not apply to development that is State significant infrastructure.*

The EDO opposes these amendments (6.5 and 6.6) and submits that the environmental protections in these SEPPs should apply to State Significant Infrastructure.

We hope these comments and recommendations are of assistance, and look forward to further engagement on these important issues of planning reform.

Yours sincerely

Environmental Defender's Office (NSW) Ltd

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