



environmental defender's office new south wales

Submission on the *proposed Coastal Protection Regulation 2011*

February 2010

The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services around NSW*

Contact Us

*Environmental Defender's
Office Ltd*

Level 1, 89 York St

SYDNEY NSW 2000

freecall 1800 626 239

tel (02) 9262 6989

fax (02) 9262 6998

email:

edonsw@edo.org.au

website: www.edo.org.au

For further inquiries on this matter contact Rachel Walmsley at: rachel.walmsley@edo.org.au

Executive Officer

Waters, Wetlands and Coast Division

Department of Environment, Climate Change and Water

PO Box A290, Sydney South NSW 1232

Via email to: coast.flood@environment.nsw.gov.au

Introduction

The Environmental Defender's Office of NSW (*EDO*) welcomes the opportunity to comment on the proposed Coastal Protection Regulation 2011 (the Regulation), Regulatory Impact Statement (RIS) and Code of Practice (the Code). The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law. The EDO has been extensively involved in law reform in relation coastal management on both on a state and federal level, most recently providing a submission regarding the Minister's Requirements under the *Coastal Protection Act 1979*.

The Regulation provides information in regard to the following 4 subject matters:

1. Ministerial Concurrences;
 - a. Application of concurrence provisions
 - b. Proposed threshold for concurrences
2. Emergency Coastal Protection Works and the Code of Practice;
3. Categorisation of land; and
4. Miscellaneous provisions.

This submission will now briefly highlight some of the concerns and suggested recommendations that accompany each of the above categories.

1) Ministerial concurrence for certain off-shore developments

a) Application of Concurrence Provisions

The Regulation provides that:

“A person (including a public authority) must not, without the concurrence of the Minister, carry out development on any part of the coastal zone to which this part applies.”¹

At first glance, this clause appears to provide an additional layer of scrutiny to a wide array of coastal developments, however on closer inspection of the Regulation, this is not the case.

This part of the Regulation applies only to off-shore developments, the part of the coastal zone that “is below the mean high water mark, excluding any estuary, lake or artificial harbour.”² The definition of estuary³ provided in the regulations is certainly very broad, and as it is excluded, this part of the regulation has quite a narrow application. Furthermore, this part does not apply to an area that is subject to an environmental planning instrument (other than a State environmental planning policy), nor is concurrence required for an approved project within Part 3A of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

Therefore the opportunities for ministerial concurrence to provide a secondary layer of examination for off-shore works only apply to a very select set of circumstances. The EDO

¹ Cl 5 of the proposed *Coastal Protection Regulation 2011*.

² Cl 4(1) of the proposed *Coastal Protection Regulation 2011*.

³ Estuary is clarified (at Cl 4(2)) to include any part of a river whose level is affected (including intermittently affected) by coastal tides; or any partially enclosed body of water that is intermittently open to the sea.

would like to see the Regulation amended so that concurrence provisions are activated for a broader range of offshore developments.

b) Proposed Threshold for Concurrences

The Regulation provides a series of thresholds so that the concurrence provisions are only activated for offshore developments that have the “potential to result in significant risk to the coastline.”⁴ By providing the following threshold exemptions, the Regulation therefore assumes the following activities are never considered a significant risk to the coastline:

- Dredging in water greater than 30m below the mean sea level, and less the 100 cubic metres per year is removed;
- Placement of less than 10,000 cubic meters per year of sediment on the seabed deeper than 30m (that’s a lot, more than 10000 tonnes);
- Placement of solid objects on the seabed, where the top is more than 30m below sea level;
- Less than 30 days disturbance to the seabed associated with carrying out of development.⁵

The RIS states that these threshold figures are apparently not arbitrarily selected, but instead are based on finding that, for example, provides that “disturbances to the sea bed at depths greater than 30 metres are considered unlikely to impact on coastal processes.”⁶ However, the reality of the situation is that tidal range, velocity of currents and a myriad of other factors of near-shore coastal systems will impact upon how a coastline is changed as result of an offshore development. Therefore, whilst the impacts arising from the deposition of 10,000 cubic metres of sediment in less than a year in one location may well be negligible, a similar action at another location may have extensive impacts on sediment flows and biodiversity levels.

We would therefore suggest the implementation of a process that assesses the level of risk posed by an offshore development to the coastal zone on a site by site basis, as opposed to one that does not require the concurrence of the Minister and is instead based on an arbitrary threshold figure.

2) Emergency Coastal Protection Works and the Code of Practice

Whilst the heading for Part 3 of the Regulation is “Requirements relating to emergency protection works” the detail of the placement, materials, maintenance and removal of emergency protection works is contained in the Code. As such the issues surrounding ECPW and the Code will be addressed simultaneously in this section.

⁴ RIS at pg 6.

⁵ Cl 6 of the proposed *Coastal Protection Regulation 2011*.

⁶ RIS at pg 11.

It is our understanding that the Code is intended to replace the current Minister's Requirements; a document on which the EDO previously provided comments⁷ in relation to topics such as:

- Imminent erosion;
- Protection of native vegetation;
- Emergency sub-plans; and
- Enforcement and monitoring.

Reference will be made to the EDO's previous submission as appropriate.

a) Placement of Works

The EDO has significant concerns firstly with the logic surrounding the placement of ECPW at any potential erosion site. The erosion and accretion of sediment is a natural process and as such the deposition of any works in an effort to prevent erosion or encourage accretion will simply displace the problem to other areas of the coastline. Having stated this fundamental objection, the EDO noted in its previous submission the importance of safety in the placement of works. The EDO is pleased to note this emphasis has continued into the Code. Furthermore the EDO would like the Code to specify that the placement of any ECPW should not impact upon any sensitive coastal ecosystem. Finally the EDO believes there is a substantial amount of ambiguity in regard to the form of works actually permitted, and would seek further clarification in the Code.

b) Material Requirements

As noted in our previous submissions, the EDO has concerns that the sand utilised in any ECPW is of a similar composition to the sand already located in the impacted area. The Code should therefore be amended to recognise the range of variation between sands of different beaches, and the detrimental effect additional material can have on marine ecosystems.

c) Maintenance of Works

The EDO supports these provisions in that they require the works to be maintained or removed "as soon as practicable after the storm conditions cease."⁸

d) Restoration of Land

It is encouraging to see that some of the recommendations mentioned in our previous submission regarding the Minister's Requirements have been incorporated into this latest Code. In particular the EDO notes the incorporation into the Code the requirement that the restoration of dunes following removal or works (including the removal of an illegal material or structure) must be carried out in accordance with the document entitled *Coastal Dune Management: A manual of coastal dune management and rehabilitation techniques*.⁹ Such a provision is in line with our previous submission that called for rehabilitation to be "conducted consistently with NSW Government guidelines on dune management and approved rehabilitation techniques."¹⁰

⁷ The full EDO submission is available at:

http://www.edo.org.au/edonsw/site/pdf/subs10/100913coastal_protection_act.pdf

⁸ Clause 3(ii) of the Code of Practice.

⁹ Clauses 4.2(iii) and 5(ii) of the Code of Practice.

¹⁰ The full EDO submission is available at:

3) Categorisation of Coastal Risks to Land

The Regulation provides for the categorisation of hazard and hazard response for coastal land. It proposes that the Minister determine the risk category to which particular land is to be allocated as well as the likely response of public authorities to the risks posed by coastal hazards to land in the coastal zone. The following tables that summarise the categorisation within the Regulation have been extracted from the RIS:

Table 6 Hazard vulnerability categories

Risk category	Hazard area (level of risk)
1	Current hazard area (likely to be affected by hazard now)
2	2050 hazard area (likely to be affected by hazard in the next 40 years)
3	2100 hazard area (likely to be affected by hazard in the next 40–90 years)

Table 7 Coastal hazard response category

Response category	Intended public authority response
A	Coastal protection works are considered technically feasible and cost effective – funding is being sought for implementation
B	Coastal protection works are considered technically feasible but not cost-effective for public funding – unlikely to be implemented by a public authority
C	Coastal protection works are not considered technically feasible – no intended public authority works

There are a series of concerns that exist with the above categorisation. The first is that these tables represent yet another layer of classification in the coastal zone. Whilst it is clear that the issues dealing with coastal process, increased population densities in coastal areas, and coastal planning controls are complex, simply placing layer upon layer of legislation, policy and categorisation is not a productive response. The new hazard vulnerability categories are likely to instead provide further confusion to landholders in this already congested area of policy and legislation.

There are also additional concerns over how these coastal risk categories and likely response of public authorities to the risks posed will integrate with the current planning lines in existing environmental planning instruments such as Local Environmental Plans and Development Control Plans. The EDO therefore would like more clarification on this interaction.

Specifically in regard to table 7 above, the intended authority response is based on criterion such as “technically feasible” and “cost effective.” The problem with these concepts is that they are firstly highly subjective and secondly are fluid and likely to change over time. Situations are sure to exist whereby coastal protection works may be deemed not technically feasible based on current capabilities, however in time this will change. As such the classification of “technically feasible” and “cost effective” may cause additional administrative burdens due to the requirement for constant revision to remain relevant.

The EDO has previously advocated for improving the methodology for effectively communicating comprehensive information to the community. One such suggestion has been to include better information in s149 Certificates to better outline the potential risks and consequences to which a particular parcel of land is exposed. It is important to note that reforms have recently passed allowing for the possibility of more information to be included in s149 certificates, and we recognise this as a positive step.¹¹ Therefore whilst the EDO supports the concept of adding further information to s149 Certificates, we believe that this information attached should be of a more scientific and applicable basis than the risk category and likely response of public authorities.

4) Miscellaneous Provisions

The miscellaneous provisions deal with the delegation of functions of coastal authorities, the penalty notice offences and penalties, as well as some transitional provisions relating to CZMPs. This submission will only provide comments in regard to the penalty section of the miscellaneous provisions.

The Regulation sets out the penalty notice offences associated with the failure to notify the council, and other relevant entities, about the placement of ECPW. The EDO would envisage that the penalty for such an offence would be severe due to the continued emphasis by DECCW that the opportunity to erect ECPW is limited to very specific circumstances in very specific areas. However the Regulation provides that the penalty for a failure to notify a council and other relevant entities, amounts to only \$550 for an individual and \$1100 for a corporation.¹²

The EDO submits that these amounts do not constitute a substantial deterrent by any means, but instead would be considered by many landowners and corporations as a cost of constructing the works. Whilst there are provisions that illegal works can be ordered to be removed, the EDO would like to see a greater emphasis in the Regulation on preventing the construction of inappropriate works, as opposed to dealing with the consequences after the event. Therefore the EDO believes that the penalty provisions should be greatly increased.

¹¹ Whilst this is a positive step, the EDO would like to see the inclusion of such information as a mandatory, and not optional, requirement.

¹² Schedule 1 of the proposed *Coastal Protection Regulation 2011*.