environmental defender's office new south wales

Submission on the draft *Environmental Planning and Assessment Regulation 2010*

5th November 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 Street
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

Submitted to: **innovation@planning.nsw.gov.au**

Executive Summary

The Environmental Defender's Office (EDO) is a community legal centre specialising in public interest environmental law. The EDO welcomes the opportunity to provide comment on the draft *Environmental Planning and Assessment Regulation 2010* ('Proposed Regulation').

Our key comments and recommendations are summarised below.

We **support** the following changes:

- Greater prescription for information in development applications, including roof plans and solar panels;
- The requirement for councils to provide reasons for the rejection of a development application;
- The increase of the deemed refusal period for integrated development and designated development from 60 days to 90 days;
- The proposed addition of an explicit requirement for councils to consider sea level rise planning benchmarks when assessing DAs under s79C;
- Statutory recognition of Reviews of Environmental Factors (REFs); and
- The proposed requirement for determining authorities to consider sea level rise planning benchmarks under Part 5.

We **support** the following changes **with amendment**:

- The proposed standard timeframes for public disclosure of documents in relation to Part 3A projects is strongly supported, however clause 15(3) should be removed. All Part 3A documents should be provided in electronically accessible form on the Department of Planning website and not through links to external websites; and
- The identification of 'coastal erosion hazard policies that restrict development on land' in section 149(2) certificates is supported. However, consideration should be given to broadening the requirement to identify whether land is within a 'coastal risk area' even where development controls restricting development have not yet been applied.

We **oppose** the following changes:

- The reduction of the period in which state agencies have to make a concurrence decision from 40 days to 21 days is strongly opposed. These agencies assess important technical and ecological issues such as biodiversity, contaminated land and threatened species which often takes some time;
- The proposed provision allowing concurrence agencies to 'stop the clock' only once for 21 days is strongly opposed. This will lead to rushed and inappropriate decisions which may detrimentally impact on the environment. Concurrence agencies should retain the ability to request information from applicants more than once to ensure that impact technical and ecological issues are fully investigated;

- The transferral of matters from the compulsory certificate under section 149(2) to the voluntary section 149(5) certificate, such as whether Property Vegetation Plans and biobanking agreements apply to land, is not supported; and
- We do not support the retention of clause 18(5), and submit that it should be removed from the Regulation to require all Part 3A projects to be publicly exhibited for 30 days regardless of whether the project was formerly a Part 4 or Part 5 development.

We provide comment relating to the following key changes to the proposed regulation:

1. Part 4
2. Part 5
3. Part 3A
4. Planning certificates

1. Changes relating to Part 4

1.1. Information requirements for development applications

The EDO submits that a good planning system must ensure that consent authorities are given sufficient information in order to properly assess a development application (DA), including the power to delay decision making if information is inadequate. The EDO therefore supports the greater prescription provided in the draft regulation as to what must be included in a DA. We note that information requirements for development applications in Schedule 1 are proposed to include drawings and roof plans that show roof tops elements including photovoltaic cells, solar panels and access points. This will enable applicants who wish to use a renewable energy source to clearly point this out in their DA.

Under the current regulation councils have 7 to 14 days to reject a development application as incomplete or insufficient. If a DA is rejected within this time no reasons for the rejection need to be provided to the applicant. The draft regulation will allow councils 14 days to reject a development application but will require councils to provide reasons to the applicant for any rejection. The EDO supports this requirement. This will improve transparency for applicants and the accountability of councils as it will require councils to properly turn their minds to a development application in terms of whether it conforms with the requirements in Schedule 1.

1.2. Deemed refusal period

Under the current regulation, the deemed refusal period is 40 days for standard DAs and 60 days for other DAs, including designated development and integrated development. The proposed regulation will increase the deemed refusal period to 50 days for standard DAs and to 90 days for DAs involving designated development, integrated development or development requiring other concurrences, etc.

The EDO supports the extension of the period of assessment for councils, particularly in relation to designated development and integrated development. There are often difficult and technical issues to assess that by their very nature take time such as assessing biodiversity surveys/studies, threatened species and contaminated land. 60 days is clearly

insufficient. Increasing the period to 90 days is therefore a welcome step. This increased time will allow councils to substantively and holistically assess important technical and scientific issues to ensure that a decision is made that properly balances environmental, social and economic interests.

1.3. Assessment period for concurrences

Under the current regulation, where consultation with a government agency is required in relation to a particular DA, such agencies have 21 days to provide comment. However, where the concurrence of a state agency is required (eg integrated development), state agencies had 40 days from the date of the last public submission received to make their concurrence decision.

The proposed regulation will retain the 21 day period for consultation but reduce the 40 day concurrence period to 21 days. The EDO strongly opposes this proposal. Concurrences are a critical element of the planning system. Concurrences constitute important safety nets, and help ensure that all potential impacts of a development are adequately considered. The departments that are responsible for granting these additional approvals have the necessary expertise to adequately assess issues such as pollution, heritage and threatened species licences. As above, such issues require considerable time to assess. Requiring agencies to make such decisions in 21 days is unworkable and will lead to rushed and inappropriate decisions which may detrimentally impact on the environment. The EDO calls for this provision to be removed from the regulation. As the deemed refusal period for councils has been increased to 90 days for such developments, it is counterintuitive to reduce the concurrence decision period.

1.4. Stop the clock provisions

Under the current regulation, councils have the ability to ask the applicant for more information within 25 days of a DA being accepted and 'stop the clock' while awaiting such information. Councils currently have an unlimited ability to stop the clock during the assessment period. The proposed regulation limits the ability to stop the clock to just once and only for a 21 day period. For ordinary DA's, this would effectively give councils 71 days to assess the applicant which is likely to be sufficient. However, the limitation on the ability to stop the clock extends to concurrence agencies that can now only stop the clock within 21 days of the application being submitted and only for a single 21 day period. The EDO strongly opposes this proposal. There should be an ability to stop the clock more than once for DAs requiring concurrence such as designated development and integrated development.

Whilst we acknowledge that there are economic costs in terms of time lost due to protracted assessment periods of DAs, there are also potentially significant environmental and social costs to the community resulting from development, particularly from DAs that are large in scope. The Regulatory Impact Statement does not quantify these costs in its assessment but focuses primarily on economic benefits to the development industry of reducing assessment times. The potential impacts of development include reducing amenity for residents, harming threatened species, removal of native vegetation, increase in greenhouse gas emissions, pollution of waterways and noise pollution. Moreover, the economic costs assessment does not seem to take into account the fact that there is never a guarantee that a DA will be approved, whether it is an extension to a house or a large residential subdivision.

As discussed above, these are quite technical issues that concurrence agencies require time to investigate. We therefore strongly oppose the reduction of stop the clock periods for concurrence agencies, especially in the context of also reducing the concurrence assessment period from 40 days to 21 days as discussed above. The EDO calls for this restriction to be removed. Concurrence agencies should retain the ability to request information from applicants more than once to ensure that important technical and ecological issues are fully investigated.

1.5. Additional matters in section 79C

The EDO strongly supports the proposed addition of an explicit requirement for councils to consider sea level rise planning benchmarks when assessing DAs under s79C. This will require councils to turn their minds to the impacts that future sea level rise may have on coastal developments and take this into account in determining whether approval is warranted and what conditions if any are appropriate to mitigate against future impacts. This is in line with the precautionary principle and will give some statutory weight to the NSW *Sea Level Rise Policy Statement.*[1] However, a notable gap is the absence of a requirement for the Minister for Planning to consider the benchmarks for Part 3A projects.

1.6 Designated development

We note additional triggers regarding environmentally sensitive areas have been added for certain types of development. Rather than inserting this requirement for some individual categories of development, we submit that there should be a generic trigger in Schedule 3 relating to developing in or near an environmentally sensitive area of State Significance. This would ensure *all* relevant developments are subject to appropriate assessment of potential impacts on sensitive environmental areas through an EIS. However, we note that many categories of designated development (such as coal mines) are likely to be called in under Part 3A.

2. Changes relating to Part 5

The EDO supports explicit recognition being given to Reviews of Environmental Factors (REFs). Clause 228 of the current regulation sets out matters that public authorities must take into account under Part 5 of the *EPA Act* to 'examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity'. Determining authorities usually considered the matters in clause 228 through the use of an internal assessment mechanism – the REF - which has no statutory basis. This document is required as part of the standard practice of most public authorities. The EDO welcomes the recognition of REFs as the formal statutory assessment under Part 5.

The EDO strongly supports the addition of the explicit requirement to consider 'any impact on coastal processes, and coastal hazards, including those under projected climate change conditions'. As above, it is critical that consent authorities be required to factor in the potential impacts of climate change on coastal development, including public development, to ensure that developments at significant risk are not approved

[1] Found at: http://www.environment.nsw.gov.au/resources/climatechange/09708sealevrisepolicy.pdf (14 October 2010).

and that appropriate mitigation conditions are required where development is permissible.

3. Changes relating to Part 3A

3.1. Public notification requirements

The EDO supports the proposed standard timeframes for public disclosure of documents in relation to Part 3A projects. Under the current regulation the Director-General is required to publish certain information on the Department of Planning website, but no timeframes are given. This has lead to some frustration for EDO clients and members of the community who have often had to wait a considerable time to obtain documents. The proposed regulation prescribes a standard 14 day disclosure period for the majority of documents required to be made publicly available under Part 3A. These include declarations of Part 3A and critical infrastructure, environmental assessment guidelines, determinations of projects, statements of commitments and response to submissions. The proposed requirement to publish this information in a timely manner is strongly supported.

However, the EDO does not support clause 15(3) of the Regulation, which allows a document to be made available by providing a link to the document on another website. This opens up the possibility of links not working properly, information not easily locatable on a third party website or documents missing. The EDO submits that all documents should be provided in electronically accessible form on the Department of Planning website.

3.2. Matters occurring before a project becomes a Part 3A project

The EDO strongly opposes the current clause 18(5) of the Regulation which is to be retained. Under this provision, where a Part 3A project was previously a Part 4 or Part 5 project, credit may be given for any public exhibition of an environmental impact statement or statement of environmental effects. This reduces the period of public consultation on the Part 3A proposal and may even lead to no consultation where documents were previously exhibited for 30 days.

This is unacceptable as a Part 3A project assessment is substantially different from a Part 4 or Part 5 project and often the proposal has been amended, sometimes significantly, before it becomes a Part 3A project. Furthermore, Part 3A overrides many local planning controls and other approvals required under environmental legislation. Comments made by the community under Part 4 or Part 5 are made in the context of such approvals and development control standards applying. As Part 3A removes the requirement to comply with these, further public consultation is necessary. The EDO submits that clause 18(5) should therefore be removed from the Regulation to require all Part 3A projects to be publicly exhibited for 30 days regardless of whether the project was formerly a Part 4 or Part 5 development.

4. Section 149 certificates

4.1. Coastal hazard information

The EDO has consistently submitted that the provision of information to the community regarding the risks posed by sea level rise through the use of section 149 certificates is a critical element of the NSW Government's adaptation response.[2] This is consistent with a recommendation of the recent House of Representatives Inquiry into Climate Change and Environmental Impacts on Coastal Communities which recommended the introduction of 'mechanisms to ensure mandatory risk disclosure to the public about climate change risks and coastal hazards'.[3] Transparent and open information will allow landowners to make informed choices about the future of their properties. We therefore strongly support the proposal to require s149(2) certificates to include 'coastal erosion hazard policies that restrict development on land'.

However, we propose that the provision should be broadened to require the identification of any land within 'coastal risk areas' even where development controls restricting development have not yet been applied. The finalisation of new controls may take some time, but this should not prevent notice being given. The early provision of information in this manner will highlight to landowners that the land may be subject to development restrictions in future.

4.2. Removal of items from compulsory certificate

The EDO does not support the removal of some elements from section 149(2) (which must be attached to all contracts of sale in NSW), to section 149(5) which is a full, voluntary planning certificate. We are especially concerned about the removal of matters such as whether a property vegetation plan (PVP), biobanking agreement applies to the land or whether the land is biodiversity certified land under the *Threatened Species Conservation Act 1995*.

The Regulatory Impact Statement states that the list has been reduced to focus the content of the mandatory section 149(2) certificates on "land use and development controls of interest in conveyancing". This rationale is flawed. If a PVP or biobanking agreement applies, it runs with the land and may restrict the activities that may occur on the land, including prohibiting certain development or the removal of native vegetation. These instruments may therefore contain important planning controls and restrictions that may have significant consequences for future owners of the land. It is therefore critical to provide this information in the mandatory certificate to make it clear to prospective owners that limitations on development, especially the removal of native vegetation, may apply.

For further information on this submission please contact Rachel Walmsley on (02) 9262 6989

[2] See EDO submission on the Draft NSW Coastal Planning Guideline, December 2009. Found at: http://www.edo.org.au/edonsw/site/pdf/subs09/091130coastal_planning_guideline.pdf

[3] House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts. 'Managing our Coastal Zone in a Changing Climate" October 2009, Recommendation 23, p xx.