environmental defender's office new south wales

Submission on the review of the *State Environmental Planning Policy (Infrastructure) 2007*

12 April 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*

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Executive Summary

The Environmental Defender's Office of NSW (EDO) is a community legal centre specialising in public interest environmental law. We welcome the opportunity to make comment on the review of the *State Environmental Planning Policy (Infrastructure) 2007* ('Infrastructure SEPP').

The EDO has received numerous calls from members of the public concerned about the Infrastructure SEPP. In the EDO's experience there is widespread confusion among the community, practitioners and public authorities regarding the scope and applicability of the Infrastructure SEPP. Two significant problems with the application of the SEPP are first, public authorities relying on the SEPP where it in fact does not apply, and second, public authorities failing to conduct a Part 5 assessment or obtain approvals under other legislation where development consent is not required under the SEPP.

In our view, part of the confusion surrounding the SEPP stems from the fact that it adds significant complexity to an already multi-layered and complex planning system in NSW that operates on many levels.[1] For example, development conducted by public authorities for the purposes of infrastructure can be authorised or occur under the following regimes:

- Infrastructure SEPP
- Part 3A, *Environmental Planning and Assessment Act 1979* (*EPA Act*)
- Part 4, *EPA Act*
- Part 5, *EPA Act*
- *National Building and Jobs Plan (State Infrastructure Delivery) Act 2009*
- Approvals under other environmental legislation

These regimes have differing environmental assessment and community consultation requirements. Some, such as the *National Building and Jobs Plan (State Infrastructure Delivery) Act 2009*, provide no guarantee of any environmental assessment or community consultation. It is therefore very difficult for the public and practitioners to determine whether the Infrastructure SEPP applies, whether consent is in fact required under the SEPP, what notification requirements exist, what other provisions of the *EPA Act* apply and what the scope of any environmental assessment will be. This has lead to disillusionment among the community and a perception that there is no transparency or accountability in relation to development by public authorities.

The EDO submits as an overarching recommendation that public infrastructure development should be subject to <u>one</u> regime that codifies best practice community consultation and environmental assessment procedures. This will improve public accountability and transparency and reduce the complexity associated with public infrastructure and development.

Our key comments and recommendations are:

- Public infrastructure development should be subject to one regime that codifies best practice community consultation and environmental assessment procedures;

[1] For example, following the recent round of planning reforms, there are now 6 bodies making development decisions under the *EPA Act*. These are the Minister for Planning, local councils, the Planning Assessment Commission, Joint Regional Planning Panels, planning arbitrators and accredited certifiers.

- The Department of Planning should implement an education and communication program for public authorities to explain when the SEPP applies and how it interacts with the NSW planning framework as a whole;
- the Department of Planning should undertake regular audits of development occurring under the Infrastructure SEPP to ensure that it is being applied correctly;
- The Department of Planning should publish guidelines to assist public authorities in determining whether exempt development proposed to be carried out under the Infrastructure SEPP will be of 'minimal environmental impact' in accordance with the principles of ESD;
- The proposed amendment to Clause 20 - to make it clear that any approvals, licences, permits and authorities required under any other Act must still be obtained even where development is exempt development under the SEPP - is supported; and
- The proposed amendments relating to the use of DECCW protocols to permit development in reserved lands where such development is not authorised under the *National Parks and Wildlife Act 1974 (NPW Act)* should be clarified to make it clear that they do not permit development prohibited under the *NPW Act*.

We provide general comments on the following issues:

- Misapplication of the SEPP
- Exempt development
- Part 5 assessments
- DECCW protocols

1. Misapplication of SEPP

The EDO is aware of development being conducted by public authorities purportedly under the Infrastructure SEPP when in fact the SEPP does not apply, or where the SEPP has not been applied correctly.

CASE STUDY 1 - Department of Education and Training

The EDO is aware of a development that occurred within a school purportedly under the Infrastructure SEPP. The school built a common room for students within a conservation area, which was in breach of an existing condition of consent that required rejuvenation of the conservation area.

The Department of Education and Training argued that the Infrastructure SEPP allowed them to override this condition of consent. However, there were two clear problems with this argument. Firstly, the common room was not actually permitted without consent under the Infrastructure SEPP. The Department of Education and Training argued that common room fell within the definition of 'classroom' which is erroneous as no teaching would be occurring in the common room. Second, even if the development was development permitted without consent, no Part 5 assessment or any other environmental assessment was done as required. The building of the common room impacted negatively on an area set aside to allow for rejuvenation of an endangered ecological community.

The council would not take action to enforce the breach of the condition of consent requiring rejuvenation as it stated that the development was a state government matter

because it occurred pursuant to the SEPP. The EDO informed the council that the SEPP did not actually apply. However, the council still refused to take action.

The Department of Education and Training has now acknowledged that it breached the requirements of the *EPA Act* (including a failure to notify neighbours for 21 days). They have advised the EDO that they are preparing a retrospective Review of Environmental Factors (REF) which is effectively meaningless in light of the fact that the development has already occurred and environmental damage has ensued.

CASE STUDY 2 - Newcastle City Council

Newcastle City Council recently proposed a significant expansion of a skate ramp in Empire Park, a public reserve in Newcastle. The council claims that the expansion falls under exempt development in the Infrastructure SEPP and as such, no assessment will be conducted under Part 4 or Part 5 of the *EPA Act*.[2]

Under the Infrastructure SEPP, exempt development in public reserves includes the construction of "sporting facilities, including goal posts, sight screens and fences, if the visual impact of the development on surrounding land uses is minimal" and "play equipment where adequate safety provisions (including soft landing surfaces) are provided, but only if any structure is at least 1.2m away from any fence".[3] In our view, the expansion of a skate ramp does not fall within either of these categories. Sporting facilities contemplates minor development associated with sporting ovals. Play equipment is limited to play equipment for children with strict specifications.

A better view is that the development may fall under development permitted without consent in Clause 65. That clause stipulates that local councils do not require consent for development on a public reserve for the construction of "outdoor recreational activities". The skate ramp might be construed as such. If not, then consent under Part 4 is required.

The effect of the erroneous characterisation of the skate park as "exempt development" is that neither consent under Part 4 nor assessment under Part 5 (for development permitted without consent) will be required by council.

These case studies illustrate misapplication of the Infrastructure SEPP by public authorities and potential breaches of the *EPA Act*. The EDO submits that the Department of Planning should implement an education and communication program for public authorities to explain when the SEPP applies and how it interacts with the NSW planning framework as a whole. Moreover, the Department of Planning must undertake regular audits of development occurring under the Infrastructure SEPP to ensure that it is being applied correctly.

2. Part 5 assessments

The Infrastructure SEPP removes the need to obtain consent under Part 4 of the Act for various types of development but does not remove the need to conduct a Part 5 assessment.

[2] Exempt development is exempt from the need for assessment under Part 4 and Part 5 (Section 76, *EPA Act*).
[3] *Infrastructure SEPP* Clause 66(1)(a).

That is, the environmental assessment provisions for activities under Part 5 still apply. This Part requires public authorities conducting an activity 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. It also requires an environmental impact statement if an activity is likely to significantly affect the environment, critical habitat, threatened species, populations or ecological communities, or their habitats. [4]

The EDO has received several reports from members of the community relating to development undertaken by public authorities under the Infrastructure SEPP where no Part 5 environmental impact assessment has been done.

CASE STUDY 3 – Cherrybrook Technical High School

The EDO is aware of a development, the construction of a 400m fence through an area of the Endangered Ecological Community *Sydney Turpentine-Ironbark Forest* ("STIF"), on the grounds of John Purchase Primary School and Cherrybrook Technical High School. As a result of the works, the STIF was damaged. No assessment under Part 5 was done, not was a licence obtained under the *Threatened Species Conservation Act 1997*.

The Department of Education and Training argued that the fence was authorised under the Infrastructure SEPP as exempt development. However, under section 76 of the *EPA Act*, exempt development cannot be carried out in critical habitat of an endangered species, population or ecological community. DECCW took enforcement action by ordering the Department of Education and Training to conduct rehabilitation and rejuvenation activities. To our knowledge this has not yet occurred.

This case study further illustrates that some public authorities fundamentally misunderstand how and when the Infrastructure SEPP applies, and as a result, they are failing to conduct Part 5 assessments which is leading to environmental degradation. As above, the EDO submits that the Department of Planning should implement an education and communication program for public authorities. Public authorities need to understand that the Infrastructure SEPP is not a 'one stop shop' that removes all other legislative requirements.

3. Exempt development

Under section 76 of the *EPA Act*, exempt development may be carried out only if it is of "minimal environmental impact". Despite this requirement, the EDO is aware of exempt development being conducted under the SEPP that appears to breach the "minimal environmental impact" test. In the EDO's experience, the "minimal environmental impact" test is not applied or considered in the majority of cases.

In *Telstra v Hornsby SC*, Preston CJ confirmed that the principles of ecologically sustainable development (ESD) are to be applied when decisions are being made under any legislative enactment or instrument which adopts the principles of ESD, of which the *EPA Act* is one.[5] This also applies to the Infrastructure SEPP as it is made under the *EPA Act*. Principles of ESD must therefore inform the consideration by public authorities of whether exempt

[4] Section 111-112, *EPA Act*.
[5] at [121] – [122].

development will be of "minimal environmental impact". Despite this, there are no decent environmental and social standards or codes imposed on public authorities doing work under the SEPP and there is an assumption that the precautionary principle does not apply. For example, the SEPP does not require public authorities to consider prudent avoidance measures when considering the installation of power lines and electricity transmission works that are known to potentially cause significant health impacts and impacts on biodiversity.[6]

The EDO submits that the Department of Planning should publish guidelines to assist public authorities in determining whether exempt development proposed to be carried out under the Infrastructure SEPP (in fact exempt development in general) will be of 'minimal environmental impact' in accordance with the principles of ESD. These guidelines should be made available for public comment before publication. Authorities must be required to consider these guidelines before commencing exempt development. A lack of guidance opens up exempt development to legal challenge under Class 4 Proceedings in the Land and Environment Court where third parties can present evidence that particular exempt development will not have minimal environmental impacts.

On a separate note, the EDO agrees with the Discussion Paper that there are instances where it has been interpreted that exempt development means that the development is exempt from the need to obtain *any* approval under *any* Act which is erroneous. We therefore strongly support the proposed amendment to Clause 20 that makes it clear that any approvals, licences, permits and authorities required under any other Act must still be obtained even where development is exempt development.

4. DECCW protocols

The EDO is concerned by proposed amendments permitting the reliance on DECCW protocols to facilitate development by public authorities on lands reserved under the *National Parks and Wildlife Act 1974* (*NPW Act*) where such development is not authorised by that Act. Although one reading is that "authorised" refers to whether development is expressly allowed for under the *NPW Act,* another view is that "authorised" refers to development that is not prohibited under the Act.

If the second reading is adopted then the proposed amendments would permit development in reserved lands even where that development is prohibited by the *NPW Act*. The EDO strongly opposes this.

Notwithstanding that a SEPP, which is a subordinate statutory instrument, cannot override a prohibition in an Act of parliament, the EDO submits that DECCW should clarify that these proposed amendments do not permit development prohibited under the *NPW Act*.

For more information relating to this submission please contact Rachel Walmsley on (02) 9262 6989.

[6] http://www.aph.gov.au/senate/committee/economics_ctte/completed_inquiries/pre1996/elec/report/c02.htm.