



TOTAL ENVIRONMENT CENTRE

Submission on the proposed SEPP (Repeal of Concurrence and Referral Provisions) 2008

Introduction

The Environmental Defender's Office of NSW (EDO) and Total Environment Centre (TEC) welcome the opportunity to provide comment on the proposed *State Environmental Planning Policy (Repeal of Concurrence and Referral Provisions) 2008* ('draft SEPP'). The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law. The EDO has commented extensively on all aspects of the recent planning reform process.¹ TEC has over 30 years experience working with various pieces of NSW environmental and planning legislation, particularly from the perspective of environmental assessment and public participation.

The draft SEPP purports to remove 1373 'unnecessary' and 'duplicative' referral and concurrence provisions from 237 Environmental Planning Instruments. The EDO and TEC submit that the removal of these inter-agency referrals should be treated with much caution. Removals should only occur where provisions are obsolete or clearly duplicated at equivalent quality elsewhere. Instead, the draft SEPP seems inordinately focused on 'streamlining' and 'reducing red tape', with the result being that some important referral and concurrence provisions will be removed if the SEPP is gazetted in its current form. We strongly oppose removal of stop the clock provisions and introduction of 'deemed approval' where there is no guarantee that comprehensive departmental expert assessment has occurred.

The Government's position appears to be founded on a fundamental misreading of the modern needs of environment protection and assessment and community involvement. It takes a 'slash and burn' approach on the simplistic basis that less approval time and effort will lead to cheaper decisions for development proponents and that this will have a consequent benefit to the community as a whole. TEC and

¹ *Submission on the Environmental Planning and Assessment Amendment Bill 2008* – 24 April 2008, *Submission on the Discussion Paper: Improving the NSW Planning System* – 8th February 2008. These submissions are available at www.edo.org.au/edonsw/site/policy.php

EDO reject this and we believe the resulting loss of environmental assets and amenity and community confidence in the planning system, will rebound on decision makers.

In brief, the adverse results of the proposed SEPP are to negate a 'voice' for the environment by:

- Replacement of expert concurrence with non-binding guidelines and local council considerations (with their political component);
- Reliance on the subjective term 'unnecessary' as a basis for removal of concurrences with no genuine assessment of impacts or rationale;
- Increased inconsistency with varied local council approaches and skills compared to greater consistency from agencies (taking account of regional factors);
- Reduced holistic and integrated assessment through removal of agency consideration at the time of DA submission, as environmental issues that could have been anticipated will now occur at a more political and later stage, including appeals to state government for intervention.

This submission makes detailed comment on the following issues:

- Determining what is "unnecessary" or "duplicative"
- Replacing concurrences with matters for consideration
- Expertise and resources of Councils
- The use of guidelines
- Replacing concurrence requirements with the "gateway" process
- Examples of specific areas of concern:
 - Coastal Protection
 - Biodiversity Protection
 - Cultural heritage

Determining what is "unnecessary" or "duplicative"

No definition is provided in the draft SEPP as to what is an "unnecessary" or "duplicative" referral. Although genuine duplication could be easily determined, we submit that "unnecessary" is a subjective term. What referrals are "unnecessary" is open to a wide interpretation. Indeed, the proposed SEPP removes certain concurrences as "unnecessary" because the matters are already considered by decision-makers as mandatory factors. As will be shown below, concurrences are not "unnecessary" in such circumstances.

Replacing concurrences with matters for consideration

Requirements for decision-makers (namely councils) to consider matters when making decisions is qualitatively different from a concurrence or referral requirement to an expert agency such as DECC. Therefore, the proposals to removal some concurrences as "unnecessary" because the issues are already relevant

considerations, and in some cases to replace concurrences with heads of consideration, is strongly opposed. This would introduce a much less rigorous and transparent process, especially where significant environmental considerations are at play. Indeed, local councils can dismiss significant environmental impacts as long as they have ‘considered’ them. In contrast, the need for concurrence from an agency with relevant expertise, such as DECC, allows the agency to refuse consent to a development with potentially significant impacts. Local councils are therefore not the appropriate bodies for determining whether impacts are unacceptable, especially given that they will likely not have the relevant expertise on hand to quantify these likely impacts in a robust and scientifically sound manner.

Expertise and resources of Councils

The level of resourcing and expertise within local councils varies greatly. It is unrealistic to expect that the smaller councils will be able to adequately assess developments to the same standards that larger, better resourced expert departments have undertaken assessments under concurrence requirements.

We note that guidelines will be developed to assist Councils, however, these are not a substitute for trained and well-resourced expert assessors on staff at Councils.

The use of guidelines

The Consultation Guide for the proposed SEPP indicates that for a range of areas where concurrences are being removed, guidelines will be developed to assist Councils in assessing developments. For example, Notes will be inserted in the SEPP indicating where guidance is available:

Insert after clause 26(4) of the Kosciuszko National Park – Alpine Resorts SEPP and a number of REPs (for example 17 and 26):

Note: The website of the Heritage Branch of the Department of Planning has publications that provide guidance on heritage assessment methodology (for example, the Local Government Heritage Guidelines).

While we support additional resources made available to assist local decision-makers, these notes do not form part of the SEPP, and it is not made clear what the status of the guidelines is. Does a Council have to follow the methodology set out or can it use an alternative assessment process? Development of guidelines is no substitute for expert assessment under legislative concurrence requirements.

Replacing concurrence requirements with the “gateway” process

The draft SEPP purports to remove some referral requirements with state agencies at the development assessment stage on the basis that the agencies would have been consulted at the ‘gateway’ stage. The EDO and TEC strongly opposes this proposal. We believe that agencies should also be consulted at the development assessment stage even where they have been consulted at the gateway stage.

Although consulting at the strategic end of the process is of course beneficial, there will be insufficient detail available at the conceptual stage to allow them to substantially assess or advise on potential impacts. Therefore, it is important that they get a chance to comment once more detail is available on the specific development application. Moreover, concurrences are an important way for government departments with various responsibilities to integrate with planning. This enables a consistent approach to natural resource management in NSW.

Examples of specific areas of concern

The Consultation Guide to the SEPP lists the types of concurrence provisions that are to be removed as including:

- roads and transport issues
- development on lands identified for acquisition
- arrangements for water and sewerage infrastructure
- aboriginal sites and archaeological sites of significance
- other heritage sites and archaeological sites of significance
- areas of high biodiversity, development near national parks, nature reserves, marine parks or aquatic reserves
- land stability, soil issues and contaminated lands
- flood liable land
- water supplies, water quality, aquatic habitat and river management issues
- development near wildlife corridors, rainforest areas, coastal areas
- onsite sewage disposal, waste water and drainage management
- general plan making provisions (referrals to State agencies for various issues related to the preparation of draft LEPs).
- mineral and extractive resources, and mine subsidence
- subdivision of rural lands, agriculture, travelling stock routes and forestry
- coastal development, tourism development and protected lands
- acid sulfate soils

Most of these issues originally attracted concurrence requirements due to the complicated nature of assessing impacts and the need to bring expertise into the assessment process. Simply addressing assessment of these often sensitive impacts may not be adequately addressed by developing guidelines for local councils. Some key concerns are outlined below.

Coastal protection

The EDO and TEC are concerned about the recent removal of concurrence requirements under the *Coastal Protection Act 1979* in relation to development assessment under Part 4. The Minister for Environment will no longer be able to veto developments that are likely to have significant impacts on the coast. The draft SEPP continues this worrying trend by removing key concurrences in LEPs relating to coastal developments. Given the increased concerns and recent litigation

relating to impacts of sea level rise and climate change impacts, a concerted legislative approach is needed to address coastal development and the impacts of climate change, not a less rigorous process. The EDO has undertaken a review of current legislative requirements on local Councils to consider climate change and sea level rise, and concluded there is a lack of legislative guidance for Councils undertaking assessments, and that clear legislation is needed.²

The government has proposed that new coastal guidelines will be developed to assist councils in assessing coastal development applications, and that this will be sufficient to replace the concurrence role of state agencies. We oppose this suggestion. Guidelines are not necessarily legally enforceable and will not be sufficient to assess the merits of a variety of development applications across local government areas with different characteristics. Furthermore, these guidelines will likely adopt a 'lowest common denominator' approach in order to be applicable across the state.

We further note, that the draft SEPP removes Part 5 of the SEPP relating to the preparation of master plans for certain coastal developments. This is not simply the removal of a government referral but a substantive part of the SEPP. We submit that it is inappropriate for SEPP 71 to be significantly altered by this new SEPP which purports to deal with the removal of concurrence and referral provisions.

Biodiversity protection

The EDO and TEC strongly support the retention of concurrence and referral provisions in the *Threatened Species Conservation Act 1995*, the *Fisheries Management Act 1994*, the *Native Vegetation Act 2003* and the *National Parks and Wildlife Act 1974* in the draft SEPP. However, we note that 70 clauses in LEPs relating to consultation with DECC on issues associated with the protection of areas of high biodiversity will be removed. This is not supported. There is a need to ensure that referrals relating to the environment, threatened species, native vegetation etc. are maintained, as these agencies have the relevant expertise to address these issues and ensure that developments are ecologically sustainable and do not have unacceptable impacts, especially in light of the ever increasing risk of climate change.

The removal of concurrence requirements must not be used to undermine the ban on broadscale clearing enshrined in the *Native Vegetation Act 2003*, and facilitate clearing of native vegetation in semi-rural zones and areas of high future development pressure on the coast.

Guidelines for assessing development near National parks may not be sufficient to identify all impacts of developments on a specific park or reserve as these may vary greatly, and the expertise of the national parks division of DECC is essential to ensure the integrity of the national park estate.

² This report was done for the Sydney Coastal Councils Group and is available at:
<http://www.sydneycoastalcouncils.com.au/SydneyCoastalCouncilsGroupInc.NSWAustralia.htm>.

Aboriginal sites and archaeological sites of significance

The EDO is currently working with a number of indigenous clients who are deeply concerned about the current assessment processes in place for cultural heritage. We have received feedback from our clients that further “streamlining” of this area of assessment (for example, for developments that do not trigger integrated assessment provisions) will result in an increase of the current rate of destruction of irreplaceable cultural heritage, and further marginalising of Traditional Owners who wish to participate in the assessment process. The inclusion of ‘heads of consideration in some LEPs’ does not guarantee a fair and transparent process.

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