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Draft Land Owner's Consent Policy 2006
NSW Maritime
Locked Bag 5100
Camperdown NSW 1450

By email: policy@maritime.nsw.gov.au

Dear Minister,

NSW Maritime Draft Land Owner's Consent Policy

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the Draft Land Owner's Consent Policy. The EDO is a community legal centre specializing in public interest environmental law. We have had extensive experience in dealing with issues around planning and development on or near environmentally sensitive public lands.

NSW Maritime has an important function as custodian of public land in Sydney Harbour, Botany Bay, Newcastle Harbour and Port Kembla Harbour. The EDO supports management of this land in a way which allows members of the public to freely enjoy the natural beauty of these waters and the recreational opportunities which they offer. The development of waterways for commercial or private facilities has the potential to alienate this land from use by the general public, and should be strictly controlled.

The *Draft Landowner's Consent Policy* ("the Draft Policy") removes most of the limitations which currently apply to granting of owners consent for development applications on Sydney Harbour under the *Land Owner's Consent Manual* ("the Manual"), and in our view is likely to result in an unacceptable increase in private development on the harbour.

The Foreword to the Draft Policy states that the changes are designed to ensure that there is no unnecessary duplication between NSW Maritime's function as landowner and the functions of other consent authorities. However, we submit that it is appropriate for NSW Maritime as landowner to take an active role in deciding whether a proposed use is an appropriate one for public land. This is a separate role from the role of consent authority in deciding whether the proposal is acceptable on environmental and planning grounds.

To remove virtually all criteria for granting owner's consent in the Draft Policy allows submerged lands to be treated as if they were private property, which is not appropriate for public lands.

There are also important practical differences between the owner's consent function and the planning consent function. Refusal of owner's consent is not subject to appeal, therefore it operates as an effective veto on inappropriate development of public land. We submit that it is entirely appropriate for NSW Maritime, as the custodian of public land to be able to veto certain types of development in this way.



Public Access

The ability for the public to access the foreshore at low tide is an important aspect of public use of waterways which should be jealously protected by public authorities.

A strict approach to preserving public access can be seen in the current Manual, which states at Section 3.1:

Structures must not obstruct or restrict existing and future safe and practical public access along and to the inter tidal zone or from the water, particularly where there are opportunities to improve that access.

There is no equivalent provision in the Draft Policy.

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 contains objectives and principles relating to public access to foreshore land (see cl 2(1)(f) and cl 14(b)), however these are principles for consideration which do not operate as an absolute bar to offending development. Similar provisions can also be found in Local Environmental Plans relating to harbour lands, but these vary greatly between local government areas.

The EDO submits that this is an issue which should be addressed by a policy of refusing owner's consent (where public access will be obstructed), rather than by way of discretionary planning principles in environmental planning instruments. Discretionary principles are not an effective way of dealing with this issue, because of the potential for a single development to break up the continuity of public access along the foreshore, which would then make it difficult for consent authorities to refuse similar proposals on adjacent sites.

Commercial Uses

The Manual prohibits private development of submerged land adjacent to public foreshore land, subject to very limited exceptions (cl 3.6.1). The equivalent provision in the Draft Policy allows commercial developments adjacent to public land where these are an "activity serving the maritime needs of the public". This exemption is very broad and would allow practically any boating-related use to occur. We submit that this is likely to result in inappropriate uses of public foreshore land.

Scale and types of Development

The Manual contains the following provisions relating to structures on submerged lands which have the effect of tightly controlling new developments on the harbour:

- Where it is considered appropriate to minimise the number of structures, consent will only be granted for shared facilities (cl 3.4);
- The excavation or cutting of natural rock within the inter-tidal zone is not permitted;
- Where possible, boatsheds should be located above mean high water mark (cl 3.7.1);
- Private landing facilities should only take the form of a minimum sized pontoon and ramp, subject to limited exceptions (cl 3.7.3);
- Private landing facilities are not to be more than 16m in length (cl 4.3);
- No consent will be granted for swimming pools on submerged land (cl 3.7.7); and
- Consent for marinas and boating industry facilities will only be given where structures are of the minimum necessary size, and building heights are generally restricted to one storey (cl 3.7.11).



There are no similar provisions in the Draft Policy.

Equivalent provisions can be found in *Sydney Harbour Foreshores and Waterways Area Development Control Plan* (“the DCP”). Therefore the intent behind these changes seems to be to remove overlap between the DCP and NSW Maritime policies. However controls contained in a DCP are discretionary and may not be enforced by consent authorities or the Land and Environment Court where the impacts of a particular development is considered acceptable. This highlights the difference between making decisions on the basis of protecting public lands, and making decisions based on environmental planning grounds.

We are not aware of any equivalent provisions relating to lands outside Sydney Harbour, therefore these changes are likely to result in an even lower level of protection for other submerged lands to which the Draft Policy relates.

Removal of Existing Non-Complying Structures

Neither the current Manual nor the Draft Policy contain specific provisions about removing existing lawful development which conflicts with NSW Maritime policies or other planning controls.

We understand that the current practice of NSW Maritime is to make consent for new development proposals conditional upon removing existing non-compliances where feasible, for example, restoring public access to the foreshore where this has been blocked in the past. We would support a specific provision to this effect being included in the Draft Policy.

Recommendations

The EDO urges NSW Maritime to include the following elements in its Land Owner’s Consent Policy.

- A prohibition on development which restricts public access to land in the inter-tidal zone.
- No commercial or private development of submerged lands adjacent to public land.
- Strict limitations on the type and scale of development permitted on submerged lands, similar to those contained in the existing Manual.
- A requirement for applicants to remove existing non-complying development when constructing new development on submerged land.

If you require further information, please contact josie.walker@edo.org.au or 9262 6989.

Yours sincerely

Environmental Defender’s Office Ltd

Rachel Walmsley

Policy Director

