IMPACT

Environmental Defender's Office Ltd

A QUARTERLY NEWSLETTER ON ENVIRONMENTAL LAW

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Community Participation in Monitoring: A Precedent

Although the *Environmental Planning and Assessment Act*, 1979 (NSW) recognises the importance of public participation in the environmental impact assessment process, the time period in which the public may participate is limited to the period before the actual carrying out of a development. The public may comment on environmental impact statements for certain types of developments and activities and apply to the Court for a new hearing of the development application for certain developments under Section 98 and/or challenge the legality of the development in the Courts under section 123. However, all of these actions by the public are usually prior to the actual carrying out of the development.

Yet, if environmental impact assessment is to be effective, it must be viewed as a dynamic, ongoing process. It should start with project formulation and initial environmental assessment in the form of an environmental impact statement or equivalent. It progresses to the approval phase where there should be a re-evaluation of the project and its impact on the environment and if approved, the imposition of appropriate conditions to minimise adverse impacts on the environment. After approval, there should be effective monitoring of the project and its impact. The information gained in the monitoring process should be used to reformulate mitigation methods both for the project in question and for future projects. (1)

If public participation is important in the pre-approval and approval stages, it is even more important in the post-approval or monitoring stage because this is when the public will actually be affected by these developments which are approved.

The failure of the *Environmental Planning and Assessment Act* to expressly provide for public participation in the monitoring phase is serious and ought to be remedied as soon as possible. Until this is achieved, the public will need to negotiate with developers and consent authorities on a case by case basis to have conditions attached to development consents enabling public participation in the monitoring of the impacts of the development.

A precedent for such participation was established by residents for whom the Environmental Defender's Office acted in two recent cases in the Land and Environment Court. (2)

The cases concerned two similar quarries at Nethercote, near Eden, on the far south coast of New South Wales. The rock to be quarried contained veins of tremolite, a type of asbestos, which scientific tests had shown to be at least as dangerous as the more common types of asbestos, crocodolite and amosite.

The quarries were designated developments for the purposes of the *Environmental Planning and Assessment Act*, 1979 (NSW) and therefore an environmental impact statement was required to accompany each development application.

As required by the Act, the consent authority publicly exhibited the development applications and environmental impact statements and invited public comment.

The residents at Nethercote made a submission objecting to the quarries, principally because of the health hazard posed by the asbestos in the rock.

The consent authority nevertheless granted consent to each of the development applications, although it did impose a significant number of conditions which were similar but not exactly the same in the two cases.

However, there was no specific condition enabling the public to participate in the monitoring of the environmental impacts, and in particular the levels of exposure to airborne asbestos dust caused by quarrying operations. A further problem hampering public scrutiny was that in one case the levels of exposure were not specified in the consent. Instead, the levels and methods of measurement, and in both cases the methods of measuring the levels of exposure, were to be agreed by private consultation between the developers and the Division of Occupational Health of the Department of Industrial Relations.

The residents appealed to the Land and Environment Court from the determination of the consent authority.

Prior to the hearing of the cases, the Environmental Defender's Office approached the developers and the consent authority in each case with a view to negotiating alternative conditions agreeable to all parties.

It became apparent that the developers intended to carry out monitoring of the levels of exposure to airborne asbestos dust. However, the residents, whilst not necessarily doubting the intentions of the developers, wanted the monitoring of environmental impacts to be more open to public scrutiny and involvement.

In particular, the residents requested that:

(1) all reasonable measures be taken to ensure that no asbestos would leave the quarry;
(2) the level of exposure to airborne asbestos dust be the same as that for crocodolite and amosite, namely 0.1 fibres of asbestos per millilitre of air;
(3) the method of measurement of levels of exposure be approved by the National Health and Medical Research Council of Australia and the Department of Industrial Relations;
(4) the residents be permitted to inspect the monitoring of exposure to airborne asbestos dust at the quarry; and
(5) the residents have access to the results of the monitoring process,

and that each of these be specifically stated as conditions of the development consent, in order that the public could see that environmental impact monitoring was being done and being done effectively.

After negotiation, each of the developers and the consent authority agreed to these requests. As the developers stated:

> 'We intend to do the right thing and we have nothing to hide, so why not let the public see that we are in fact doing the right thing!'

The Land and Environment Court then made orders embodying the agreed conditions.

It is hoped that environmentalists, developers, consent authorities and Courts alike will apply this precedent to enable public participation in the monitoring phase of the environmental impact assessment procedure.

Footnotes

1. Preston B.J., "Monitoring - The Neglected Aspect of Environmental Impact Assessment" Vol. 13 No.6 *Habitat* (December 1985), 6

2. Lackey and Wentworth on behalf of the Nethercote Residents v Council of the Shire of Bega Valley and the Minister of Public Works, Ports and Roads, No. 10156 of 1985, Land and Environment Court, 3 May 1985; and

   Lackey and Wentworth on behalf of the Nethercote Residents v Council of the Shire of Bega Valley and Heffernan Concrete Industries Pty. Ltd., No. 10157 of 1985, Land and Environment Court, 28 June 1985.

Proposed Nature Reserve Saved But for How Long?

Warrell Creek is a little known tributary of the Nambucca River on the north coast of New South Wales. The area has been under consideration for nature conservation since 1970. It was first recommended as a nature reserve by the National Parks Association of NSW in 1976. This recommendation was adopted by the National Parks and Wildlife Service and formally referenced as a proposed nature reserve under the *National Parks and Wildlife Act.*

The area contains scientifically important sand dune systems, littoral rainforest and wetland areas. It is essentially natural although over the years there has been some degradation. This degradation has progressed to the stage where it is now critical, if the area is to be preserved, that all future developments be prevented and the area declared a nature reserve.

The urgency for protection of the area has recently been increased by two current proposals for sand and gravel extraction in the wetlands on the western side of Warrell Creek. These proposals would necessarily totally remove the existing *Melaleuca* forest swamps in the area dredged and lower the level of the land, among other impacts.

The National Parks Association of NSW rightly viewed such developments as the beginning of the end for the nature reserve proposal. The cumulative impact of this development combined with too many other developments in the past and other proposed developments would destroy the nature conservation, scientific, recreational, and other values of the area.

The National Parks Association instructed the Environmental Defender's Office to appeal under s.98 of the *Environmental Planning and Assessment Act* against the local Council's decision to approve the development.

However, it was realized that the environmental impact statement was so grossly inadequate that it failed to comply with the statutory requirements. In these circumstances, neither the local Council at first instance nor the Land and Environment Court on appeal would have the power to determine the development application which included the inadequate environmental impact statement. Additional proceedings under section 123 of the Act were commenced to challenge the inadequacy of the environmental impact statement and hence the legality of the Council's determination. The s. 98 merit appeal was adjourned pending the outcome of the s. 123 proceedings.

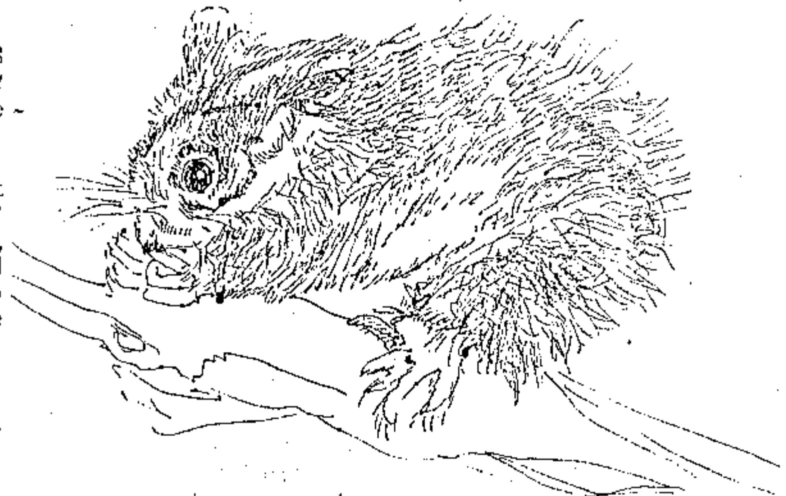
Expert reports prepared for the National Parks Association emphasised the values of the Warrell Creek area and catalogued the gross inadequacies of the environmental impact statement.

As a result of these expert's reports, the developer and Council conceded before the hearing commenced that the environmental impact statement was inadequate and that the Council's development consent was ultra vires. The developer agreed to being restrained by the Court from taking any step in reliance upon the purported consent of the Council to use the land for the purpose of extraction and screening of decorative sand and gravel.

The National Parks Association's legal challenge therefore was completely successful. In addition, in the process of preparing their legal case, further information has been obtained on the significance of the Warrell Creek area for nature conservation, scientific study and recreational pursuits. There never has been a better time nor a more persuasive case for protection of the area as a nature reserve.

Unfortunately, there is a real risk that the recent victory will be in vain. The developer in this case as well as others still wish to proceed with their proposals. New environmental consultants have been engaged to prepare more adequate environmental impact statements.

The National Parks and Wildlife Service and the NSW Government must act *now* to preserve the area once and for all.



Legal Briefs

1. The *Environmental and Planning Assessment Act* has recently been amended by the *Environmental Planning and Assessment (Amendment) Act* 1985. The amendments and new regulations are expected to come into force on or about 1 February 1986. A full outline of the amendments will be contained in the next newsletter.

   Some of the main changes include:

   (1) the empowering of the Minister (but not the Council as was originally proposed in Bill No.1) to grant consent to a development application for a prohibited development;
   (2) The right to an enquiry under section 119 in relation to any prohibited development, whether or not it would be classed as designated development.
   (3) the deletion of the requirement for sequential public exhibition of the environmental study and local environmental plan and substitution of simultaneous exhibition;
   (4) the substitution of a new definition of 'activity' in Part V of the Act along the lines of the existing definition of 'development';
   (5) the nomination of a particular determining authority for the purposes of Part V where the approval of more than one authority is required;
   (6) the deletion of the 'final decision' requirement in s. 112 and the substitution of a proscription of the carrying out of a prescribed activity or activity likely to significantly affect the environment unless an EIS has been considered;
   (7) the insertion of a time limit of 3 months for challenging the validity of development consents and environmental planning instruments;
   (8) the substitution of a new requirement for the information to be supplied in development applications for developments which are not designated developments;
   (9) the insertion of two new matters in s. 90 (1) which consent authorities are required to consider when determining development applications, one of which is whether the development is likely to cause soil erosion; and
   (10) the insertion of a provision prohibiting consent authorities refusing consent to development applications by the Crown or imposing conditions without the written approval of the applicant or Minister.

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2. *The Environmentally Hazardous Chemicals Act* 1985 was passed by Parliament on 1 November 1985. The Act is an important addition to NSW's environmental legislation. Of particular interest to the public is the open-standing provision enabling the public to bring proceedings to remedy or restrain breaches of the Act (s.75) and to appeal on the merits against the making of a chemical control order (s. 38).

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3. The long awaited decision in *Angel v Minister for Arts, Heritage and the Environment and Ors.* No. 85/121, on whether access would be granted under the *Freedom of Information Act* 1985 to documents relating to woodchip licences in Tasmania was handed down by the Administative Appeals Tribunal (Dep. Pres. Todd, Taylor and Stevens) on 13 November 1985. Mr. Angel, a member of the EDO Board, but acting in this case as assistant director of the Total Environment Centre in Sydney, had appealed to the Tribunal against the decision of the Minister for Arts, Heritage and Environment, Mr. B. Cohen, to refuse access to certain documents on the basis that the documents were exempt pursuant to sections 33A, 43 and/or 45 of the *Freedom of Information*
   The documents in question were based upon information supplied by woodchipping companies to the Forestry Commission of Tasmania which, in turn, supplied it to the Commonwealth Department of Arts, Heritage and Environment.

   The Tribunal held that there was clear evidence, given by the woodchipping company and the State of Tasmania, both of which were joined as parties, and by the Department of Arts, Heritage and Environment, that disclosure of any one or more of the documents would cause damage to the relations between the Commonwealth and the State of Tasmania and that disclosure would divulge information or matters communicated in confidence by the State of Tasmania to the Commonwealth.

   The Tribunal therefore upheld the decision of the Minister that the documents were exempt under sections 33A and/or 45. The Tribunal also noted that s.33A 11(a) could apply not only in the case where disclosure of the contents would cause, or could reasonably be expected to cause, damage to the relations between the Commonwealth and a State, but also in certain cases where the mere fact that a document has been disclosed may without more cause damage to the relations between the Commonwealth and a State.

   The Tribunal considered the provisions of section 33A (5) but held that there was insufficient evidence that disclosure of the specific matter in the documents would be in the public interest. What evidence there was amounted to little more than the general public interest operation of, or information in the possession of departments.

   Although it was not necessary for the Tribunal's decision, the Tribunal also considered the claim of exemption under s. 43. The Tribunal held that on the evidence presented the provisions of s.43 (1) (c) (ii) applied in this case to exempt the documents. The Tribunal stated sub-para (ii) did not require the incorporation of even a modified concept of the public interest, as was required in sub-para (i) (refer *Actors' Equity Association of Australia and Anor.* 3 AAR 1).

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4. *Australian Heritage Commission Act.*

The Australian Government's role in the conservation of the National Estate under the *Australian Heritage Commission Act* is undergoing review at the present time by a Heritage Review Task Force established by the Department of Arts, Heritage and Environment. Two members of the EDO Board with expertise in heritage legislation, Mr. Ben Boer, a senior lecturer in environmental law at Macquarie University and Mr. Reece McDougall, formerly of the National Trust and now an advisory officer for land use at the Department of Agriculture, recently were invited to Canberra to give their submissions to a seminar organized by the Task Force. Their submissions included that:

(1) the functions of the Heritage Commission be expanded, including taking greater responsibility for World Heritage nominations instead of the Department of Arts, Heritage and Environment;
(2) the number of members of the Heritage Commission as well as the Commission's staff be expanded;
(3) funding be increased for the National Estate Grants programme;
(4) the procedure used by the Heritage Commission be embodied in Regulations; and
(5) an open-standing provision should be inserted in the Act to enable the public to enforce the Act.

It is expected that the Report of the Task Force will be completed by early 1986.

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5. The Minister for Planning and Environment, Mr. R.J. Carr, has approved a regional environmental plan which sets an absolute height limit for the 200 km of the lower South Coast. The plan applies to the Shires of Bega Valley and Eurobodalla. Future buildings will be limited to a maximum height of 14 metres, the equivalent of 5 storeys.

Mr. Carr stated that the current low scale of development is part of the character of the lower South Coast just as much as the attractive beaches, spectacular headlands and majestic Great Dividing Range.

This plan will be welcomed by residents of the South Coast who approached the EDO seeking assistance in opposing recent high rise development proposals in Narooma and other centres on the South Coast.

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Address ____________________

____________________ Phone ________

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Concession	☐ $ 15 per annum
Groups	☐ $100 per annum

Donation ☐ $100 ☐ $200
☐ $500 ☐ $1,000

Cheque enclosed for $

Please forward to:

Environmental Defender's Office
3rd floor
142 Clarence Street
Sydney NSW 2000
Telephone 29 8154

(b) make a Tax Deductable Donation through the ACF

Please make your cheque payable to the Australian Conservation Foundation, sign the statement of preferance below and post this form to the Australian Conservation Foundation, 672b Glenferrie Road, Hawthorn, 3122.

"I prefer that this donation be spent for the purposes of the EDO."

Signed ____________________

Name ____________________

Address ____________________

Cheque enclosed for $

FRIENDS OF THE EDO

The Environmental Defender's Office has made it through its first year of operation with flying colours in both its litigation work, its community assistance and its education work. The EDO has been successful in the Courts and has set precedents for others to follow. It continues to answer an ever-increasing number of queries from the public, explaining the relevant laws and procedures and advising members of the community what can be done in their situation.

Unfortunately, the EDO's funding situation has not improved markedly. Legal aid for each case in which the EDO acts has been both difficult and time-consuming to obtain and has not been a significant source of funds to date. The other source of legal funding, a partial core legal centre grant, has been insufficient to guarantee the continued operation of the office, and there is little prospect that this problem will be cured for 1986.

The EDO must therefore look to the public for support. The EDO is here to help the public defend the environment but to do this the public must help the EDO. The establishment of the EDO is a precedent in itself. It is the first and only legal centre in Australia assisting the community in environmental law.

As a reader of this newsletter, you are already a valued friend of the EDO. We need, however, your continuing support in two ways.

First, we need your assistance in recruiting other people as friends of the EDO. If you believe in what we are doing, if you have been helped by the EDO, spread the good word to others.

Second, we urgently need donations in addition to memberships. Please consider making the EDO your special community cause for 1986. Remember tax deductability is available via the Australian Conservation Foundation. This can make a significant difference for larger donations: twice the amount for the EDO at only half the cost to you.

Make the EDO's survival your responsibility.

Please call in to our office, write or telephone us any time. We would welcome the chance to exchange ideas on fundraising, the office,s legal work and our community education role.