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Submitted online:

http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=8897

Dear Mr Walton,

Draft Large Scale Solar Energy Guidelines

Thank you for the briefing and the opportunity to comment on the Department of Planning and Environment's Draft Guidelines for large scale solar energy projects. As a community legal centre with over 30 years' experience in environmental and planning law, EDO NSW seeks to ensure that planning and development decisions and environmental impact assessment (**EIA**) processes are clear, scientifically robust, fair, participatory and accountable.

We welcome the Department's ongoing efforts to encourage best practice environmental assessment and community engagement, to clarify and explain the development assessment process for major projects, and support ecologically sustainable development (**ESD**). EDO NSW provides free legal advice to around 25 community members each week on planning or environmental concerns. For many people it may be the first time they have faced the complexities of the planning system. Departmental guidelines like these may be a useful reference point for people trying to understand the system and the opportunities for public engagement in decision-making.

We note the Draft Guidelines have been prepared in the context of other finalised or draft guidance from the Department which we have previously commented on.¹

This submission includes general comments on how the planning system can increasingly contribute to strategic climate change goals, and specific comments on the Draft Guideline text.

General comments and recommendations on strategic renewable energy and climate change goals

1. Global warming is an urgent and systemic problem, and one that state planning systems must play a more direct and concerted role to address. This was the conclusion of our 2016 report, *Planning for Climate Change*.² The report analysed each stage of the

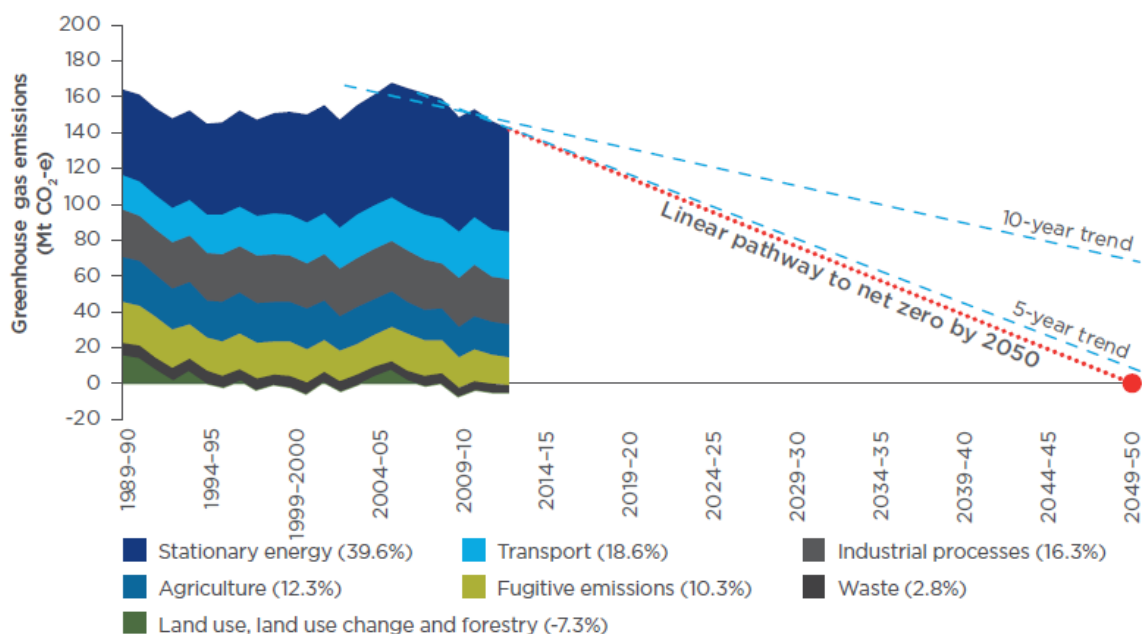
¹ This includes the ongoing EIA Improvement Project for State Significant Development and Infrastructure, Wind Farm Guidelines, Social Impact Assessment Guidelines, the Integrated Mining Policy and related Economic Assessment Guidelines. See submissions at: http://www.edonsw.org.au/planning_development_heritage_policy.

² EDO NSW, *Planning for Climate Change: How the NSW planning system can better tackle greenhouse gas emissions*, July 2016, at http://www.edonsw.org.au/planning_for_climate_change.

Environmental Planning and Assessment Act 1979 (NSW) (Planning Act) and made 14 practical recommendations to reduce greenhouse gas emissions from NSW sources, including a Climate Impact Statement for all major projects. The Department has been invited to respond to these recommendations.

2. To achieve the aims of the Planning Act to protect the environment and encourage or facilitate ESD, we **recommend** the planning system and policies must encourage the development of clean renewable energy and discourage more polluting alternatives. This is consistent with the Government's strategic aim of achieving Net Zero Emissions by 2050, announced in November 2016.³ This is also consistent with the Paris Agreement under the *UN Framework Convention on Climate Change*, which the NSW Government supports.
3. As the Draft Solar Guidelines note, the economics of energy production and consumption are increasingly making renewable energy highly attractive. The finding that up to 19% of Australia's electricity came from renewables in 2016 (p 6) is encouraging – but it is not sufficient to 'broaden the mix' of energy supply unless this also involves the rapid reduction in greenhouse gas emissions. We **recommend** the NSW Government set staged renewable energy and emission reduction targets beyond 2020.
4. NSW has one of the world's highest carbon footprints per person.⁴ Emissions from burning fossil fuels for electricity (stationary energy) are still above 1990 levels, and make up half of the NSW total emissions.⁵ Slow progress over the last 3 decades has greatly increased the challenge of net-zero by 2050, consistent with the Paris goals (as the Government graph below demonstrates).⁶

Figure 2: Pathways to net-zero emissions



Source: NSW Government analysis of trends in data from Australian Greenhouse Emissions Information System

³ The Hon M. Speakman, '\$500 million for NSW's environmental future', media release, 3 Nov. 2016.
⁴ See e.g. NSW EPA, *NSW State of the Environment Report 2015*, Ch 5 'Greenhouse gas emissions'.
⁵ See <http://climatechange.environment.nsw.gov.au/About-climate-change-in-NSW/NSW-emissions>.
⁶ NSW Government, *Fact Sheet: Emissions in NSW*, Office of Environment and Heritage, Nov. 2016.

5. While the Draft Solar Guidelines refer to existing policies to encourage renewable energy, we reiterate our strong concern that the planning system entrenches a number of barriers to a clean energy transition, particularly a transition swift enough to avert dangerous climate change. The electricity sector is vital to this transition because it generates 51% of NSW carbon pollution. The barriers under the Planning Act include:
 - a. **Failure to include explicit objects** or purposes to reduce greenhouse gas emissions (**mitigation**) or adapt to climate change (**adaptation**);
 - b. **Lack of clear statutory requirements** to consider climate change mitigation or adaptation when making strategic planning instruments under the Planning Act;
 - c. **Lack of Climate Impact Statements** and inadequate greenhouse impact assessments – with no clear guidelines for consultants, decision-makers or the community to compare project lifecycle emissions, identify unacceptable impacts or climate-friendly alternatives;
 - d. **Lack of clear requirements on decision-makers** to apply consent conditions that minimise or specifically limit greenhouse gas emissions for all major projects; refuse unacceptable climate impacts; or strengthen emissions standards of approved projects over time.⁷
 - e. **Lack of greenhouse gas emission limits or load-based licensing fees** in other approvals, such as pollution licences from the NSW EPA;
 - f. **Inequitable access to appeal rights** – in practice this means that community objectors’ rights to bring merit appeals against major project approvals⁸ are *curtailed* by ministerial discretion, while proponents enjoy broader merit appeal rights, which may be *preserved* by ministerial discretion;⁹
 - g. **Lack of post-approval monitoring**, auditing or reporting on major project greenhouse gas emissions and conditions (e.g. via a public database).
6. We **strongly recommend** these 7 barriers be addressed by planning law and policy reform to bring NSW in line with the Government’s Net-Zero target, its express support for the Paris Agreement goals and targets, and with the Government’s membership of The Climate Group States and Nations Alliance.
7. We advise that critical changes to the planning system are necessary now to achieve the Government’s long-term objectives. Importantly, for the avoidance of doubt, reducing the State’s contribution to global warming must go beyond NSW-level emissions and address downstream ‘scope 3’ or exported emissions.
8. We **recommend** that greenhouse gas emissions (scope 1, 2 and 3) be clarified as an explicit consideration in decisions made about all major projects under the NSW planning system. At a minimum, this would be required as part of an EIS and/or highlighted in a Climate Impact Statement, with clearer obligations for decision-makers when considering these assessments.¹⁰ While an amending Act is preferred, this could take effect in the

⁷ Despite continuous improvement objectives in NSW pollution laws, there is no express power in the Planning Act to update consent conditions over time. ‘Modifications’ could require stronger conditions.

⁸ The Planning Act gives rights to community members who make formal submissions against certain major project developments to challenge an approval in the Land and Environment Court ‘on the merits’. This limited right is removed when the Minister directs the PAC to hold a public hearing (s 98).

⁹ Proponent merit appeal rights are not limited to designated development or SSD; they have a longer period to appeal after the decision; and in the recent Rocky Hill Mine refusal, the Planning Minister did not give the usual direction to the Planning Assessment Commission to hold a public hearing, thereby preserving the merit appeal rights of Gloucester Resources against the mine’s refusal.

¹⁰ EDO NSW, Planning for Climate Change: How the NSW planning system can better tackle greenhouse gas emissions, July 2016, at http://www.edonsw.org.au/planning_for_climate_change.

Planning Regulation,¹¹ the Standard Secretary's Environmental Assessment Requirements for State Significant Development and State Significant Infrastructure, and the Department's Guidelines for the economic assessment of mining and coal seam gas projects.¹²

9. In the context of large-scale solar projects, a Climate Impact Statement would demonstrate how the project contributes to strategic climate change goals, and outline any emissions or adaptation planning risks associated with the project.

Specific comments and recommendations on the Draft Guidelines

Objectives and application of the Guidelines

10. We welcome the series of objectives proposed in the Draft Guidelines (p 4-5).
11. We agree that solar energy development should include necessary components that are ancillary to the State Significant Development project itself, so that the overall impact of development is understood and assessed (pp 5 and 10¹³). We **recommend** that a consistent approach to direct, indirect and cumulative impacts is adopted across the planning system. For example, fossil fuel exploration and mining projects must not be able to avoid or reduce overall scrutiny by staging or dividing projects up into their component parts.¹⁴

Strategic context

12. As noted, we welcome the Government's support of a sustainable solar energy industry and its acknowledgement of 'broad public support for alternative, renewable, low emission energy generation sources' (p 5). We support the inclusion of the list of strategic opportunities of large-scale solar energy proposals (p 6),¹⁵ particularly in relation to the Paris Agreement under the UN Framework Convention on Climate Change and the NSW net-zero emissions 2050 target.
13. Consistent with our general comment above, the Strategic Context section (p 6-7) could more explicitly link the need for planning decisions to work towards climate change mitigation and adaptation goals and policies. This is briefly noted under Project Assessment (p 15), but should be reiterated upfront.

¹¹ Sch. 3 of the Environmental Planning and Assessment Regulation 2000 sets out EIS requirements.

¹² The 2015 economic assessment guideline and technical notes do not require scope 3 assessment.

¹³ See the 'Planning approval - Transmission lines' example on p 10 of the draft Guidelines.

¹⁴ See for example, *People for the Plains v Santos and Others* (2017), which examined whether a wastewater treatment plant could be considered coal seam gas 'exploration' that did not require consent. Summary and link to judgment at: http://www.edonsw.org.au/mining_coal_seam_gas_cases.

¹⁵ Namely to:

- address the aims of the International Paris Agreement on reducing greenhouse gas emissions;
- contribute to NSW achieving net-zero emissions by 2050 as set out in the NSW Climate Change Policy Framework;
- contribute to the Commonwealth's renewable energy target;
- deliver on commitments in the NSW Renewable Energy Action Plan; and
- assist in meeting energy demand and improving energy security for NSW in the context of the regulatory framework for the National Electricity Market.

SSD declaration

14. The Draft Guidelines note that the capital investment value threshold for State Significant Development (**SSD**) is lowered if a solar (or other) project is proposed 'in an environmentally sensitive area of State significance'. This raises two concerns that we recommend the Department address:

- a. Why are large-scale energy projects permitted at all in such environmentally sensitive areas? For example, these are defined to include Ramsar wetlands, World Heritage Areas, areas of high Aboriginal significance or high biodiversity significance, nature reserves for aquatic life, flora or fauna, and habitat critical to the survival of threatened species.¹⁶ Major industrial projects should be explicitly prohibited in these sensitive areas, consistent with their publicly recognised values.
- b. While the intent of making these projects 'SSD' is presumably to provide additional scrutiny of significant environmental risks or impacts, the practical consequence of an SSD classification is that several important statutory permits are waived.¹⁷ This is a perverse outcome.

15. To address these concerns we **recommend**:

- i. prohibiting SSD (or in the present context, energy projects over \$10m capital investment value) in environmentally sensitive areas of state significance;¹⁸ or
- ii. amending the Planning Act so that if SSD is proposed in environmentally sensitive areas, environmental authorisations that are otherwise exempt would apply; or
- iii. deleting the Planning Act exemptions (ss 89J-K) and requiring that all SSD is subject to these important environmental authorisations.

Other Approvals

16. The example of planning approval for transmission lines (p 10) raises the need for consistent assessment of a project's total impacts, even if ancillary components are technically subject to separate processes. While we agree with the Guidelines' general approach, this is not always adopted (above, para 11).

17. The section on federal referral and assessment under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should list the 10 matters of national environmental significance that projects may affect (Draft Guidelines, p 11).

Development assessment of solar energy proposals

18. We welcome the strategic considerations noted under 'Project context' (p 15), including the NSW net-zero target, the Renewable Energy Action Plan and energy security considerations. Consistent with the NSW Government's support for the Paris Agreement and its membership of The Climate Group, we recommend including a further reference to:

- *the Paris Agreement to keep average global warming well below 2 degrees (and to pursue efforts to limit warming to 1.5 degrees), and Australia's commitments to reduce emissions under that Agreement.*

¹⁶ State Environmental Planning Policy (State and Regional Development) 2011, clause 4, Definitions.

¹⁷ *Environmental Planning and Assessment Act 1979* (NSW), ss 89J-89K.

¹⁸ Under the SEPP (State and Regional Development) 2011.

19. We **recommend** 'Public interest considerations' include explicit reference to the *principles of ecologically sustainable development* (p 18). Several ESD principles are relevant to the energy industry in particular, including the precautionary principle, intergenerational equity, improved environmental valuation and the polluter pays principle. Solar energy and other projects with comparatively low greenhouse emissions are likely to be viewed positively from the perspective of ESD principles and the Planning Act's related objects to encourage ecologically sustainable development and protect the environment.
20. We welcome the Draft Guidelines' reference to assessing cumulative impacts, but this could be clearer where it says 'especially biodiversity...' (p 18). The Guidelines go on to note that biodiversity impacts will not be part of the Secretary's Environmental Assessment Requirements, but do not explain how that affects the cumulative impact assessment process regarding biodiversity. We **recommend** the Guidelines more clearly explain what cumulative impact assessment entails, either by way of further examples or further references.
21. We also **recommend** that the Figure 1 summary of SSD assessment and approval (p 19) include a step that relates to Biodiversity Development Assessment Reports (if required).

Community and Stakeholder Engagement

22. We welcome the Draft Guidelines' explanation and encouragement of early, iterative, tailored and best practice community engagement, the mutual benefits this can bring for communities and developers, and the 'social licence' to operate. We also welcome recognition that major projects can affect community cohesion (p 24).
23. We **recommend** the Department seek specific advice from Aboriginal people and organisations such as NSWALC, NTScorp and others on best practice consultation and benefit-sharing with Aboriginal communities. We recommend the Renewable Energy Advocate explore this as an area for social research.
24. We also **recommend** the section on 'Industry-scale public engagement' refer to non-government organisations as a useful source of information. There are a number of NGOs working in the area of climate change action. For example The Climate Council has established a renewable energy *Cities Power Partnership* with local governments.

Conclusion

Thank you for considering this submission. We hope it assists the Department in finalising the Guidelines for large scale solar projects, and in ensuring the planning system makes a positive contribution to important and strategic renewable energy and climate change goals that reflect the long-term interests of the NSW community. If there are any matters that you would like to discuss, please do not hesitate to contact me or Rachel Walmsley, Policy & Law Reform Director, on (02) 9262 6989 or by e-mail.

Yours sincerely,
EDO NSW

Mr Nari Sahukar
Senior Policy & Law Reform Solicitor

Attachment A – Recommendations from EDO NSW, *Planning for Climate Change: How the NSW planning system can better tackle greenhouse gas emissions* (2016)

Full report available at: http://www.edonsw.org.au/planning_for_climate_change.

6 stages of the planning system analysed in the 2016 Report:



01. Setting the Framework

Recommendation 1 (New climate change Act)

Enact new climate change laws that include provisions that:

- set a clear overarching objective to reduce greenhouse gas emissions;
- impose duties on Government ministers to set periodic and long-term emissions reduction targets and carbon budgets, based on expert advice;
- set a legislative renewable energy target for NSW electricity use; and
- require the new Act's implementation and goal-setting to be consistent with internationally agreed climate goals, best available science, and ecologically sustainable development principles.

Recommendation 2 (Planning Act objects)

Insert an object in NSW planning law to reduce greenhouse gas emissions in accordance with those duties, targets, carbon budgets, global goals and best available science.

02. Strategic Planning

Recommendation 3 (Emissions reduction in strategic plans and SEPPs)

Amend NSW planning law to require that strategic plans contribute to reducing, monitoring and improving greenhouse gas emissions across sectors, in accordance with relevant targets and best available science. Update all state environmental planning policies (SEPPs) accordingly.

Recommendation 4 (Resource extraction areas)

Before releasing a new resource area, require the relevant Minister to consider:

- likely emissions from resultant projects in the context of drawing down a state or national carbon budget;
- the scale, cost and timing of lifecycle greenhouse gas emissions of a project; and
- potential cumulative impacts with other past, present and approved or proposed future projects.

03. Environmental Impact Assessment

Recommendation 5 (Climate Impact Statements)

Require consistent and independent assessment of the likely greenhouse gas emissions of all major projects. This must include a Climate Impact Statement that states:

- how the project proposal contributes to relevant goals and targets to reduce greenhouse gas emissions;
- specific measures to avoid, minimise and offset emissions from the project;
- the measures in place to ensure downstream emissions are avoided, minimised and offset;
- the full cost of the project's emissions; and
- full and proper consideration of alternative options.

Recommendation 6 (Emissions assessment guidelines)

Publish greenhouse gas assessment and decision-making guidelines to ensure consistent, robust assessment and decisions based on best available science. Guidelines should apply an 'avoid, mitigate and offset' hierarchy for reducing emissions.

Recommendation 7 (Independent assessment)

Require mandatory accreditation of environmental consultants who prepare Environmental Impact Assessment reports and independent appointment of accredited assessors.

04. Development Decisions

Recommendation 8 (Decision making guidelines and duties)

Strengthen decision-making requirements for development approvals and conditions in the EP&A Act, with the aim of achieving emissions reduction targets. In particular, establish new duties to:

- have regard to state and national emissions trajectories and act in accordance with short and long-term reduction targets;
- consider the level of greenhouse gas emissions as grounds for refusal (or a duty to refuse unacceptable impacts);
- impose specific conditions on development consents and mining titles to minimise emissions, meet certain standards if the project is approved, and to offset emissions that cannot be minimised or avoided; and
- apply clear guidelines, rules and standards to minimise and offset emissions.

Recommendation 9 (Continuous improvement)

Amend NSW planning laws to clarify that development consent conditions can be updated to require continuously improved standards, whether or not a modification has been requested.

Recommendation 10 (Building standards)

Expand the Building Sustainability Index for energy and water efficiency standards, including

- significantly higher residential standards;
- expand efficiency standards to commercial and industrial buildings;
- built-in review periods that require standards to continuously improve; and

- lead and develop national standards for other sustainability measures such as lifecycle emissions and waste levels.

05. Other Approvals and Licences

Recommendation 11 (Resource titles)

Mandate climate change and emissions as a consideration for assessing exploration or production title applications under mining laws. Before issuing a mining title, the relevant Minister should be required to consider:

- likely emissions in the context of drawing down a state or national carbon budget;
- the scale, cost and timing of lifecycle greenhouse gas emissions of a project; and
- cumulative impacts with other past, present and approved projects.

Recommendation 12 (Environment protection licences)

Add greenhouse gases as pollutants in NSW pollution control laws, to recognise their contribution to environmental degradation and encourage behavioural change. In the absence of a carbon price, this should include load-based licencing fees for greenhouse gas emissions, consistent with the polluter pays principle.

Recommendation 13 (Emissions standards for power stations)

Establish emissions standards and continuous improvement requirements for NSW power stations, where appropriate based on nationally consistent standards. Standards and requirements would be enforceable conditions on environment protection licences.

06. Compliance and Enforcement

Recommendation 14 (NSW greenhouse monitoring register)

Establish a comprehensive greenhouse gas monitoring and auditing register to report on individual facilities with significant carbon footprints in NSW. This would draw on existing and new data, to track and report on approved and actual emissions.