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Nature Conservation Saves for Tomorrow

Planning legislation updates 2017
NSW Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

31 March 2017

Submission on proposed changes to the *Environmental Planning and Assessment Act 1979*. – Part 2 Major Projects

Dear sir or madam,

The Society submission reflects our years of experience reviewing and assessing major projects which impact on the environment and conservation values of the greater Blue Mountains region. This is Part 2 of the society's submission on the proposed changes to the *Environmental Planning and Assessment Act 1979* (EPAA).

The Blue Mountains Conservation Society is a community organisation working to achieve the preservation and regeneration of the natural environment of the Greater Blue Mountains. The Society has a membership of over 800 people.

Objects of the Act

We support the proposed objects relating to built and cultural heritage and good design. We do not support the changes to the objects which downplay protection of the natural environment compared to the current objects.

We believe a major omission is that there is no reference to climate change and emissions reduction. Our reasons have been set out in Part 1 of our submission.

The proposed changes to the object on Ecologically Sustainable Development (ESD) are not supported as they seem to restrict the meaning of ESD, for instance, by referring to 'relevant economic, environmental and social considerations" in decision-making. This seems to be subjective and unclear. The EPAA needs to continue to recognise the long-standing meaning of ESD in the context of pollution in NSW as set out in the *Protection of the Environment Administration Act* at s.6. This definition

includes the principles of the precautionary principle, inter-generational equity, conservation of biological diversity and ecological integrity and polluter pays. The society supports the the ESD object proposed by EDO NSW in their submission at page 6.

The fourth proposed object to protect the environment "including threatened species and other species of native plants and animals" is a narrow definition and essentially means all species, threatened or unthreatened. Most importantly, it removes the explicit reference to threatened populations and ecological communities and their habitats". These references should be retained as the full wording recognises the importance of ecological communities and populations in maintaining biodiversity.

The third proposed object adds promoting "Business… opportunities" to the existing employment and housing opportunities. It is questionable why 'business', which may not deliver the public benefits of more employment or affordable housing, should be given this status. Historically, employment generating developments have been recognised by the planning system for instance, in the Western Sydney Employment Lands SEPP, and given fast track approval processes. However, business opportunities can be operations which really only benefit the business owners or shareholders (sometimes living overseas), which is more clearly a private benefit.

We note that the objects also remove other public benefit responsibilities which have been in the EPAA for a long time. These relate to ensuring there is land for public purposes and the provision of utilities and community services and facilities. These usually related to new housing developments and were introduced to ensure new suburbs were not being built on the fringes of Sydney without the timely provision public transport, open space, recreation areas and community facilities.

REGULATION OF MAJOR PROJECTS – SECTION 4: STATE SIGNIFICANT DEVELOPMENT PROCESSES

Better integrating development consents and other statutory approvals clarifying the regulation of major projects [Section 4.1][1]

While we agree with many of the problems identified in this section, we do not agree with the proposed solutions for conditions of consent.

(i) Transferrable conditions

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The society does not support the proposal for phasing out certain conditions of consent once they are addressed in other regulatory instruments such as environment protection licences or mining leases. The test of "substantially consistent" is weak because it allows watering down of conditions and allows the consent authority to use its discretion without any public notification or scrutiny.

The Bill proposes that the consent authority has to be satisfied that "the matters regulated by those conditions will be adequately addressed by such an authorisation

[1] Summary of Proposals, January 2017 p.26 ff.

when it is issued."[2] This wording allows for a weakening of the condition because it is only required to be sufficient or barely sufficient and allows changes over time as the test is applied only when the transfer decision is made. It is subjective and discretionary. The proposed change weakens the force and primacy of consent conditions and it does not remove the problem of having development controls in multiple documents.

Once in the new regulation or licence, conditions can be further eroded through the different processes, penalties, objectives and cultures of the different agencies. For instance, some agencies use a more consensual approach by negotiating conditions with proponents. As well, environment protection licences do not have to be consistent with consent conditions after five years. This proposal will particularly benefit major projects which continue to operate for many years such as mines and quarries.

If this proposal does go ahead, the society believes that

- Transferred conditions need to be explicitly required to have at least equivalent force as the original conditions;
- there should be an explicit requirement that a condition cannot be weakened over time;
- the Department of Planning should be required to advise the public when it proposes to transfer a condition and allow public comment;
- the consent conditions should refer to what has replaced the original conditions, when it happened and where the new condition can be found (in other words historical tracking of the changes);
- conditions of consent should explicitly identify the other statutory approvals which apply and where those approvals can be found.

(II) Power to amend conditions

What is proposed is a power for the consent authority to amend conditions on monitoring and environmental audits. While this is a good idea it is too limited. For instance, the consent authority cannot amend the conditions to take into account new information. At present only the proponent can seek to have conditions of consent amended.

There needs to be a broader power allowing the consent authority to amend conditions in certain circumstances, as exists, for instance, at the federal level. The federal Minister for Environment can take the initiative to amend environmental conditions in the light of new information including material which has not been assessed in the environment impact statement (EIS) under the *Environment Protection and Biodiversity Conservation Act* at s.143.

One example of the difficulties the current EPAA cannot address in NSW occurred recently when the Independent Monitoring Panel for the Springvale Mine [SSD 5594], recommended amending the consent conditions to address far field impacts on nationally significant swamps which are being undermined. These impacts had not been assessed through the Environmental Impact Statement (EIS). The

[2] Proposed section 80A Imposition of conditions

monitoring panel was created to identify and advise on emerging information from the monitoring process. The consent authority cannot take a precautionary approach and amend the conditions of consent despite the new information which has been gathered from monitoring required by the consent conditions. A general power to amend conditions of consent would be a sensible response to a current problem and show the practical value of monitoring programs.

(iii)Broadening the applicability of offsets

The society does not support broadening the use of offsets. The current offsets policy has been reduced to give significant place for financial offsets rather than like for like offsets. This makes a mockery of the notion of offsets. This system allowing developers to pay money to degrade the environment should not be extended.

Improved environmental impact assessment [Section 4.2]

Environmental assessments should be reviewed by independent experts selected independently by the department not by the proponent nor through a short-list of experts proposed by the proponent. This could reduce delays which occur when regulatory agencies seek further studies and information from the proponent. This independent review would also help restore public confidence in the assessment process.

Discontinuing Part 3A [Section 4.3]

The society supports the removal of Part 3A. However, there is no need to delay the implementation any further as the government was going to do this in 2011. There has already been ample notice to proponents.

We support discontinuing transitional arrangements. These merely perpetuate different processes, are inefficient and unnecessarily complex. We do not support the continuation of modifications under s.75W as they favour the proponent and are not consistent with other modifications under the EPAA. All modifications should be assessed against the proposal as originally approved which is the requirement under EPAA s. 96. This prevents a project changing significantly over time through a series of modifications.

FAIR AND CONSISTENT PLANNING AGREEMENTS [Section 6]

All planning agreements between proponents and local councils should have a clear public benefit and should be publicly available before project approval. Not all planning agreements are made available. With major projects, the local councils are not the consent authority and, particularly in regional NSW, they can be small, under-resourced organisations so there is a greater imbalance of power between the parties. This is more reason for making these agreements public.

CONFIDENCE IN DECISION-MAKING [Section 7]
7.3 Strengthening decisions at the state significant level – Planning Assessment Commissions

The society supports restoring third party merits appeals as a means to strengthen confidence in decision-making in a situation where most major projects are approved. The society supports the comment of the Independent Commission against Corruption (ICAC) that the benefits of community appeal rights are that they operate as a "disincentive to corrupt conduct" [3]

The proposed change to the EPAA is that the review power of the PAC is removed, however, a two stage PAC hearing can be held as part of the project determination. The main reason seems to be to reduce the approval time. Whilst PAC reviews do not replace third party appeal merits appeals, because they are conducted outside the legal framework, they were reviews by a body independent of the planning administration. In that way they could provide a fresh set of eyes to a development proposal.

The new commission will only be the determining authority and public hearings can be held as part of the assessment and determination process. Adding a more inquisitorial approach at the hearings is probably a useful change as allows the commission to test and assess the proposal in public. However, the society believes that the questioning should include issues or questions raised by the public.

If this proposal does go ahead it should only apply to developments which are submitted after the date at which the legislative amendments come into force. This will ensure that developments which are already in process are not delayed to avoid a review.

Review of decisions - Internal reviews for some SSD [Section 7.5]

The society does not support introducing applicants' right to request an internal review of state significant developments (SSD). This is poor precedent given that SSD are large projects which can significantly affect the environment and infringe on people's rights. These projects need transparent and accountable approval processes to maintain public confidence in planning decisions.. There should not be a new avenue away from public scrutiny, for proponents to seek changes to conditions they are not happy with.

The proposed internal review could apply to modifications to consent where, currently, public hearings are often not held. This would remove them from further scrutiny. We also believe that there should be no right to an internal review to the Minister where the proposal has at any time made a political donation.

[3] Quoted in EDO NSW's submission on the proposed EPAA changes at p.20

ENFORCEMENT - ***Introduce enforceable undertaking [*****Section 10]**
We support this but it should not replace fines or prosecutions. To do so would remove the proponent from public accountability and where appropriate, opprobrium. Copies of enforceable undertakings should be publicly available.

Thank you for the opportunity to comment on these proposed amendments.

Yours sincerely

Madi Maclean

President