



Nature Conservation Council

The voice for nature in NSW

Director
EIA Improvement Project
Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

25 November 2016

Submission on the Environmental Impact Assessment Improvement Project Discussion Paper

Dear Sir/Madam,

The Nature Conservation Council of NSW (**NCC**) is the peak environment organisation for New South Wales, representing over 150 member societies across the state. Together we are committed to protecting and conserving the wildlife, landscapes and natural resources of NSW.

While we are pleased to have this opportunity to provide input on the various initiatives proposed by the Department in its Environmental Impact Assessment Improvement Project Discussion Paper, we do not believe that these initiatives alone will improve the EIA process, address the full extent of community concerns or deliver improved environmental outcomes.

There is significant community concern regarding the assessment and determination of major projects. In particular, the community perceives significant imbalance in the system, less scrutiny of major projects and favouritism of major project proponents by Government. The Government's repeal of Part 3A of the *Environmental Planning and Assessment Act* 1979 in 2011 did little to appease community concerns, with many of the undesirable features of Part 3A, including restrictions on third party merit appeal rights and overriding of environmental approvals, being carried over into Part 4.

While we recognise that the EIA Improvement Project relates to policy changes, we submit that additional legislative change is needed to address many of the community's concerns.

In addition to the initiatives set out in the Discussion Paper, consideration should also be given to addressing other community concerns, including in relation to:


- The lack of guidance around the assessment of cumulative impacts
- The failure of the planning system to provide absolute protection for areas of high conservation value
- Weak biodiversity offsetting rules
- The failure of the planning system to adequately resolve land use conflicts
- Improved mechanisms for responding to the impacts of climate change

We provide feedback on the initiatives proposed in the Discussion Paper, as well as other aspects of the EIA process, in our **enclosed** submission.

The Government has a long way to go in restoring the community's trust in the NSW planning system, particularly in relation to the assessment and determination of major projects.

Please do not hesitate to get in touch if you require any additional information.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kate Smolski', written in a cursive style.

Kate Smolski
Chief Executive Officer

NCC SUBMISSION ON THE ENVIRONMENTAL IMPACT ASSESSMENT IMPROVEMENT PROJECT DISCUSSION PAPER

PART 1 – NCC COMMENTS ON THE DISCUSSION PAPER INITIATIVES

We welcome the opportunity to provide feedback on the Environmental Impact Assessment Improvement Project Discussion Paper (Discussion Paper). Our comments on the eight initiatives set out in the Discussion Paper are outlined in more detail below.

INITIATIVE 1: DEVELOP A CONSISTENT FRAMEWORK FOR SCOPING THE EIA PROCESS

This initiative is aimed at identifying the most important issues during an early scoping phase, and tailoring the level of examination in the EIS relative to its importance.

In our view, an EIA is intended to consider and assess a broad range of issues. As part of this assessment, it should become clear which issues are of most relevance or concern for the project, and which ones are less important. If during the EIA it becomes clear that an issue of less importance, it will be given less priority.

Often, the importance of an issue cannot necessarily be understood without a proper assessment being undertaken. We are concerned that some important issues may be dismissed at an early scoping phase, prior to proper assessment.

If this initiative is to proceed, the framework must adopt a precautionary approach that will ensure that all environmental impacts of the project are adequately identified and assessed. There should also be community engagement at the scoping stage to help identify relevant issues.

INITIATIVE 2: EARLIER AND BETTER ENGAGEMENT

We welcome the Department's efforts to improve community engagement. This is a key concern for many of our members, who often provide feedback to us that community engagement is inadequate and a waste of time.

Some of the key issues raised are that:

- Consultation is often tokenistic and simply a 'tick the box' exercise.
- Consultation does not lead to outcomes (i.e. people do not feel that their input influences decisions).
- Consultation periods are inadequate – EIA documents are complex and take time to read, understand and interrogate. Further, the community does not have 'full time' capacity to engage, often engaging in their spare time.
- The quality of the consultation is more important than the quantity. Our members often complain of 'consultation fatigue', and often disengage in consultation processes when they do not see their input leading to genuine or improved outcomes.

- Petitions that relate to proposed applications are often treated as one submission by the Department, rather than taking into account the number of people signing the petition (and therefore level of community support for or objection to a project).
- Departmental summary reports of community engagement and submissions are sometimes inaccurate, or present a skewed view of community input.

As part of Initiative 2, the Department should consider the following suggestions for improving community engagement:

- Decision makers should provide better feedback to communities about how their input has been considered and how decisions have been made.
- The Department should consider what options there are to provide support to communities to better engage in the process and interrogate the information (e.g. resourcing for own experts).
- Consultation periods should allow adequate time for communities to understand and respond to the proposed initiatives or projects.
- Better and earlier community engagement should include community representation as part of the scoping and risk assessment.
- The community does not trust proponent led engagement. It would be more appropriate to have independent or Department led engagement.

While we recognise the Department has made an effort to improve community engagement over recent months, increased levels of community engagement have not necessarily led to improved quality of engagement, with many members of the community continuing to feel like their input is being ignored.

INITIATIVE 3: IMPROVE THE CONSISTENCY AND QUALITY OF EIS DOCUMENTS

We welcome the initiative to improve the consistency and quality of EIS documents. In our view, Initiative 3 is closely linked to Initiative 5, as the lack of accountability of persons preparing EIS documents raises concerns about the integrity of the information included in the EIS. This is discussed further below.

In terms of improving the consistency and general quality of EIS documents, we make the following comments:

- EIA documents are not sufficiently interrogated by the Department when first received, or refused if they are not up to standard.
- There could be greater guidance on the content and format of an EIS, including a more concise, simple overview document and reduced repetition. However detailed information and data should be made publically available.

- There is sometimes inconsistency within the EIS. For example, different components (e.g. water management, biodiversity etc.) can often suggest conflicting management measures.

Suggestions on how to improve the consistency and quality of EIS documents are outlined in more detail in response to Initiative 5 below.

INITIATIVE 4: SET A STANDARD FRAMEWORK FOR CONDITIONING PROJECTS

Consent conditions are often complex, difficult to understand and difficult to monitor and enforce. There is also inconsistency between projects which contributes to the complexity and inefficiency in the system.

We generally welcome the initiative to set a standard framework for condition projects, and suggest that this opportunity be used to strengthen consent condition to ensure improved environmental and social outcomes.

In particular, we submit that:

- Conditions must include measurable performance criteria that can be easily regulated, including specific criteria for monitoring and reporting.
- Conditions should use maximum and minimum measures, not averages.
- Commitments to environmental management need to be translated into clear and prescriptive conditions of approval that can be easily regulated.

We also submit that leaving key issues to be resolved in post approval management plans is unacceptable, and these types of conditions should be avoided. It is essential that the decision maker has all the relevant information before him/her when making a decision, including in relation to the future mitigation of environmental and social impacts. This will also provide better certainty for proponents and the community.

INITIATIVE 5: IMPROVE THE ACCOUNTABILITY OF EIA PROFESSIONALS

There is a strong correlation between Initiative 3 and Initiative 5, and as outlined above these two initiatives should be considered together.

The Department suggests two potential ways to build public confidence in the integrity of the project assessment process, including:

- A requirement for those leading EIA processes such as EIS Lead Authors and Specialist report Lead Authors to adhere to a code of practice; and
- Extending the use of peer review of EIA documents.

We generally support these two proposals.

Ultimately however, while consultants continue to be directly engaged and paid for by proponents there is the risk of bias, undue influence and unethical practices.

We believe the most effective way of ensuring the integrity of environmental impact assessments is to break the financial nexus between the developer and the environmental consultant.

This issue was raised at NCC's 2015 Annual Conference, where the NCC membership unanimously passed the following motion:

THAT the Nature Conservation Council of NSW, noting that the NCC Planning Policy 2014 calls for mechanisms for ensuring the integrity of environmental impact statements, including that environmental consultants be independently appointed, call on the NSW Minister for Planning to establish an independent system of government accreditation for environmental consultants who undertake assessment work for major projects under NSW planning laws¹.

We therefore submit that the planning system provide a system for the independent appointment of environmental consultants. Such a system could be implemented by the following steps:

- a central register of consultants is created (potentially managed by the Department of Planning, Office of Environment and Heritage or an independent body),
- proponents pay a fee (based on a percentage of the estimated construction investment value) into a designated fund,
- a consultant(s) is allocated to the proponent's project from the register of consultants,
- the consultant prepares a public environmental study of values and potential impacts, and
- the developer then finalises its proposal and preferred course of action.

We recognise that there may be potential issues with respect to liability and competition but we believe these issues could be appropriately managed; for example, registered consultants could be allocated through an open tender process, which would allow consultants to set their own fees.² We also recognise that any such framework would need to be developed in consultation with industry and community.

We also submit that there are further mechanisms and principles which could be implemented alongside any proposal for the independent appointment of consultants that would contribute to improving the integrity of environmental consultants. For example:

- *Rejection of inadequate documents*

Clause 51 of the EP&A Act Regulation allows a consent authority to reject a development application within 14 days if the application does not contain any information, or is not accompanied by any document, specified in Part 1 of Schedule 1 of the Regulation, or is not accompanied by an environmental impact statement (if required).³

¹ NCC Annual Conference Minutes 2015, Motion B3, available at www.nature.org.au/about/governance/annual-conferences/

² We also note that public interest exemptions can be sought from the ACCC regarding competition issues, if necessary. See, for example, *Competition and Consumer Act 2010* (Cth), Part VII (Authorisations, Notifications, and clearances in respect of restrictive trade practices).

³ We note that the *Local Development Performance Monitoring Report for 2010/2011* released by the Department of Planning and Infrastructure reports that only 0.9% of applications were rejected, while 37% of applications were referred back to applicants for further information, available at <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=29mGD0zKm9c%3d&tabid=74&language=en-AU>

This clause is unclear however, as to whether a consent authority can reject an application that, despite including the necessary documentation, contains inadequate or inaccurate information. We propose that consent authorities should be able to reject development applications that are accompanied by inadequate supporting documentation including inadequate environmental impact assessments.

- *External auditing through peer review panel*

The Government could introduce strategic auditing and quality assurance processes through a peer review panel or a new government authority with the role of assessing the accuracy of environmental impact statements, species impact statements and assessments, as well as ensuring ongoing management conditions are complied with.

- *Annual reporting*

The Government could introduce a requirement for the Minister to table an annual report in parliament providing statistics and updates on environmental assessments and accuracy of EIA predictions over time.

INITIATIVE 6: PROVIDE GREATER CERTAINTY ON EIA TIMEFRAMES

While there could be greater certainty on EIA timeframes, timeframes should not be unjustifiably reduced at the expense of robust environmental assessment and sound decision making.

We note that long decision making processes are often based on poor information provided in the EIA. This should be improved by clear Secretary Environmental Assessment Requirements and a rigorous, transparent process, including the rejection of inadequate EIS documents, prior to an EIS being placed on public exhibition.

INITIATIVE 7: STRENGTHEN THE MONITORING, AUDITING AND REPORTING OF COMPLIANCE

There is significant concern within the community that major projects are not adequately monitored or audited and compliance action is insufficient or absent. There is therefore scope for the Department to significantly improve its monitoring, auditing and reporting of compliance activities.

In particular we note that:

- Monitoring and audit information is not always publically available or accessible.
- Breaches of consent conditions are not always reported.
- Compliance action is not always taken for breach of consent conditions.

Additional resourcing should be provided to the Department to ensure that it has capacity to adequately audit major projects and investigate and prosecute breaches of consent conditions.

INITIATIVE 8: PROJECT CHANGE PROCESSES FOLLOWING APPROVAL

Post-approval oversight can be difficult due to the lack of publically available information, the range of plans and licences that are finalised post-approval, and multiple modifications to projects.

We support the initiative to better communicate post-approval changes, and in particular we note that:

- Post-approval information should be made publicly available (e.g. post-approval management plans should be put on major projects website).
- Post approval management plans, Environment Pollution Licences and water licence arrangements are often negotiated without any transparency.
- In cases where a project has had multiple modifications there should be clear information that allows the community to understand the modified project.

We also submit that the planning system could better limit or minimise the scope for subsequent variations to projects, particularly in relation to variations that will increase the impacts of a project.

PART 2 – ADDITIONAL COMMENTS ON IMPROVING THE EIA PROCESS FOR MAJOR PROJECTS

In addition to providing feedback on the eight initiatives outlined in the Discussion Paper, we take this opportunity to reiterate our feedback on other ways the Government could address community concerns with the EIA process for major projects.

- **INTERACTION BETWEEN MINING ACT 1992 AND ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979**

There is poor interaction between the *Mining Act 1992* and the *Environmental Planning and Assessment Act 1979*, with mining exploration licences and mining approvals trumping land use planning controls under the EP&A Act. Essentially, exploration and mining activities can access any land (except National Parks and nature reserves) irrespective of the zoning of that land or its landscape or conservation value. This undermines the EP& Act, and the strategic planning and planning controls put in place under that Act. Inevitably by giving out exploration licences, the government is sending a message that mining could happen. Any later objections or concerns raised are often faced with resistance from applicants who have already invested in exploration and costly EIS/EIA reports. Consideration should be given to reviewing the interaction between the Mining Act and the EP&A Act.

- **FAILURE TO RESOLVE LAND USE CONFLICTS**

Similarly, the failure of strategic planning to adequately resolve land use conflict means that there is often case by case conflict between urban development, mineral extraction, agricultural activities and high value conservation land. Major projects, which are often high impacting and cover large areas, are therefore often contentious, as there are competing interests and conflicting uses. In our experience, the imbalance and discretion in the planning system means that environmental and social interests often lose out to economic interests.

On a number of occasions, the Government has suggested that upfront strategic planning will identify and better balance competing interests and resolve land use conflicts. However, we have failed to see strategic plans or planning reforms achieve this to date (e.g. Strategic Regional Land Use Plans, new Regional Plans).

NCC has long argued that strategic planning under the EP&A Act could be improved and, in particular, proper protection (e.g. prohibition of certain high impacting activities) should be given to areas of high conservation value. This would ultimately provide greater certainty for both proponents and the community.

- **REQUIREMENTS FOR ENVIRONMENTAL APPROVALS**

Broadly speaking State significant development has the most significant environmental impacts, and it follows that proposals with the greatest impact should be subject to the greatest scrutiny. However, sections 89J and 89K of the EP&A Act override the requirement to obtain or condition environmental approvals under other environmental legislation. These provisions essentially leave the assessment of environmental impacts and specific licensing considerations in the hand of the Planning Department rather than agencies with environmental expertise. The assessment of development impacts may not be subject to the same level of scrutiny as intended by environmental legislation. See further NCC and TEC's *Submission to NSW Planning System Review - White Paper*⁴.

- **SRLUP 'GATEWAY'**

The *Environmental Planning and Assessment Amendment (Gateway Process for Strategic Agricultural Land) Regulation 2013* amended the EP&A Act and EP&A Regulation to establish a gateway process for mining and petroleum development on strategic agricultural lands. The Gateway Process allows for additional scientific scrutiny, but it does not afford definitive protection to important mapped agricultural areas and has significant shortcomings. This process could be substantially improved, including by expanding the process to cover high conservation areas and allowing gateway decision makers to 'close the gate' on proposals that are not suitable.

- **BIODIVERSITY OFFSETTING**

The NSW planning system places too high an emphasis on biodiversity offsetting. Biodiversity offsetting is not appropriate in all circumstances, and should not be seen as a mechanism for justifying high impact development that will destroy areas of high environmental value (e.g. endangered ecological communities, threatened species habitat, wildlife corridors).

Further, we have significant concerns with the proposed new Biodiversity Assessment Method (BAM) proposed under the new Biodiversity Conservation Bill 2016. In our view, the proposed BAM does not

⁴ NCC and TEC (2013) *Charting a new course: Delivering a planning system that protects the environment and empowers local communities - Submission to NSW Planning System Review - White Paper*, Section 4.4, www.nature.org.au/media/2024/submission-on-the-white-paper-nature-conservation-council-and-total-environment-centre.pdf

meet best practice principles for offsetting, and will lead to worse environmental outcomes than previous offsetting schemes. Our concerns are set out in more detail in our submission on the draft Bill⁵.

If biodiversity offsetting is to occur, it must meet best practice principles that require 'like for like' offsets and no net loss of biodiversity. Further, certain areas must be off limits to offsetting (e.g. 'red flag' areas such as coastal catchments, areas of endangered ecological communities or threatened species habitat).

- **THIRD PARTY MERIT APPEAL RIGHTS FOLLOWING A PAC PUBLIC HEARING**

Existing restrictions on third party merit appeal rights following a PAC public hearing override judicial oversight of planning decisions, and reduce the transparency and accountability of decisions of the Planning Assessment Commission. The Government should repeal sections 23F and 98(5) EP&A Act. See further the EDO NSW report *Merits Review in Planning in NSW*⁶.

⁵ Environment groups' joint response to the consultation package of reforms to land management and biodiversity conservation in NSW, www.nature.org.au/media/213826/environment-groups-joint-submission_final-270616.pdf

⁶ EDO NSW (2016) *Merits Review in Planning in NSW*, www.edonsw.org.au/merits_review_in_planning_in_nsw