

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

Via email: EIAproject@planning.nsw.gov.au

30 August 2017Draft Environ

**RE: Draft Environmental Impact Assessment Guidance Series June 2017**

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**6**Dear Sir/Madam,

The Nature Conservation Council of New South Wales (NCC) is the state’s peak environment organisation. We represent over 150 environment groups across NSW. Together we are dedicated to protecting and conserving the wildlife, landscapes and natural resources of NSW. The National Parks Association of NSW (NPA) has been established as a conservation organisation for 60 years. We run one of Australia’s largest bushwalking clubs with a network of 16 branches, hundreds of active volunteers and over 20,000 supporters. NPA has played a role in the establishment of many of NSW’s national parks and nature reserves.

Our organisations welcome the opportunity to comment on the Draft Environmental Impact Assessment Guidance Series June 2017.

Our organisations and members have a strong interest in planning and environment decisions across the State and in their local areas. Land-use planning and development is intrinsically linked with environmental protection, nature conservation and natural resource management. Effective planning is needed to help us tackle our most pressing environmental challenges, including: loss and fragmentation of native vegetation and wildlife habitat; degradation of rivers, wetlands and water catchments; urban sprawl, traffic congestion and urban air pollution; and carbon pollution and impacts of climate change.

Our organisations do not consider that the Draft Environmental Impact Assessment Guidance Series June 2017 will achieve the stated aim of greater transparency and certainty for the community although it may give these to the proponent. We consider what is proposed will:

* give proponents a greater say in how their projects are assessed;
* give proponents a greater say in how consultation with the community occurs;
* downplay the role that Environmental Impact Statements (EISs) play in environmental impact assessment;
* decrease the role of the Department in the assessment of projects;
* reduce the Department’s role in assessing submissions and evaluating community concerns.

Further, we do not consider the changes will address widely held views that the NSW scheme for environmental impact assessment:

* is not sufficiently rigorous;
* is not transparent and accountable;
* is not impartial and independent;
* favours the interests of proponents over the public interest.

We consider that there would be much greater certainty, transparency and accountability for both the community and proponents if the EP&A Regulation provided a list of matters required to be addressed in an EIS that could be supplemented with Secretary’s Environmental Assessment Requirements(SEARs)for a specific proposal.

We do support involving the community in the scoping phase.However, we do not support the Scoping Report being used to reduce the scope of environmental assessment prior to the exhibition of the EIS including for the following reasons:

* not all members of the community may take part in the scoping phase;
* the community may not agree with the proponent as to which matters are significant;
* the project may change significantly between the Scoping and EIS stages;
* information not raised at the scoping stage may be raised in submissions to the EIS; and
* there appears to be no way in which a matter eliminated for consideration at the scoping stage can later be required to be considered if raised it in response to the EIS.

If the Department of Planning and Environment proceeds with proposals relating to Scoping Reports, NCC considers that a new offence should be included in the EP&A Regulation for lodging a misleading or deceptive Scoping Report.

We also consider that what is proposed in the Guidelines as a whole fails to specifically address how the principles of ecologically sustainable development should be implemented.

We also strongly support the proposal to be described precisely in the project description in the EIS. We are concerned, however, that the Guidelines allow for the proponent to continually update the project description. If the project description changes after approval we consider that the community should be notified and that the proponent also be required to discuss with the Department whether a modification of the approval is required.

Please see below our detailed submission. If you seek any further information on the contents of this submission please contact Daisy Barham on (02) 9516 1488 or ncc@nature.org.au

Yours sincerely,



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Nature Conservation Council of NSW



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**Submission in to Draft Environmental Impact Assessment Guidance Series June 2017**

***General Comments***

We consider that separate Guidelines should be prepared for State Significant Development (SSD) and State Significant Infrastructure (SSI). We consider that those guidelines should consist of chapters that would correspond to the relevant material in draft Guidelines 1-9. The Guidelines respectively for SSD and SSI could be prepared so that chapters could be readily downloaded. We believe that this would avoid unnecessary repetition and make the guidelines more user friendly. The guidelines should also where relevant discuss the role and procedures of the Planning Assessment Commission.

We **support** the use of different colours to show the proponent’s and Department’s roles but this convention is not used consistently through the document. We suggest showing the Department’s responsibilities in yellow.

**Guideline 1**

Although we support the aim of “greater certainty and transparency for the community and other stakeholders, proponents and assessment and compliance officers over the project for which approval is sought and how changes to that project are managed in the post-approval phase”, we are disappointed that Guideline 1 does not acknowledge that there is broad community dissatisfaction with environmental impact assessment processes. Concerns include:

* The proponent pays the consultants who prepare EISs and therefore the consultant is at not at arm’s length from the proponent and therefore could potentially influence what consultants say;
* Many conditions are not final. Matters are postponed for consideration in management plans and other documents;
* Discussion with other agencies is not reported in full;
* Community participation in the assessment of proposals or modification of proposals is suboptimal
* Conditions are not effectively enforced; and
* Approvals are not routinely independently audited.

There is also the widespread perception that the Department of Planning and Environment (the Department) seeks to facilitate projects at the expense of thorough assessment of potential impacts and appropriate conditioning or refusal of projects.

We consider that the proposals in the Guidelines give the proponent a greater role in both assessment and community engagement, and accordingly, reduce the role of the Department of Planning and Environment in those matters (discussed further below). We consider that this will further erode public confidence in EIA processes.

Although reference is made to the implementation of ecologically sustainable development (ESD) being an objective of the EP&A Act, there is no discussion in any of the Guidelines as to how the specific principles of ESD should be applied at any stage of the EIA process. We think this is a major omission from the guidelines.

We **support**:

 “an increased focus on the entire project cycle, managing impacts by linking conditions of consent to the prediction of impacts and supported by clearer compliance and enforcement measures.”

However, conditions are only effective if predictions of impacts are reasonable and accurate. We consider that the Department should for each project use peer review to test predictions for impacts that are identified as significant. This would give the community re-assurance that the predictions are reliable.

In principle, we also **support**:

“Proportionality: the level of assessment of a matter in an EIS should be based on its relative importance in informing a determination. Any condition of approval should also reflect the importance of the matter and not seek to control and regulate matters of minor detail.”

However, we do not support the proponent be primarily responsible for identification of issues at the scoping stage. We believe all issues should be addressed in the EIS. If the proponent considers them irrelevant or minor, the proponent should indicate its reasons for this opinion in the EIS. Logically, there will be greater discussion of issues that have been identified as significant in the scoping stage.

**In principle, we support**:

 “Mitigation hierarchy: environmental impacts should be addressed through a sequential and cascading response starting with avoidance and progressing through minimisation to management and in some cases, offsets. The rationale for the hierarchy is to limit the extent of the environmental impacts and where they occur, to internalise them to the project site as much as practicable.”

Priority must be given to avoidance. We consider that biodiversity offsetting is unacceptable as it results in a net loss of habitat of threatened species or endangered ecological communities.

We are also pleased to see explicit recognition of cumulative impacts. We agree that “EIA should identify and assess potential cumulative impacts which result from the Project”. However, we consider that this is a role best done by the Department that has access to information on all SSD and SSI projects in NSW. Cumulative impacts should be the subject of conditions of consent not merely the subject of recommendations in the EIS for the post-approval phase.

**In principle, we support:**

“Clarity and consistency in conditions and compliance: a standard approach to setting consent conditions will improve the clarity and consistency of conditions for decision-makers, proponents and the community and other stakeholders. Conditions should focus on the most important environmental matters, be specific and limit the need for further work where a matter has been appropriately assessed in the EIS”

The issue is who identifies whether an issue is significant – the proponent or the Department. We consider that the Department must make this decision.

We state that any amendments to the EP&A Regulation to implement the Guidelines should be publicly exhibited and consider that material in the Community and Stakeholder Engagement Guideline should be included in the Regulation although to do so requirements would need to be spelled out more precisely.

**Guideline 2**

There is the assumption that all interested parties will be engaged at the Scoping Stage. We believe that this is a false assumption as people may only become aware of project at the EIS stage.

The statement relating to what environmental matters should be considered “what does the project mean for the natural environment, in terms of air quality, biodiversity, water and land?” is inconsistent with the implementation of the principles of ESD. Specifically, there needs to be identification of issues where there is scientific uncertainty so that the precautionary principle can be applied. Also, the principal of conservation of biological diversity and ecological integrity as its name suggests requires consideration of both biological diversity and ecological integrity. Specific mention should be made to carbon emissions too.

The reference to “what risks does the project face due to its location including bushfire, flooding and sea level rise?” fails to specifically mention climate change associate risks and the implications of climate change modelling.

We are concerned by the following statement:

“Who are the major stakeholders with an interest in the project and how should they be engaged?”

A stakeholder is defined as:

“Any person or group with an interest in, or the potential to be affected by, a State significant project.”

Whereas “community” is defined as:

“A group of people living in a specific geographical area or with mutual interests that could be affected by a State significant project”, and

“Community and other stakeholders” are defined as:

“All those with a stake in a project including community members that may be impacted by, or interested in the project.”

 “Major Stakeholder” is not defined.

We consider that the definition of “stakeholder”, “community” and “community and other stakeholders” overlap leading to uncertainty. In our opinion communities that are directly and significantly impacted are stakeholders as are environmental groups. Unfortunately, this is often not recognized in EIA. We therefore question whether use of the word stakeholder is appropriate or even necessary. If the community at large is consulted properly all those with direct interest in the project should be consulted.

All Scoping Reports and Scoping Worksheets should be publicly exhibited as this would increase the transparency and accountability of the process. We also consider given the significant role that is proposed for scoping reports – identifying matters to be addressed in the EIS - that they and scoping worksheets should be exhibited for 28 days and not 14 days.

**Guideline 3**

We support early community participation in the EIA process. We consider that this helps the proponent identify potential impacts of a proposal early. However, we are concerned that assessment subsequent to the scoping stage only applies to issues identified in the Scoping Report.

We disagree with the statement “Where there is likely to be no impact on a matter, an explanation as to why no further assessment of that matter is required should be included in the Scoping Report, and there will be no need for further discussion in the EIS.”

We do not support scoping studies being used to reduce the scope of environmental assessment prior to the exhibition of the EIS. This is because:

* limited data on some issues may be available at the scoping stage;
* not all members of the community may be aware of or take part in the scoping phase;
* the community may disagree with the proponent as to which matters are significant;
* the project may change significantly between the Scoping and EIS stages;
* information not raised at the scoping stage may be raised in submissions to the EIS; and
* there appears to be no way in which a matter eliminated for consideration at the scoping stage can later be considered if raised it in response to the EIS;

We consider that if the proponent dismisses an issue in the Scoping Report it should still be addressed in the EIS with an explanation for why it has been dismissed.

We consider that the Regulations should set out basic matters that all EISs should address. This would give greater transparency and consistency between projects. SEARs would be restricted to matters that are project specific.

We consider that the statement “During the preparation of Secretary's Environmental Assessment Requirements (SEARs), SEARs the Department will consult with relevant public authorities as to the accuracy of the proponent’s characterisation of impacts on matters. If the proponent’s characterisation is considered to be inaccurate, appropriate SEARs will be issued.”

Does not allow for the proponent omitting a potentially significant impact and therefore, should be amended to read:

“During the preparation of SEARs the Department will consult with relevant public authorities as to whether a proponent has **identified all potential relevant impacts** and for those which are identified, has appropriately characterised those impacts. If the proponent’s fails to identify potential impacts or appropriately characterise them, SEARs will be issued.” The opinion of the relevant public authority(ies) should be determinative not that of the Department.

How the principles of ESD should be applied in preparing a Scoping Report should be set out in this Guideline.

All Scoping Reports and Scoping Worksheets should be exhibited for 28 days not 14 and issuing of SEARS should not commence until all submissions have been received.

“Region” is used throughout the guidelines without being defined. Without clarification there will be no consistency in how proponents document the potential areas that will be impacted by a proposal. See in particular the Impact Rating Guide and Section 3.7.13 in Guideline 4

We are concerned that the principles of ecologically sustainable development are not implemented in the proposed methods for the Impact Rating Guide. In particular, lack of scientific knowledge about an issue should be identified.

**Guideline 4**

We repeat that we do not consider the scoping phase should restrict neither matters that can be addressed in the EIS nor matters that the community can make submissions about. (See comments in relation to Guideline 3).

The Objectives state:

“The proponent should also demonstrate how the objectives of a project address principles of ecologically sustainable development (ESD).” We consider that this approach is inconsistent with the proper implementation of the principles of ESD. These principles should be incorporated in the assessment sections not merely in the Objectives section. Each relevant ESD principle should be addressed including the polluter pays principle.

We oppose the concept and use of “Maximum Parameters” because it postpones considerations of potentially significant parts of the project. This is inconsistent with both providing a specific description of the project in the EIS and the principle that conditions should be final. The propositions that: the proponent resolves “as many uncertainties as possible in the EIS and limit[s] the elements to which a maximum parameters approach applies” is clearly open to abuse by the proponent.

The Guideline states that if the proponent use the “Maximum Parameters” approach that the proponent “should consult with the community and other stakeholders on an ongoing basis from the initial scoping phase through to project delivery on the elements of the project that require further design. The community and other stakeholders should be updated as the design progresses”. We consider that if the “Maximum Parameters” approach is adopted the proponent must discuss how the project changes with the community. We consider that it should be the Department and not the proponent who specifies what form the consultation should take.

We consider that section 3.10 is the appropriate place to address the application of the principles of ESD in detail.

We also consider that determining whether the impacts and benefits of the proposal favour the public interest must be undertaken by the Department. As proponents act in their own interests not the public interest.

**Guideline 5**

We consider that the Department and not the proponent must collect and summarise submissions on the EIS. This ensures the Department is fully aware of the issues raised by the submissions.

While we support the proponent preparing a Submissions Report addressing issues raised by both the community and other Government Departments, we consider that the Submissions Report should not be considered by the Minister or their delegate when determining a project. We consider that the community would have greater confidence in decision-making if the approval authority relies on the Department’s assessment and summary of the Submissions Report rather than considering the Submissions Report itself. In addition, a project may raise issues which the proponent cannot fully address and which may require a Governmental response. These could be raised by the Department.

In order to enable the community to understand changes to projects we consider that all Preferred Infrastructure Reports and changes to State Significant projects must be publicly exhibited.

We are concerned by the statement that:

 “where the submissions received do not require a response, for example if an agency recommends standard conditions but does not raise any issues of concern, or if the submissions do not relate directly to the project and its impacts, the Department may decide that a response to submissions is not required.”

Firstly, we do not consider that for SSD or SSI projects other agencies should be issuing “standard conditions” without there being a public record of why they have imposed those conditions for specific projects. Secondly, the community should be advised of issues in submissions that the Department does not consider “relate directly to the project and its impacts”.

The Guideline should clearly state that it is the Department not the proponent that decides whether or not changes are significant. This is implied by this box being coloured white but it is not explicitly stated.

We consider that it is inappropriate to show in the Submissions Report “location of individual community members and other stakeholders that made a submission to indicate local versus regional interest”. There is a risk that regional issues may be treated as being more important than local ones. This may not be correct. It could also raise privacy issues where submitters have asked for their address details to be suppressed.

The critical issue is to determine whether the likely impacts raised by the community/other stakeholders are local or regional issues. This should not be done by looking at the location of where submitters live. It should be based on sound objective criteria.

We are concerned that there appears no mechanism for issues to be addressed that submissions raise that are not ones that the proponent can address but Government or other bodies can.

We consider that the proponents should never refer by name to people or organisations that make submissions. We support referring to submitters by number only in the Submissions Report.

We support: “The Submissions Report should revisit and provide an updated evaluation section of the EIS as a result of submissions” however, we do not consider it appropriate for the proponent to indicate “conclusions on overall acceptability of the project”. This should be done by the Department in its Assessment Report.

**Guideline 6**

The statement:

“The Department of Planning and Environment (the Department) is committed to the participation of all stakeholders, and particularly the community, in environmental impact assessment (EIA) in NSW”

would be better expressed:

“The Department of Planning and Environment (the Department) is committed to the participation of the community in environmental impact assessment (EIA) in NSW.”

The identification of “stakeholders” is often arbitrary, thereby, often alienating the broader community. Such terminology should be abandoned.

We consider that the Department should determine what forms of community consultation a proponent should use for a particular project at the Scoping and later stages of a proposal. We consider that this would give greater consistency in how community consultation occurs and greater public confidence in it than if it is left to proponents to decide which community engagement techniques they use.

Community and Stakeholder Engagement Plans (CSEP) should be made public not just “key elements of the CSEP”. Failure to make parts of the CSEP public would lead to increased community distrust in the EIA process.

We consider that Table 2 – “Determining the approach to engagement during preparation of the EIS” is complex and that it will lead to highly subjective outcomes, a lack of consistency in how community engagement is undertaken between projects as well as a lack of trust in proponents. As indicated above, we consider that the Department should specify how the proponent undertakes community engagement.

It is unclear what is meant by **”**The CSEP is established through the SEARs.” We consider it would be better expressed that “SEARS will set how the proponent is to conduct community engagement and full details will be set out in the CSEP”.

**Guideline 7**

We support the key principles except we consider that they should include a statement that enforceable means that legal action can be brought to ensure compliance with conditions.

In our opinion the distinctions between:

• environmental management conditions, and

• specific environmental conditions

is an arbitrary and unhelpful distinction.

We are concerned by the statement:

 “The project description is intended to be a dynamic chapter that is updated, as needed, throughout the EIA. If any changes to the design or amendments to the description of the project are proposed following EIS exhibition, the onus is on the proponent to ensure the project description is updated and submitted to the Department. If updates are made to the project description, the Minister or delegate will condition the most up-to-date version of the project description.”

It should be clarified that the project description cannot be changed once approval is granted. If the proposal is modified a new project description should be drawn up. The proponent should not be able to arbitrarily change a project without:

* notifying the community of the changes, and
* the Department considering whether or not the EIS should be re-exhibited.

We support conditions containing requirements that the proponent monitor and report compliance with the conditions of consent. However, we consider that the community would have increased confidence in the EIA process if additionally the Department also regularly conducted random audits of projects to ensure that conditions of consent are complied with.

We have serious concerns about whether some types of conditions proposed in this Guideline are final and certain as well as whether the principles of ecologically sustainable development, particularly, the precautionary principle have been adequately considered. These include performance-based conditions that require:

1. “a baseline survey if additional information is required to supplement the baseline information provided in the EIS and Submissions Report”,
2. supplementary documentation to address any residual uncertainty about a proponent’s ability to achieve the performance criteria,
3. development of and implementation of a Monitoring and Response Plan or a Management Plan where management-based measures are not included in an EIS,
4. identification of one or more management objectives which outline the intent of the condition, and
5. preparation of plans that demonstrate how and when the environmentally beneficial objectives will be achieved.

These types of condition defer consideration of matters that should be assessed prior to determining the application and be properly addressed in the EIS.

We are disconcerted by the statement that:

“Conditions that will result in beneficial environmental outcomes such as improvements to open space or enhancements to urban design will be drafted on a case-by-case basis.” It is unfortunate that it suggests that other types of condition will not be drafted on a case-by-case basis. We consider the use of standard conditions is highly undesirable.

We are also very concerned by the statement:

“Proponents are encouraged to provide the details of any management-based measures and monitoring and reporting protocols in EIA documentation to provide greater transparency and certainty to regulatory agencies, the community and other stakeholders.”

Community confidence will only be increased if it is mandatory that proponents provide details of proposed management-based conditions.

We do not consider that the increased use of performance-based conditions will not necessarily result in increased innovation or be in the public interest. We consider that such conditions facilitate the postponement of consideration of impacts leading to conditions that are not final and certain. We strongly disagree with the assertion that this type of condition will “make compliance with the conditions of consent easier to understand, monitor and enforce.**”**

We do not consider that the example condition that states “No more than 0.2 ha of EEC River Flat Eucalypt Forest may be cleared” is a good example of this type of condition. We consider that there should be an attempt to minimise the impact on the EEC for example by showing on a map where the impact can occur.

**Guideline 8**

As indicated, we consider that the “maximum approach for defined elements of the project” should not be actively encouraged. This approach results in conditions that are not final and certain.

We strongly **support** **“**change the approach to conditioning the project from: ‘generally accordance with the EIS’ to the ‘project as described in the project description chapter’”, however as we have indicated we do not support the proponent changing the project description without advising the community or the Department advising the proponent whether the EIS should be re-exhibited.

We consider that the example of how to determine what type of modification is applicable relating to quarries is inappropriate. It would be exceedingly rare for the impacts of a quarry expansion of that scale to restricted to visual amenity. Other impacts such as dust and noise would typically be relevant. The decision of the Land and Environment Court relates to a specific set of facts and circumstances.

Section 7.1.2 & 7.1.4 We question why the community is not referred to, especially why there is no requirement for community engagement for Type 3 modifications.

**Guideline 9**

We consider an independent peer review should be:

* mandatory for all SSI and SSD projects at both the scoping and EIS stages
* all peer reviews be publicly available.

 We also consider that the proponent should pay for such reviews but not appoint the consultant who carries them out. Appointment of peer reviewers should be done by the Department. This would significantly increase the community’s confidence in the EIA process.

We support the Department and PACs seeking peer review of issues.

The tasks that a peer reviewer should undertake include at the scoping stage consideration of whether relevant issues raised by the community have been adequately addressed.

**End.**