



Ms Carolyn M^cNally
The Secretary
Department of Planning & Environment
GPO Box 39
Sydney NSW 2001
Email: EIAproject@planning.nsw.gov.au

27th November 2016

Dear Ms M^cNally,

Re: Feedback on Improving the Environmental Impact Assessment Process

OzEnvironmental Pty Ltd welcomes the opportunity to provide feedback to the Department of Planning & Environment (“DPE”) regarding its review of the Environmental Impact Assessment process (“Review”) for State significant projects [both State Significant Development (SSD) and State Significant Infrastructure (SSI) proposals].

I congratulate you on your leadership of the Department, especially in striving to drive reform on environmental planning and assessment policies and the culture of the organisation. Your initiatives in the areas of compliance management, social impact assessment, and the overall EIA process are warmly welcomed and I wish you well in driving further change that enhances confidence in the integrity of the EIA process.

1. About OzEnvironmental Pty Ltd

OzEnvironmental advises rural society across Australia – farmers, councils and traditional owners – on mining and energy projects. Over the past six years this work has included EIA review and planning agreement negotiations on seven mines, four wind farms and two landfills in NSW worth over \$30 billion, plus work in other states on similar projects. The Principal prepared EISs for coal developments in the Hunter Valley in the 1980’s.

2. Scope of the Review

I understand from the EIA Improvement Project Discussion Paper, October 2016 (“Paper”) that:

- the scope of the Review is the entire EIA process including proposal development, Government agency and public consultation, exhibition of Environmental Impact Statements, the assessment and determination of projects and the post approval phase when projects are constructed and operated; and
- at this point in time (Stage 1) the DPE is seeking feedback on what the key issues for improvement are, how the process can be streamlined and environmental outcomes improved.

The Paper indicates that the primary objectives of the Review are to:

- build confidence in the integrity of the EIA process;
- deliver earlier and better engagement with affected communities;
- strengthen monitoring and reporting on project compliance;
- improve clarity and guidance for proponents and the community including key issue identification and development of a standard approach for applying conditions to projects;
- improve the consistency and quality of EIA documents, including the accountability of EIA professionals; and
- make assessment decision making time frames more certain and efficient.

3. Building Confidence in the Integrity of the EIA Process

3.1 Acknowledging the Unevenness of the Playing Field

The first step in building integrity in the system is to acknowledge that the ‘playing field’ of the current EIA process is unlevel, in fact very unlevel, with proponents being advantaged over the general community because they have more time, more technical resources, more economic capacity and more political clout. This unevenness must be acknowledged and addressed if the system is to approach being seen as fair and equitable.

Proponents also have powerful lobbyists treading the corridors of Parliament House and briefing Ministers. This either directly or indirectly influences policy making. On the other hand the general public – rural or urban – rarely has this luxury.

Having acknowledged this imbalance, I urge the DPE to modify the EIA process to provide the means for the general public to have more influence and power to truly drive regional development goals, the scope of major projects, the merits or otherwise of proposals and the required consent conditions for approvals.

At the moment when a proponent first liaises with the DPE the project proposal is essentially already set; so therefore the so-called ‘community engagement’ comes too late and is tokenistic. The dye is already cast, with the proponent basically defending their project’s location, scope and design.

Based on personal experience, I know that many farmers and rural communities directly affected by mining projects are denied natural justice. When miners know they have the legal right to explore or develop, their attitude tends to be authoritarian and the farmer is typically not treated with respect and is effectively rendered powerless. There is little sense of a collaborative approach. For the EIA process to have credibility and integrity this imbalance must be addressed.

3.2 Delivering Earlier and Collaborative Engagement with Affected Communities

Key stakeholders, including councils and their local communities, seek ‘a seat at the table’ when it comes to planning the types of development that are appropriate in their region and under what terms and conditions. By including the broader populace and being inclusive, collaborative, open and transparent there is increased confidence and assurance in likely future development approaches. The traditional model of a formal, hierarchical top down approach where policy is framed by government allied with strong business lobbying is no longer tolerated by general society.

A recent dynamic, digital connectivity, has generated a more collaborative society. This technological revolution provides a potentially effective tool to enhance how policy is conceived and advocated.

Given this new service, the process for the public to make submissions and provide feedback in response to a project EIS could be updated to enable input via social media, and for the DPE to provide rapid responses to facilitate improved dialogue.

Landholders and others potentially impacted adversely often find that major project proposals cause disruption and distress in their personal lives and uncertainty. I have had the leaders of three rural communities (clients) suffer adverse health outcomes as a consequence of leading representations on major project proposals. They truly feel that the EIA system is loaded against them. For farmers potentially impacted by a major project, questions are raised regarding the future of their agribusiness, for instance, do they commit to capital improvements or the next phase of the farm plan or will this be a waste of money? Again, if communities are to feel they can trust the EIA process then the system must be changed to provide these people with a more effective voice.

The DPE is strongly encouraged to develop mechanisms to protect the rights of landholders, given that the adverse impacts from a major industrial project are not of their making; yet the situation is foisted upon them. Often it is not a negotiation where they are willing participants with an eye to mutual benefits being achieved from the outcome. It is therefore recommended a policy be developed by DPE to assist landholders when they have to negotiate with a proponent. Similarly I encourage the DPE to be more assertive in requiring proponents to engage in a more respectful, collaborative manner. There needs to be explicit, performance based measures to shed light on accountability and responsibility on 'community engagement' undertakings.

For instance, it is recommended that the DPE require an affected landholder to sign off when he/she feels he/she is adequately informed, has a good understanding of the scale and nature of the predicted impacts through the provision of relevant EIA information and the likely risks.

3.3 More Rigour and Transparency in how Decisions are Made

I strongly support the reform agenda of the DPE to improve decision-making on major projects and help rebuild trust in the process.

In 2013 the then NSW Commissioner of the Independent Commission Against Corruption The Hon David Ipp AO QC in his report entitled 'Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources' (October 2013) stated that *'an efficient and effective policy and regulatory environment was one where opacity, uncertainty and discretion were eliminated from the decision making framework'*.

I suggest that, aside from the points raised in 3.1 and 3.2 above, the following actions be implemented to help deliver as even more rigorous and effective EIA process:

- a) Upfront, the DPE prepare regional or catchment wide strategic plans that are underpinned by the values and aspirations that communities wish to see reflected in the management of the natural, cultural and economic resources in their region. These values ought be articulated in the core principles of the plans. The plans would be based on the Ecologically Sustainable Development philosophy and provide a vision for future development and general land use management in that region, with priority given to delivery of long term economic benefits.
- b) Similarly, it would be beneficial if the assessment of projects reaffirmed the correlation between the regional strategic plan and the proposal.
- c) The Planning Assessment Commission ("PAC") be replaced with a review model where statements of claim by the various parties can be interrogated and cross examined. In the

interests of openness and transparency, interested parties ought be provided the opportunity to examine, challenge or explain the various assertions put before the PAC. Currently, whilst the PAC listens to all points of view, there is limited open discussion and dialogue about the relative merits or veracity of the evidence presented. Interested parties yearn for greater clarity in those forums as to which of all the often competing claims the PAC gives credence to.

I recommend that the Government replace the PAC with a Development Assessment Commission (“DAC”) chaired by a judge or pre-eminent lawyer to determine major projects. Parties would be able to be self-represented and the legal rules of evidence not apply. Cross examination of evidence would be a key aspect of DAC’s work. Members of the DAC would be appointed via an independent, transparent process, say on the recommendation of relevant professional bodies. A comparable process that worked very well in the 1980’s and 1990’s was the NSW Office of The Commissioners of Inquiry for Environment and Planning, chaired by John Woodward. Evidence was tested in the public arena and there for all to see. I recommend the Government re-activate this approach.

- d) A third party merit review process be allowed so parties can challenge the factual basis of any development decisions in the courts. In Australia’s democratic society this provision is important and will reduce the scope for opaque deals between proponents and government and catch inappropriate decisions.
- e) Provide a means for those who make a Submission on an EIS to have a right of reply to the Response to Submissions document prepared by the proponent. Sometimes proponents are selective in their interpretation of points raised and valid concerns too easily dismissed;
- f) Separate the functions of strategic planning and development assessment within Government. It is important in a planning sense that the strategic and regional planning process ‘lead’ the resources development agenda, so that our economic and cultural development is in accord with community aspirations and values and is mindful of the environmental and social values in a region. At present, major resources projects often ‘spring up’ and catch communities and Councils unawares with little prior knowledge or expectation.
- g) Strengthen the regulatory monitoring and compliance function of Government to reinforce implementation of consent conditions. This is elaborated on in section 4 below.
- h) Introduce to relevant government departments internal and external measures to protect against regulatory capture. Regulatory capture occurs when regulatory agencies change over time and move from acting in the public interest (their assigned statutory function) to promoting or advancing the interests of industries they are supposed to be regulating. It is akin to one interest group on the playing field seizing control of (ie ‘capturing’) the umpires, such that the game is no longer taking place on a level playing field.

The possibility of regulatory capture is a risk to which the DP&E is exposed by the very nature of its functions. There are many and varied interest groups that lobby vociferously to influence environmental planning and assessment policies and procedures. If not already in place, the implementation of various internal and external checks would help reinforce transparency and accountability and improve public confidence in the system.

Recommended internal checks include:

- Public reporting of the outcome of meetings between DP&E and companies, local government, the various industry groups and other key stakeholders;
- Adopting more explicit guidelines for employee conduct; and
- Ensuring the DPE engages with a diversity of interests, experts and change agents to avoid insulation.

Recommended external checks include:

- If the PAC was to remain, then ensure it is completely independent of and at arms length from the DPE with more resources so it has the unfettered capacity to engage the expert services it requires to address matters of public interest;
- The Auditor General or an Environmental Ombudsman undertaking annual, independent audits; and
- Remaking the law so the burden of proof lies with those promoting the development, not those who may query it.

3.4 Precautionary Principle to Underpin Major Project Determinations

I would like to suggest that a more strict precautionary approach be adopted to ensure that the major projects are only permitted if they can satisfy the fundamental principles of Ecologically Sustainable Development and the Precautionary Principle.

The EISs for projects contain information on, inter alia, job numbers and over what time frame, accommodation needs of workers, socio-economic, hydrogeological, biodiversity and indigenous assessments. It is my experience that such studies are often not sufficiently robust to allow for assessments to a high level of confidence. The specialist topics mentioned are important to local communities and their judgment of projects. To this end I applaud ongoing moves by the DPE to strengthen the SEARS to require more comprehensive baseline data in modelling work and that the reports be fully transparent regarding assumptions and limitations of the model and its predictions.

4. Strengthening monitoring and reporting on project compliance

I welcome recent initiatives by the DPE to enhance its compliance management role.

I support the commitment to undertake periodic audits of major projects such as mines and wind farms and to enforce conditions of consent. This step in the planning, approval and operation of major projects has been inadequate and upscaling this function will help rebuild community trust and confidence in the assessment and determination process.

I would encourage similar moves by the EPA to better resource and prioritise regulatory compliance and enforcement. The adequacy of the consent conditions is only as good as the supporting monitoring, compliance and enforcement regime underpinning the system. I have examples where the EPA has let the community down by poor performance and am happy to share them with the DPE.

5. Provide improved clarity and guidance for proponents and the community to identify the most important issues and develop a standard approach for applying conditions to projects

I welcome moves by the DPE to require the proponents of major developments to engage earlier with councils, local communities and the DPE before the scope and intent of a project is finalised.

Councils and local communities wish to be consulted in a meaningful, collaborative way before a PEA is submitted and SEARS issued.

I support the suggestions that:

- proponents and the DPE be required to inform community members how their views have been taken into account, and if not, why not; and
- The DPE lead engagement/dialogue with the community on key issues.

A common theme of consent conditions is one of 'adaptive management', suggesting that the various management plans for operations, noise, dust, water, etc will be sufficient and that if impacts exceed predictions then the management plans will be modified to address the shortcomings. I recommend more rigorous, explicit performance standards whereby proponents will be legally liable for Environment Protection Licence and planning consent condition exceedances. The approach by proponents to adapt management plans is providing too much latitude for proponents to not deliver on their EIA commitments. The studies underpinning the impact predictions should be required to be more robust and comprehensive and the proponents held accountable for the results.

Certainly, consent conditions must be prescriptive and performance based. Many conditions as written are too vague and general, thus providing inappropriate wriggle room for proponents in how they might be interpreted.

Strengthening Social Impact Assessment ("SIA") requirements is urgently required and I note DPE is undertaking an upgrade. I would like to see the SEARS be more prescriptive in requiring proponents to address specific SIA matters, leading to the conditioning of various social impacts in the consents.

Increased obligations should be placed on proponents to be more proactive in seeking out Voluntary Planning Agreements with affected councils. At present, proponents will avoid VPAs if possible and councils have to be assertive to protect their rights in this regard. It is recommended that the VPA Guidelines be more explicit in stipulating that councils are entitled to seek financial contributions for community based (as distinct from council based) social and economic impacts. Further, proponents should be required to secure VPAs.

DPE policies and guidance notes on VPAs are confusing in that the commentary is centred on what is relevant for projects located in urban areas, with little comment on the rural context where mines and wind farms are usually located. This matter needs addressing.

6. Improve the consistency and quality of EIA documents, including the accountability of EIA professionals

A common concern amongst communities is that because EISs are prepared by consultants paid by the proponents they are 'advocacy' documents designed to paint the project in the best possible light. I would like to see improved checks and balances in the compilation of EISs, including that developers no longer be allowed to hire their own consultants. As an alternative, proponents could pay a fee into a fund and consultants are allocated by an independent arbiter.

The challenge with EISs is that, by definition, they are technical documents, so it is important they not be 'watered down' in an endeavor to simplify the message. Rather, the capacity (ie funds) to undertake technical reviews needs to be provided by the Government to the key stakeholders, including councils.

The DPE is to be commended for engaging more and more independent experts to review the adequacy of the content of EISs. Many studies are by their nature complex and highly technical, so reviewers need the skills and experience to match.

7. Make the assessment decision making time frames more certain and efficient

I am willing to support the setting of timeframes for each stage of the EIA process subject to there being sufficient checks and balances implemented to ensure that there is:

- true collaboration and meaningful dialogue between proponents and local communities and councils before a PEA is tabled and SEARS issued;
- Ongoing, close dialogue during the EIS preparation by the proponent with councils and communities;
- increased robustness and accuracy in the content of the EISs;
- Increased openness and transparency in how the DPE engages with all interested parties to optimise confidence in the fairness of the assessment process; and
- Implement an alternative to the PAC process which is more investigative and questioning of the assertions and claims of the various parties, in the public area.

I thank you very much for the opportunity to provide feedback on these important matters.

If you have any queries regarding the above please don't hesitate to contact me on ph 0419 271 819 or email wgiblin@bigpond.net.au

I would be pleased to meet with DPE officers to discuss any of the matters raised herein.

Yours sincerely,



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