Dear Madam/Sir,

RE: Draft Environmental Impact Assessment Guidance Series

Thank you for the opportunity to comment on the Draft Environmental Impact Assessment (EIA) Guidance Series. I write in my capacity as Greens NSW spokesperson for the Environment.

EIAs are an important environmental management tool that can help predict and prevent the environmental impact of a range of policies, projects and developments. Unfortunately, the EIA process and resulting documentation such as Environmental Impact Statements (EIS) have lost community trust with many questions regarding the integrity of the process, the independence of those conducting the EIA and writing EISs, and poor levels of public engagement and dissemination of information.

The processes identified within the guidelines raise some significant concerns, principally, a proponent lead process rather than one lead by a public body such as the NSW Department of Planning and the Environment (the Department). This will continue to erode public confidence unless adequately addressed. Having reviewed the proposed guidelines, I welcome a reform of the current system however more work is needed to be done, specific areas of importance and improvement are discussed below.

1.0 Environmental Impact Assessment as a tool for decision-making

Environmental Impact Assessment (EIA) is a tool designed to help assess the environmental impact of a proposed development. In practice EIA is a procedure that seeks to bring environmental factors into consideration alongside traditional considerations such as the economic costs and benefits of a development proposal. At its heart, impact assessment is an un-pretentious tool: fundamentally, it generates information about the potential effects of development to allow decision makers to ‘think before they act’ (Morrison-Saunders et al 2014). The environmental information obtained through EIA can assist decision makers to determine whether a project should proceed, and, if so, what conditions should be imposed on the development such that harmful impacts might be mitigated or avoided (Harding et al 2004).

The principle of Ecologically Sustainable Development (ESD) is the foundation of the EIA process. Especially important here is the Precautionary Principle, as the EIA must take into account and communicate all uncertainties throughout the process and allow for appropriate decision making. ESD is more than just a consideration, and when incorporated into the project at the early scoping stages with early and effective community participation, the principles of ESD (including the precautionary principle, equity both now and in the future, conservation of biodiversity and the integration of the three pillars of sustainability) will assist decision makers in determining the most environmentally friendly option that meets the project objectives.
a) Strategic Environmental Assessment

The identification and assessment of cumulative impacts is welcomed in any reform. In addition to site-specific impacts, EIA scope and boundary must take account of both indirect (e.g. the potential of greenhouse gas emissions) and cumulative effects. A failing of EIA is that it can neglect the cumulative impacts as specific projects are assessed on a case by case basis (Harding et al 2009). Small individual projects may not trigger the need for EIA but the total impact of many small projects may be significant (Glasson et al 1994 in Harding et al). This is especially pertinent for NSW as EIA is a requirement for major projects only, indicating a significant number of sizable projects fall short of receiving the same level of assessment and critique with potentially significant impacts un-addressed.

The narrow, spatial and temporal focus of EIA on individual, isolated projects which only allow the consideration of limited alternatives rather than broader strategic options that consider far-reaching and cumulative consequences has raised questions about the effectiveness of EIA as a tool for achieving sustainable development. Without strategic planning, cumulative impacts cannot be properly assessed (Harding et al 2009). If the assessment of cumulative impacts is to be mandated for as part of ongoing reforms cumulative assessment must be considered in a strategic context within the framework of EIA itself and incorporating Strategic Environmental Assessment (SEA) goes some way to addressing the limitations of project based EIA. SEA can be used to assess the impacts of programs at various levels of governance and is a tiered approach to decision making.

Recommendation

1.1 ESD must underpin the EIA process with particular regard to the Precautionary Principle and this must be a requirement in early decision making (i.e. at the scoping stages) to achieve the best environmental and social outcomes for the community,

1.2 Planning for ESD requires recognition of the inherent constraints of the natural environment (e.g. air, water, biodiversity) and that these constraints can be identified through resource-inventory or baseline studies,

1.3 EIA should attempt to understand the natural constraints on development (such as areas of significant habitat) and allow collection of adequate data over time such that natural variations may be revealed, with the information incorporated in local and regional planning instruments; it should be mandatory for this information to be taken into account by proponents during the early stages of formulating development proposals,

1.4 EIA must consider both indirect and cumulative impacts and the interrelationships between these impacts. The EIA must take into account all uncertainties and these must be communicated throughout the process. Incorporating Strategic Environmental Assessment (SEA) into the EIA process will assist with the assessment of cumulative impacts. SEA is another form of EIA.

2.0 Community engagement

Reforms that mean engagement with the community at the scoping stages of a project are a step forward in early involvement of the public. This is vital if the public is to play an effective role during the EIA process. Public participation should be an integral component because this provides an avenue for not only informing the public but also about getting information and knowledge from the community. The International Association for Impact Assessment (IAIA) states that ‘in planning stakeholder engagement it is necessary to
balance broadcasting (informing) and receiving (listening, understanding, discussing) information. Different stakeholders need to be involved in different ways using different communication tools.

Early involvement highlights areas of conflict, fosters trust between the parties involved. Early engagement provides the faith that public participation and consultation has the potential to have a major influence on the outcome and not just a ‘tick box’ exercise. It is vital that those who will continue to live with the consequences of environmental decisions should have the opportunity to express their values and engage in discussions about the type of future they want (Robinson 2004 in Harding et al). If the community cannot do this in a meaningful way, ESD and thus the sustainability of the project outcome will be compromised.

Earlier and better engagement is crucial to achieving the best environmental outcomes. This must include transparent and effective public participation that starts at the beginning of the EIA process and continues throughout the whole process. Poor timing within the decision making cycle is one of the reasons participatory processes fail; the community cannot have meaningful input therefore faith in the process is eroded (Harding et al 2009).

2.1 Community engagement and scoping

Scoping is a critical, early step in the preparation of an EIA. The purpose of the scoping process identifies the issues that are likely to be of most importance during the EIA and eliminates those that are of less concern. It is the point at which early consideration of environmental and economic factors can inform the decision-making process and will establish the Terms of Reference for the project. If the extent of public concern can be revealed at this early stage, it will help the proponent to decide if they should abandon the project, find an acceptable alteration, or press ahead with an enhanced public participation program (Harding et al 2009).

Community participation is more than just an exercise in good PR or a tool to demonstrate social responsibility. A robust alternatives assessment must be part of any EIA process, and it must be more than just an arbitrary exercise to be included within the scoping report. Opportunity to enhance the quality of the alternatives assessment lies in the scoping process itself, which provides an early opportunity for engagement by the project proponent with not only the regulatory authorities but also with other expert bodies and the public. Community participation at this point can be valuable in determining the best project outcome that balances the needs of the community it will be directly impacting. This gives the scoping process credibility because the community has very real concerns that once a project is approved, even very significant changes with large impacts upon the environment are often approved with relatively little community consultation.

It is a key concern that the community engagement process will be proponent driven, this will leave the process open to subjectivity and bias between parties that may at times may have deeply conflicting interests and there is potential opportunity for community concerns to be discarded or downplayed.

Involvement by the Department will go a little towards improving proponent’s accountability, however without mandated regulation of the participation process the needs of the community will continue to be undermined.

2.2 Public exhibition and submissions

Public exhibition of EIS documents is an important part of the EIA process, however by the time the EIS documents are on exhibition any comments the public may have are unlikely to change the outcome of the decision. It is concerning that not all projects will be required to exhibit the scoping report because EIA relates only to major projects within the planning system. As previously discussed, the scoping phase is

2 http://eia.unu.edu/course/index.html?page_id=140.html
3 https://www.environmentalistonline.com/article/considering-alternatives-during-eia-process
critical therefore 14 days is not a significant period of time at exhibition to allow the public to comment in any meaningful way.

In a proponent driven process there needs to be systems to ensure that community concerns are addressed. A ‘submissions report’ as described by the guidelines that formally documents the proponents responses from the exhibition period may contribute to improving accountability however if this is not mandatory and subject to departmental discretion then the reliability of the document as a tool to improve proponent accountability consistently, across all projects requiring EIA, will be compromised. Further a submissions report cannot be relied upon as the sole means of addressing community concerns because it occurs too late in the EIA process for meaningful project changes to be made.

Criticisms of the EIA process in relation to EIS submissions have been reported for the Westconnex M5 East tunnel project⁴. The project is highly contentious within the community and at the end of the EIA process the project received over 12000 submissions, almost all in opposition, however the project was still approved 3 months later.

EIA documentation, which can often stretch to thousands of pages, is often heavy on technical jargon and difficult for the community to navigate. Reforms that provide guidance on improved accessibility of the EIA documentation is welcomed. Further, if a guiding objective of the reforms is ‘reduced EIA assessment and approval time frames’ this should not also mean that the quality of assessment including technical reporting and community engagement is adversely impacted to suit the convenience of the proponent.

Recommendations

2.1 The effectiveness and suitability of public participation methods to maximise engagement and meet the public’s needs requires un-biased consideration and guidance. Engagement objectives and the participation approach should be determined independently of the proponent.

2.2 Mandatory exhibition of scoping reports. All scoping reports should be exhibited by default, or, at the very least, the Department should introduce clear criteria for when a scoping report will be the subject of public consultation.

2.3 An examination of alternatives in the scoping stage should involve public participation.

2.4 The submissions report must be mandatory for all projects for which EIA is required, it must detail the proponents responses and actions. Where public concerns are not addressed, explicit, explanations must be provided by the proponent. Departmental follow-up on the actions would improve the proponent’s accountability.

2.5 Accessibility to documents must be improved. EIA documentation must be presented in a way that is clear, readable and accessible to the community. Greater prescription of data formats, mapping of issued Secretary’s Environmental Assessment Requirements (SEAR’s) in a machine-readable formats and a requirement that documents submitted by proponents comply with NSW government standards of accessibility. The Department should consider compliance with standards of accessibility as grounds for rejection of the application.

2.6 A public inquiry should be mandatory for any project about which a high level of public concern has been expressed (e.g. through a prescribed number of signatures on a petition)

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3.0 Accountability and Independence of EIA professionals

The reforms indicate that EIA process will be entirely proponent driven which is cause for concern. There is no doubt that EIA is an important tool for assessing impacts of development on the environment and a key mechanism in decision making by public authorities, however it has often been criticised for falling short of its full potential. Wright et al (2013) point to the fact that many EIAs are prepared outside government agencies, often contracted out to the lowest bidder with a focus on achieving mandated deadlines rather than quality. In some cases, EIAs become little more than exercises in “cutting and pasting” as there is insufficient time, funding, expertise and attention to detail. A proponent driven process has potential to drive the outcomes of the EIA towards bias and subjectivity, challenge ESD and fall short of effective meaningful community participation.

Consultants working on the EIA reports are ‘either directly or indirectly employed by a party whose interests may differ in significant ways from the public interest (Beder 1990 p 45 in Harding et al) 2009). The lack of independence or perceived lack of independence of EIA report authors significantly undermines community trust in the process.

A system of professional accreditation as indicated by the reforms is supported. An accreditation system for EIA professionals must be something that is earned through experience and expertise and regulated so that it becomes an offense to operate without appropriate accreditation. The Greens previously introduced the Threatened Species Conservation Amendment (Ecological Consultants Accreditation Scheme) Bill 2011\(^5\), to amend the Threatened Species Conservation Act 1995 to establish an accreditation scheme for ecological consultants preparing or carrying out certain assessments, impact statements or surveys under the Act, the Fisheries Management Act 1994 or the Environmental Planning and Assessment Act 1979. Under the bill it would be an offense to prepare or carry out an ecological assessment if the person was not an accredited ecological consultant and established an accreditation panel to make recommendations and undertake peer reviews. Critically, the ecological consultant was to have the responsibility to avoid conflicts of interest it being grounds for suspension or revocation of accreditation. In a proponent lead process, without any external governance, the quality of the EIA professional cannot be ensured. The Greens continue to support the measures contained within the bill.

The preferred system is one where the proponent bears the costs, however consultants are chosen independently and work under the supervision of a public body (e.g. the Department) at arms-length from the proponent. Such a system is in operation in the United States. Under the National Environmental Policy Act (NEPA) implementation is considered an important responsibility of the federal government and every agency in the executive branch of the Federal Government has a responsibility to implement NEPA’s policies using EIA. If private companies become involved in the NEPA process, the guidance states ‘Federal agencies might require the private company or developer to pay for the preparation of analyses, but the agency remains responsible for the scope and accuracy of the analysis’\(^6\).

3.1 Peer review

Peer review is an excellent way of improving accountability and addressing some of the issues highlighted above can be done through the inclusion of a formalised process of external review or audit. I support the Department’s view that independent review of proponents’ assessments is integral to maintaining confidence in the EIA system, however care must be taken not to rely on the peer review as it generally occurs at the end of the process and may have little influence on the outcome of the EIA.

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\(^5\) http://bulletin/Prod/parlment/nswbills.nsf/0/8D01C9C82124EE31CA2578E3000F7AB4?Open&shownotes
However, the reforms do not go far enough as the Peer review is not mandatory. The Department should have a default position of requiring peer review for each project involving EIA. Further maintaining an independent peer review from the interests of proponent is vital if credibility is to be maintained.

**Recommendations**

3.1 EIA and the execution of the EIS, must be undertaken independently of the proponent. This may mean that the Department takes a lead role in mandating and guiding requirements at each stage of the process. The costs of preparation of Environmental Impact Statements (EIS) must be borne by the proponents.

3.2 The peer review must be a mandatory, transparent process.

3.3 The peer reviewer should be appointed independently of the proponent. These measures would give greater public visibility to the peer review process and improve the perceived integrity of EIA. This would mitigate the perception that developer concerns might influence the work of the reviewer.

3.4 The forthcoming ‘Draft Guideline’ regarding professional practice should consider a regulated accreditation scheme. It should also detail which institutions were consulted and whether the proposals reflect international best practice.

4.0 Monitoring, auditing and reporting of compliance

Post-decision monitoring and auditing systems are one of the weakest areas of EIA systems worldwide and especially in Australia where provisions for follow-up are discretionary, and not mandatory.

Proponents should not be allowed to evade responsibility for environmental care through transferring issues from the EIS to an ‘Environmental Management Plan’ or similar instrument. Similarly, monitoring must be based on adequate baseline studies with post-decision monitoring and auditing regimes being mandatory and ongoing (i.e. not a once-off activity) and include penalties for non-compliance.

If a project that has been approved has worse environmental, social or economic impacts than predicted in the EIS, the proponent should be held accountable for ongoing remediation/restoration of those impacts. A degraded environment should be seen as a constraint against further detrimental impact, not as an opportunity to downplay a new impact’s significance. The system should allow consultants to be called to justify their forecasts and be subject to penalties at law if their forecasts are found to have been made falsely or misleadingly. This important principle of accountability should be built into the EIA process.

I recognise that the Department intends to monitor compliance with conditions of consent and that the Department has proposed there will be a ‘compliance unit’ tasked with compliance responsibilities for projects requiring EIA. However, in order to achieve meaningful outcomes, that is, to ensure the proponent is not breaching conditions of consent on a regular basis is an undertaking requiring significant time and resources that unless the proponent pays, will likely be a tax-payer funded exercise.

EIA processes should be able to mitigate carefully assessed risks. This is only possible with stringent post assessment requirements.

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Recommendations

4.1 Hold proponents legally and financially responsible for worse environmental, social or economic impacts than predicted in the EIS
4.2 Hold EIA consultants accountable to their forecasts and be subject to penalties at law if their forecasts are found to have been made falsely or misleadingly
4.3 Guaranteed resources and expertise for monitoring and auditing compliance

Thank you for the opportunity to comment on the Draft Environmental Impact Assessment Guidance Series and please do not hesitate to contact me for further information.

Kind Regards

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Bibliography and references