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# Loopholes, Exemptions, and Symbolic Environmental Laws

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Submission to Environment ACT regarding  
the Draft Dragway Noise Environment  
Protection Policy

Author: Dr James Prest,  
Principal Solicitor, EDO ACT Inc.

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Level 1, Public Trustee House  
4 Mort St  
Canberra A.C.T 2601.

GPO Box 574 Canberra A.C.T. 2601

Telephone (02) 6247 9420  
Fax (02) 6247 9582  
Email [edoact@edo.org.au](mailto:edoact@edo.org.au)

[www.edo.org.au](http://www.edo.org.au)

Environmental Defender's Office (ACT)

### Selected Excerpts

(p.12) “Incredibly, the ACT government is persisting with a dragway proposal despite the fact that its own Chief Minister’s Department review of Dragway sites and options in 2004 (the ‘Dragway Options Report’) rejected the proposal, particularly at Block 51 Majura. That site is now the government’s “preferred” site for the Dragway. The 2004 Options Report concluded that:

“Block 51 is not suitable for drag racing due to environmental, cultural and heritage constraints.”<sup>1</sup>

(p.23) “The regulatory and policy approach proposed by the *Draft Dragway Motor Sport Noise Environment Protection Policy (EPP)* is fundamentally flawed. From its starting assumption, which seeks to accommodate the noise from a dragway as an inevitable consequence of what is mistakenly considered to be an otherwise beneficial activity, it flies in the face of abundant evidence of ecological unstainability, to incorporate a host of dubious methodological sleights of hand, and finally arrive at a policy position that threatens to unravel the overarching sustainability objectives of ACT government policy. It threatens, in its future operation, to render the statutory objects of the *Environment Protection Act 1997* purely symbolic.”

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<sup>1</sup> Chief Minister’s Department Working Group (2004) *Canberra International Dragway: A Summary of Options for a Dragway in the ACT Region* (the “Dragway Options Report”), August 2004, CMD, ACTPLA, Urban Services, 61pp. at [http://www.cmd.act.gov.au/Documents/dragway\\_options\\_report.pdf](http://www.cmd.act.gov.au/Documents/dragway_options_report.pdf) at p.36.

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## **Introduction: Why this issue is of concern to the Environmental Defender's Office (EDO)**

The EDO is a Community Legal Centre specialising in environmental and planning law in the ACT and surrounding region. We have an interest in the proper administration of environmental legislation, and questions of law reform that are raised by administration of environmental laws.

We are part of a national network of independent EDOs that now extends to nine offices around Australia. Since 1985, EDOs have provided public interest legal services to ensure compliance with environmental and planning legislation. EDO ACT has a track record of providing legal advice and information on environmental and planning law to the ACT public since 1996.

The importance of the noise pollution issue in the ACT has been recognized by the Environment Protection Technical Advisory Committee which stated in a recent *Annual Report*:

“[An] issue that has emerged as one of concern is the impact of noise on residents of the ACT... This is an issue that the Committee felt deserved particular attention and, while some work is being done to deal with the issues raised, the Committee believes it is of sufficient concern to justify a concerted effort to address it properly.”<sup>2</sup>

In an era where human induced climate change is now becoming a reality, and with increasing concern over usage of non-renewable fuel resources, the ACT Government has proposed the introduction of Sustainability legislation and taken a number of other positive steps.

However in the midst of this positive action comes the contradictory and diametrically inconsistent proposition that public monies should be expended for the establishment of a motor 'sports' dragway park in the Majura Valley in the ACT. Dragway racing has accurately been described as the noisiest form of motor sport, with Top Fuel dragsters emitting up to 118 decibels of noise when measured using  $L_{Aeq,15min}$ .<sup>3</sup>

We also note the far-too coincidental introduction and passage through the Legislative Assembly of the *Motorsport (Public Safety) Act 2006* in April of this year. This legislation means that the ACT public have now undertaken to underwrite the insurance and public liability risks associated with “a dedicated motor sport facility” in the ACT. The explanatory memorandum for that Bill stated: “the key policy proposal is to manage the risks associated with organised motor sport at a dedicated motor sport facility. The ...Bill ...establishes an appropriate legislative platform under which motor sport activities contemplated at dedicated motor sport facilities can be managed.” That Bill is now law.<sup>4</sup>

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<sup>2</sup> EPTAC (2004) *Annual Report 2003*, Environment ACT website, at p.1.

<sup>3</sup> Professor Stephen Hyde (2006), *Dragway Noise Draft EPP - Observations and Modelling*, Submission to Environment ACT, June 8, 2006, unpublished Adobe Acrobat document, Research School of Physical Sciences and Engineering, Australian National University.

<sup>4</sup> The passage of the Act was notified on 5 April 2006.

The EDO has concerns that the proposed dragway forms part of a broader proposal for a dedicated motor sports facility in the ACT at the same site. We note that – unlike other Motor Sports Noise EPPs in the Territory – the proposed Draft Dragway Noise EPP does not specify a compliance location, and therefore is not tied to a particular site or location.

The EDO has followed on behalf of a number of clients – with concern – the approach taken by Environment ACT's to the issue of noise pollution for many years now. As an organisation with a mandate to review environmental laws and their administration with a view to improved levels of environmental protection, we made the following submission in relation to the draft dragway environment protection policy.

### **Statement of Key Concern**

The fundamental difficulty that the EDO has with the regulatory and policy approach proposed in the EPP is that it amounts to little more than a glorified exemption from noise pollution standards that would normally apply in the ACT.

Further, the EPP purports to be, and passes itself off as, part of the regulatory regime for pollution control in the ACT. However, the *Environment Protection Act 1997* specifically states (s.30) that although such policies can be made they are instruments of an administrative, rather than legislative, character. This means that they are purely advisory rather than legally binding.<sup>5</sup> In other words, Environment ACT is proposing that a major development with very serious noise pollution consequences is to be regulated principally by means of a non-binding policy document.<sup>6</sup>

This document is unlikely to be effective in controlling and regulating noise from the EPP as it selects and applies an excessively cautious threshold of operation based on an inappropriate selection of noise measurement units. In particular, with the proposed event credits points system, the  $L_{Aeq,T}$  limits embedded in the policy will most likely remain inoperative, as the noise standard (gauged using  $L_{A10,T}$  is unlikely to be violated. This regulatory loophole will exist because of the failure of the EPP to tailor the units of measurement selected to the particular nature of dragway noise, that is very short bursts of loud noise produced by drag races (including burnouts).

### **Draft EPP has inadequate coverage of environmental harm issues**

The EPP for the Dragway is deficient in that it only assesses some of the aspects of environmental harm as defined in the *EP Act* that will be associated with the proposed development. In particular it does not address air pollution impacts, the question of greenhouse impacts, and does not address the gross waste of non-renewable resources involved in drag racing and motor sport, as was noted by the

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<sup>5</sup> This conclusion is supported by the statement in the General EPP (1998) which states: "As policies and guidelines, the EPPs are not legally binding." (p.6).

<sup>6</sup> It is recognized that a future environmental authorisation may draw heavily on the contents of the EPP. However there is no guarantee that it will do so.

previous ACT Commissioner for Environment in a 1995 Report.<sup>7</sup> Nor does it address issues associated with the transport, use and storage of hazardous materials and fuels on the site.

### **Inconsistent with broader sustainability objectives and policies**

The broader environmental and ecological impact of the dragway proposal is not addressed in the EPP document which simply assumes that the Dragway will and should go ahead. There is no discussion of the alternatives to the proposal. There is no discussion of the topics of pollution reduction and pollution avoidance.

There is no consideration of how a Dragway will (particularly if it is government owned and operated) comply with the proposed *Sustainability Legislation*. According to the Chief Minister's Department such legislation will set out a "sustainability code of practice to assist the incorporation of sustainability into the decisions, actions and operations of Government agencies. This will provide guidance for agencies in integrating economic, environmental and social considerations in their activities".

It is clear that a dragway proposal would not withstand an objective assessment of whether it is ecologically sustainable, as a development of this nature is not ecologically sustainable. Nor is it likely that it can be made to be so.

Nevertheless, in spite of the above, it is necessary to consider the validity of the proposed EPP on its merits. The remainder of the submission focuses on this task.

### **Event Credits: Glorified Exemption or Perversion of Market Mechanism?**

The presentation of the Dragway Motorsports EPP as Environment ACT's preferred method of addressing dragway noise requires us to initially examine its underlying assumptions.

The event credits approach appears to be unique to the ACT. It is best understood as a glorified exemption hiding beneath another name. It is glorified because it attempts to attract some measure of policy credibility to itself by use of the term "credits". Thus it misleadingly implies that it forms part of a tradable permits scheme, in which noise abatement credits can be bought and sold in an open market. However this is not the case in this jurisdiction.

The key point is that tradable permits schemes have been used overseas in order to create an incentive for polluters to reduce their pollution **below an agreed baseline**, that is, to encourage them to go "beyond compliance". This crucial element is not apparent in the scheme proposed in the ACT.

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<sup>7</sup> In that report Dr Baker stated "I am not convinced that motor sports activities are in the best interests of the environment of the ACT nor in the spirit of achieving targets for Greenhouse Gas Emissions." Commissioner for the Environment (1995) Management of Noise from Motor Sports in the ACT, August 1995, Cited in Commissioner for the Environment (2000) *Proposed Increase in Number of Event Credits in the Motor Sports Noise in Environment Protection Policy*, November 2000, Office of the Commissioner for the Environment, ACT, at p. 7.

By contrast, the OECD's Environment Directorate in 2003, in a report headed *The Use Of Tradable Permits in Combination With Other Environmental Policy Instruments* states in relation to tradable permits: "many countries have used credit-based schemes in which permits are generated when firms reduce emissions below a certain baseline."<sup>8</sup>

The dominant feature of the ACT scheme proposed is the proposed grant, *gratis*, of an exemption from normal regulatory requirements at no penalty or cost to the polluter. The ACT scheme does not set out a timeline for reduction in the number of event credits. This is in marked contrast to even other Environment Protection Policies for noise in the ACT which have previously set out a timeline for reduction in the number of event credits. (The reader is advised to refer to the December 1998 edition of the *Motorsports Noise Environment Protection Policy*, which provided for event credits to be reduced from 28 to 18 over the period 2001 to 2011 (at p.11).

Our research reveals that prior to the adoption of the term event "credits", noise from motor sport activity in the ACT was regulated in the early 1990s by use of the more honest term "exemptions".

It is of considerable concern that the central mechanism applied by the EPP, the "event credit" is a device not referred to in either the Act or Regulations.<sup>9</sup> This suggests that the EPP is proposing to implement a device that is not authorised by the Act or Regulations.

We note that it is not proposed that the dragway will be subject to any of the other requirements of the *Environment Protection Act*, Part 9, such as the lodgement of the financial assurance, the preparation of an environmental improvement plan, or the production of an environmental audit. The General EPP (1998) suggests that situations where "a proposed activity ... entailed atypically high risks of serious or material harm" would normally require lodgement of a financial assurance. (p.21)

The EDO submits that the development of a dragway is such a proposal as to warrant the imposition of a requirement for lodgement of a financial assurance.

### **Inconsistency of the current event credits approach with polluter pays principle**

The proposed grant of "event credits" for free to the dragway proponents is inconsistent with the polluter pays principle. On this basis it is inconsistent with the *Environment Protection Act*.

In particular, the event credits approach contained in the draft EPP is inconsistent with section 3 (1) (g) of the Act which provides that it is an object of the act to: "(g) promote the principles of ecologically sustainable development" seeing that one of

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<sup>8</sup> OECD Environment Directorate Working Party on National Environmental Policy (2003) *The Use Of Tradable Permits In Combination With Other Environmental Policy Instruments*, OECD Environment Directorate, Paris, ENV/EPOC/WPNEP 2002/28 (FINAL) 7 July 2003, 38pp at p.8.

<sup>9</sup> Electronic search of full text of legislation conducted 13/6/06.

these principles is the polluter pays principle. More particularly, the approach to event credits embodied in the EPP is inconsistent with ss. 3(1)(h) which puts forward the essence of the polluter pays principle as an object of the act, as follows:

“(i) to allocate the costs of environmental protection and restoration equitably and in a way that encourages responsible use of, and reduces harm to, the environment with polluters bearing the appropriate share of the costs that arise from their activities.”

It appears that the Draft Dragway Noise EPP is also inconsistent with the policy position set out in the *General EPP (1998)* which states:

“Overall, EPPs, along with the Environment Protection Act and Regulations, are designed to provide a framework for environment protection which: is based on the principles of “polluter-pays” and “user-pays” charging for fees, consistent with the ACT’s commitment to the *Inter-Governmental Agreement on the Environment (May 1992)*;<sup>10</sup>

Nowhere does the EPP that is proposed, suggest that the dragway noise polluter will be required to bear a realistic share of the cost in terms of noise pollution arising from that particular activity.

Further, the approach put forward by the EPP is also inconsistent with the ESD principles as specifically enumerated by the Act in section 3(2)(d): “improved valuation and pricing of environmental resources” as there is no value or price placed on the tranquility, peace, and natural attributes - that is, the soundscape - of Canberra Nature Park at Mount Ainslie and Mount Majura, or indeed that of relative quiet and silence that is enjoyed by many of the residents of Canberra's Inner North (when compared to the urban environment in Sydney or Melbourne).

### **Inconsistency with objects of the *Environment Protection Act***

As the EPP fails to require progressive pollution reductions over time, the proposed EPP is inconsistent with the objects of the *Environment Protection Act*. Section 3(1)(c) states :

“(c) to require people engaging in polluting activities to make progressive environmental improvements, including reductions of pollution at the source as such improvements become practical through technological and economic development;”

We note the requirement in the objects clause that the act “must be construed and administered accordingly”, that is, consistently with the objects of the Act. Further we note the apparent disparity between the approach set out in the draft policy and the requirement in the Act, s. 12 (2) that “In the exercise of his or her functions, the authority must have regard to the objects set out in section 3.”

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<sup>10</sup> Environment ACT (1998) *General Environment Protection Policy*, p.4.

## Definition of noise pollution

The NSW *Protection of the Environment Operations Act 1997* defines noise pollution by as “the emission of offensive noise”, which is in turn defined (in summary form) as : “the emission of offensive noise, which means noise that by reason of its level, nature, character or quality, or the time at which it is made, or any other circumstances, is harmful (or is likely to be harmful) to or interferes unreasonably (or is likely to interfere unreasonably) with the comfort or repose of a person outside the premises from which the noise is emitted, or noise that is of a level, nature, character or quality prescribed by the regulations or that is made at a time, or in other circumstances, prescribed by the regulations.”<sup>11</sup>

The ACT definition from Regulation 25 is more quantitatively focused. It states (in conjunction with s.5 of the EP Act):

“For the Act, noise emitted from a place in the ACT is taken to cause environmental harm in an affected place if the noise level is louder than the noise standard for the compliance point for the place from which the noise is emitted.”

## Exemption proposed is more lenient than other EPPs

The exemption proposed in the draft dragway EPP is more lenient than that applying to other motor sport in the ACT under the other Noise EPPs. This fact is strongly set out in the Chief Minister's Department's own report on the Dragway (2004).<sup>12</sup>

The Motor Sports Noise EPP states “No event may exceed 65 dB(A) at the compliance location through the use of event credits.” (p.7) Later it states “The maximum permitted noise level which can be obtained using event credits is 65 dB(A).”<sup>13</sup>

The Applicable noise zone standard (NZZ) in the Broadacre area of the Majura Valley, which is classified as Noise Zone “E”, is 50 dB(A) during the day, reducing to 40 dB(A) at night after 10pm. The applicable NZZ in the Nature Park, which is classified as Zone G where the daily maximum is 45 dB(A) and 35 dB(A) after 10pm. Similarly the residential areas most likely to be affected, being Hackett, Ainslie, Campbell, and Watson are also within Zone G where the applicable NZZ or permitted noise level is 45 dB(A) during the day, and 35 dB(A) after 10pm.<sup>14</sup>

By contrast with the other Motor Sports Noise EPP (applicable at Fairbairn Park near Queanbeyan), this proposed Draft Dragway EPP states that “the maximum permitted noise level is 20dB<sub>A,Leq,15min</sub> above the applicable noise standard.”<sup>15</sup> This means that in the Majura Valley Broadacre area, the maximum permitted noise level

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<sup>11</sup> POEO Act 1997 (NSW), s.4 and Dictionary.

<sup>12</sup> Chief Minister's Department Working Group (2004) *Canberra International Dragway: A Summary of Options for a Dragway in the ACT Region* (the “Dragway Options Report”), August 2004, CMD, ACTPLA, Urban Services, 61pp.

<sup>13</sup> Environment ACT, *Motor Sports Noise Environment Protection Policy* (2002), p.8.

<sup>14</sup> Environment Protection Regulation 2005 (ACT), Schedule 2, Tables 2.1 and 2.2.

<sup>15</sup> Note that the Dragway EPP states “In addition, a maximum noise level of up to 30dB(A) LA1,15min above the noise standard is permitted. Events generating noise above this noise level will be penalised through the loss of additional event credits (Table 2).”

is effectively 70 decibels  $L_{Aeq,15mins}$ . This is inconsistent with the existing Noise EPP (65 decibels  $L_{Amax}$ ).

Fairbairn Park restrictions include limiting events to no more than two consecutive days, whereas the Draft Dragway EPP allows for an annual occasion where events may be held for no more than three consecutive days.<sup>16</sup>

The General EPP states that EPPs are designed to provide a framework for environment protection which: implements what would generally be acknowledged by stakeholders to be national best practice in environment protection.<sup>17</sup>

The *Dragway Options Report* (2004) stated:

“The CIDM Business Plan proposes: 26 local events (including street registered vehicles); 7 regional events (described as a 1 to 2 day event); 1 international event [described as a 2 to 3 day event];<sup>18</sup> and 26 burnout competitions per year (burnout competitions typically feature about 150 entrants). Some non-drag racing events are also proposed, including two concerts and two stadium style events (eg. motocross).” (p.7)

*Dragway Options Report 2004* “Whilst the proposed dragway would need to seek its own Motor Sports Noise Environment Protection Policy, it is inevitable that a system similar to Fairbairn Park’s event credits would be used. This would present a significant challenge to CIDM as its Business Plan proposes an event schedule that falls well outside the parameters of Fairbairn Park’s event credit criteria. For example, CIDM currently plans to operate the dragway for much longer periods (up to 13.5 hours on some days) and more regularly than Fairbairn Park is allowed whilst generating more noise.” (p.47)

It then concluded:

“This proposed level of activity is not acceptable under current ACT Government requirements.” (p.47)

*The key policy question now in 2006 with the presentation of the Draft Dragway Noise EPP is “What has changed since 2004?”*

In the *Dragway Options Report* (2004) was included a Table which “shows that CIDM has proposed to hold 64 events on 78 days per year that would require **312 event credits** — in comparison to Fairbairn Park’s 27 credits.” (p.48) (emphasis added).

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<sup>16</sup> Draft Dragway EPP, p.9.

<sup>17</sup> Environment ACT (1998) *General Environment Protection Policy*, p.4.

<sup>18</sup> Chief Ministers Department (2006) *Canberra Dragway Frequently Asked Questions*, February 2006.

For the benefit of the reader this Table is reproduced below:

**Table 15 — Estimated event credits required for dragway per year**

Event	No. of Times Event Is Held	Event Days	No. of Events	of Event Required	Credits
National*	1	4	8	32	
Regional	7	14	28	70	
Local	26		52	156	
Street and Burnouts	26	26	26	26	
Stadium Style	2	4	4	12	
Concerts*	2	4	4	16	
<b>Total</b>	<b>64</b>	<b>78</b>	<b>122</b>	<b>312</b>	

The Dragway Options report concluded in 2004 that on the basis of information submitted by CIDM, there would be a requirement for 312 event credits — in comparison to Fairbairn Park's 27 credits. On that basis it was concluded that "This proposed level of activity is not acceptable under current ACT Government requirements."

What has apparently changed since 2004 and the writing of the *Dragway Options Report* by the Chief Minister's Department is the selection of an alternative methodology by Environment ACT that would minimise the need for the Dragway proponents to obtain event credits in order to operate their publicly subsidised facility.

### **Danger that additional event credits will be unilaterally allocated**

If past experience with the regulation of motor sports in the ACT is any guide, it suggests that if there asked insufficient event credits available for the motor sports fraternity to conduct their activities as they please, additional credits will be allocated upon demand. This occurred in 2001 when the environment protection policy for motor sports noise from the Fairburn Park cluster were unilaterally increased from 19 to 28 by means of the issue of a new edition of that environment protection policy. That administrative action was severely criticised by the then Commissioner for the Environment,<sup>19</sup> however it went ahead regardless.

### **EPP inconsistent with CMD's 2004 *Dragway Options Report***

Incredibly, the ACT government is persisting with a dragway proposal despite the fact that its own Chief Minister's Department review of Dragway sites and options in

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<sup>19</sup> Commissioner for the Environment (2000) *Proposed Increase in Number of Event Credits in the Motor Sports Noise in Environment Protection Policy*, November 2000, Office of the Commissioner for the Environment, ACT.

2004 (the 'Dragway Options Report') rejected the proposal, particularly at Block 51 Majura. That site is now the government's - and not residents - "preferred" site for the Dragway. We note that the 2004 Dragway Options report concluded that:

"Block 51 is not suitable for drag racing due to environmental, cultural and heritage constraints."<sup>20</sup>

It is not clear to the EDO what has changed since then except the Government's determination to proceed with the project.

In relation to noise it referred to

"the study results show that the dragway proposed for Block 52 Majura would not meet 2004 [noise] standards;"<sup>21</sup>

It then stated that:

"the design of a dragway at Block 51 would channel sound towards residential areas whereas the Block 52 design channelled sound away from those areas;" (p.50)<sup>22</sup>

From the point of view of the drag racers themselves, Block 51 Majura is probably inappropriate. This can be understood from the WSID website. The Western Sydney International Dragway was oriented deliberately on a North-South Axis, which will not be possible on Block 51 due to the limited size of the parcel of land which has an East-West orientation. The WSID website states:

"It [WSID] has an ideal north-south orientation, which avoids racing into the sun at any time,"<sup>23</sup>

In spite of all these factors Environment ACT is facilitating the approval of a proposal for Block 51 (albeit because of Commonwealth reluctance to participate in the Dragway project on Block 52).

**If the Block 52 project would not meet noise standards, the Block 51 project certainly wouldn't, that is, unless the noise standards were altered.** The purpose of the EPP is essentially to create a massive exemption from normal noise pollution standards, and to disguise this fact by the selection of an inappropriate methodological approach to noise measurement. However as the paper by Professor Stephen Hyde of the Australian National University demonstrates, the units of sound measurement that are selected in the EPP for measurement of noise impacts of the dragway have been apparently selected in order to minimise the apparent impact of the dragway on paper.

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<sup>20</sup> Chief Minister's Department Working Group (2004) *Canberra International Dragway: A Summary of Options for a Dragway in the ACT Region* (the "Dragway Options Report"), August 2004, CMD, ACTPLA, Urban Services, 61pp. at [http://www.cmd.act.gov.au/Documents/dragway\\_options\\_report.pdf](http://www.cmd.act.gov.au/Documents/dragway_options_report.pdf) at p.36.

<sup>21</sup> *Dragway Options Report* (2004), p.50.

<sup>22</sup> *Ibid.*

<sup>23</sup> Western Sydney International Dragway website, <http://www.wsid.com.au/> viewed at 13.6.06.

The *Dragway Options Report* (2004) states:

“Due to substantive changes in noise legislation since the draft Preliminary Assessment was conducted for Block 52 in 2001, **a dragway in the Majura Valley would not meet current noise requirements.** Also the number and type of proposed events would need to be reduced, impacting on the dragway’s financial viability.”<sup>24</sup> [emphasis added].

The Noise EPP does not propose measures to address or prevent additional noise impacts during certain wind conditions or temperature inversions despite evidence that these are important: (Benbow Report, 2004, p.71).<sup>25</sup> The *Dragway Options Report* (2004) stated:

“From the work done by Renzo Tonin in 1996, increases in noise levels of up to 15dB(A) more than those for neutral conditions can occur in light to moderate wind conditions or during temperature inversions.”<sup>26</sup>

In relation to noise exposure for North Canberra, the *Community Discussion Paper* (2006) also says:

“the incidence of easterly winds during warmer months and / or temperature inversions during winter is likely to result in some noise intrusion where these coincided with event times.” p.8.

Close reading of the 2004 report by the Chief Minister's Department, indicates that a large number of sites have previously been considered for a dragway proposal and rejected on the basis of "not suitable due to excessive noise".<sup>27</sup> There is a discussion of the “1993 Matrix study” where it is stated that in relation to particular parcels of land:

“there were no practical noise reduction measures that could be implemented to ensure that noise levels in the nearest suburban areas or nearest rural residences could meet the criteria set out in (then) current noise legislation. At the time, the noise criteria under the *Noise Control Act 1988* were based on the background noise level, with noise levels recorded at receiver locations not to exceed the background noise level plus 5dB(A).”<sup>28</sup>

This suggests that the proposed Dragway Noise EPP represents a lowering of noise pollution standards in the ACT since the 1993 study. It appears to be a fact that a proposal that previously was considered unacceptable can now be considered to be acceptable. This is because the approach to noise measurement proposed to be applied is different, and because the standards have slipped.

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<sup>24</sup> *Dragway Options Report* (2004), p.57.

<sup>25</sup> The Benbow Report (2004) was an “investigation into potential noise impacts associated with the proposed international dragway at Block 52 Majura ACT.” (p.1) That report states (p.71): “The predictions suggest that there will be an increase in noise levels at the receivers in the event of a temperature inversion. An increase in noise levels will also be likely during windy conditions at receivers located in the direction of the wind.”

<sup>26</sup> *Dragway Options Report* (2004), p.49.

<sup>27</sup> *Dragway Options Report* (2004), at pp.32-33.

<sup>28</sup> *Dragway Options Report* (2004), p. 33.

### Failure to follow interstate and international best practice

It is instructive to review the ACT's proposed approach against that which is recommended by the New South Wales Department of Environment and Conservation (formerly the EPA) in its advice to local government.

### Failure to require standard noise reduction approaches

The NSW *Noise Manual for Local Government* makes the obvious point that serious efforts be made to control the noise at the source. It states:

“There are generally two approaches to controlling noise at source: use of noise-efficient technology and best management practices. Both these approaches aim to reduce the amount of noise at the source so that the surrounding environment is protected.”

However the Dragway EPP does not consider the “use of noise-efficient technology” in its discussion of “Measures to Limit Adverse Environmental Impact” at 7. on page 7. This subject appears to have been completely bypassed.

The following Table sets out the advice given by the NSW EPA to local government in the publication *Noise Guide for Local Government* in relation to motor sports noise, and compares that approach that is recommended for NSW Local Governments (who are the noise regulator in NSW) by the NSW EPA with that taken in the ACT's proposed EPP:

Recommended NSW Treatment	Coverage in the ACT EPP Policy
“Some common noise reduction strategies include: • Considering alternatives to the noisy activity” (p.23)	Alternatives are not addressed in EPP.
“it may be appropriate for council to require a proponent to develop an environmental management plan as part of a development consent “ (p.27)	Not mentioned in the EPP (although may be addressed in a subsequent authorization).
“In this scenario the noise assessment should assess: • the sound power level of the different types of racing vehicle • the number and type of events planned for the facility (e.g. drag racing, motocross, circuit racing, speedway or go-karts) • the number and location of racing cars on the circuit and in any pit or warm-up areas • potential meteorological effects on noise propagation and impacts in the surrounding area.”	These issues not addressed in the EPP.
“Implement a program for testing the noise of racing vehicles to ensure they meet racing association noise limits.” (p.60)	– NOT FOLLOWED
NSW EPA advises a more restrictive approach to new	Opposite approach followed:

<p>noise sources:          “The community is generally more sensitive to a new source of noise (e.g. from a new sporting facility at a greenfield site) than from existing facilities at the same noise level. This means that the same noise impact on the community from a new facility compared with an existing facility would occur only if the activity levels at the new facility were lower. In this case the proposal is for a new development. Therefore the number of events allowed for this new facility may be less than council might have approved for an existing facility of comparable size and proximity to residences.”</p>	<p>More Credits granted, allowing More Noise to the new source when compared with existing sources.</p>
<p>“For example, an event that exceeded the background by 8 dB(A) would count as two events,” (p.61)</p>	<p>This approach not followed.</p>

[Page references in Table are to NSW EPA (2004) *Noise Guide for Local Government*]

The noise assessment should also identify the vehicle numbers on the track and their configuration with the potential to cause maximum noise impact. Noise modelling that is applied to each proposal should be compared with actual measurements that would serve to validate the model for this use.

### Further Evidence of Inconsistency with Interstate Practice

The Marshall Day Report (2005) that was commissioned by the ACT government compared noise regimes across Australia and found that the NSW approach differs from the ACT policy in two ways:

- In NSW, local authorities must first decide on an acceptable number of events that meet the noise criterion. In the ACT, there is no limit on the number of events that meet the noise criterion.
- In NSW, events that exceed the noise criterion are treated as multiple events, with noisier events having a higher multiplying factor. In the ACT, events that exceed the noise criterion ‘cost’ credits, with noisier events costing more credits.”<sup>29</sup>

### Failure to Set out Required Mitigation Measures

The Noise EPP does not set out conditions that would be required despite the fact that the Benbow report recommended the following:

- “There is potential to reduce noise levels further if the track is designed with a higher acoustic barrier surrounding the entire track. Such ameliorative measures have been successfully utilised for similar purposes. This would incorporate the following:
- Cutting the drag strip 5 metres below the ground surface, ensuring the walls are vertical;
  - A 10 metre high earth berm designed to be used for spectator seating and corporate suites; and

<sup>29</sup> Marshall Day Acoustics (2005) *Dragway Policy Advice*, November 2005 (Marshall Day Consultants), p.15.

- A 5 metre high acoustic barrier on the top of the berm, effectively creating a 20 metre noise control barrier.”<sup>30</sup>

However, there are strong indications more recently that such noise control measures as recommended by expert consultants may not be adopted due to “excessive” cost. The CMD’s *Community Discussion Paper* (2005) states:

“An indicative project cost plan was completed by GHD Consulting Engineers for the Territory in 2005. This report concluded that it was not possible to construct a ¼ mile international standard dragway facility for \$8m, the amount committed by Government, although a national standard facility could be constructed in stages for about this total cost. These costs did not include land withdrawal or possible additional noise mitigation or management conditions associated with the project that might arise, particularly from compliance with noise guidelines.”<sup>31</sup>

This suggests strongly that there will be pressure to relax noise standards in order to keep the cost of the project “within budget” particularly in the present climate of fiscal restriction in the ACT.

### **The Regulations that the EPP depends upon are Out of Date**

As stated above, the EPP is merely a policy document and actually depends on the mechanisms available in the Regulations and the Act in order for its policy position to be put into legal effect. The detail of the noise control regime is set out in Part 3 of the Regulations.

However, as will be seen below, these regulations are out of date and require revision for two main reasons. The first is because of the inappropriateness of  $L_{10,T}$  and the second is because of references to a publication from another jurisdiction that is no longer in force or in use.

The *Environment Protection Regulation 2005* states at s.31 that:

For the Act, for measuring emission of noise—

- (a) the noise level measured must be  $L_{10,T}$ ; and
- (b) all measurements must be taken in accordance with the procedures set out in the noise control manual.

"noise control manual" means the *Environmental Noise Control Manual*, published by the NSW Environment Protection Authority, under the *Protection of the Environment Administration Act 1991* (NSW), as in force from time to time.

Importantly, the principal pollution control legislation in NSW is actually the *Protection of the Environment Operations Act 1997* and associated Regulations rather than the *Protection of the Environment Administration Act 1991* (NSW), which provides the administrative mechanisms to support operation of the *POEO Act*.

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<sup>30</sup> Dick Benbow & Associates Pty Limited (2004) *Environmental Noise Impact Assessment: Proposed International Dragway, Block 52, Majura ACT*, Prepared for sport & recreation act, at p.71.

<sup>31</sup> CMD (2005) *Community Discussion Paper*, p. 7.

The ACT Regulations are badly in need of updating as they refer to a publication from another jurisdiction that is no longer in force or in use. This fact was confirmed in telephone discussions by the author with NSW DEC staff.<sup>32</sup> It is also spelled out in *The Noise Guide for Local Government* (June 2004), NSW, which states:

“The EPA’s *Environmental Noise Control Manual* can no longer be considered to contain current information on noise management. The manual is no longer in print, is not being updated, is not actively supported by the DEC, and has been superseded by other DEC policy documents, including this Guide.”<sup>33</sup>

### **Failing to choose an appropriate unit of noise measurement**

The core failing of the proposed Dragway Noise EPP relates to its selection of inappropriate units for the measurement of noise, as we explain below.

The units of noise measurement that are selected are crucial, as inappropriate selection of units can give a misleading impression that the noise pollution impacts of an activity are far less than they actually are.

The units selected are also crucial as the overarching purpose of the EPP is to “to propose noise guidelines for the development “according to the Chief Minister’s Department’s *Canberra Dragway Community Discussion Paper* (2006). This is very important because, as the *Discussion Paper* states: “The agreed noise criteria will be used in the Preliminary Assessment Report to evaluate the proposed dragway”.

The Dragway Noise EPP applies two different approaches to noise measurement:  $L_{A1,T}$ , and  $L_{Aeq,T}$ . In addition it operates in conjunction with the *EP Regulation 2005* which specifies use of the unit  $L_{A10,T}$ . In particular, the EPP proposes use of  $(L_{A1,T})$  where  $T = 15$  minutes for measurement of maximum noise levels.<sup>34</sup> The key point is the decision in the EPP to define  $T = 15$  minutes. Given that  $L_{Aeq}$  is a time averaged sound level, then it becomes crucial as to the period of time over which the noise is averaged, the longer the period relative to the duration of the peak noise, the lower will be the apparent recorded noise when using these units of measurement.

### **Characteristics of dragway noise**

It is vital to tailor the selection of noise units to the particular noise problem that we seek to manage and regulate. So what are the characteristics of dragway noise?

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<sup>32</sup> Telephone interview with staff of the NSW DEC Noise Policy Unit, Sydney, 14.6.06. At 2006, the NSW DEC has a number of different noise publications, principally the *Noise Guide for Local Government* (June 2004), as well as specific policies for industrial noise, road traffic noise, and rural noise. <http://www.environment.nsw.gov.au/publications/epa/noise.htm>

<sup>33</sup> Department of Environment and Conservation (NSW) (2004) *Noise Guide for Local Government*, 100 pp, ISBN 1 74137 067 1, June 2004, DEC, Sydney NSW, at p. v. <http://www.environment.nsw.gov.au/noise/nglg.htm>

<sup>34</sup> For example, *Draft Dragway Noise EPP* at Table 2, page 9.

The CMD's *Dragway FAQ* document states:

“By its nature a dragway produces short bursts of high noise with lower levels of noise between events.”<sup>35</sup>

The Chief Minister himself stated in *Estimates* (July 2005)

“the noise profile of the dragway consists very much of quite widely interspersed peaks of significant noise of very short duration... They do, of course, involve an extreme of noise, but normally over a very short time span.”<sup>36</sup>

The NSW EPA, in its primary publication on noise pollution, the *Noise Guide for Local Government*, stresses the importance of choosing the appropriate noise descriptor according to whether the noise source is relatively constant and stable or whether it involves impulsive noise with high peaks.

“Target shooting ranges and gun clubs produce high levels of very-short-duration noise from firearm discharges. One approach to capture this type of noise is to set a sound level meter to linear peak hold so that the short-duration events can be captured and measured by the meter.”<sup>37</sup>

“Where a noise source contains certain characteristics, such as tonality, impulsiveness, intermittency, irregularity or dominant low-frequency content, there is evidence to suggest that it can cause greater annoyance than other noise at the same noise level.” (p.69)

The NSW EPA states in its *Noise Guide for Local Government* (2004):

“The particular characteristics of a noise, such as an audible impulsive or tonal component, may result in a higher level of disturbance and annoyance than would be suggested by the measured sound pressure level alone. In this situation, a correction factor should be applied to the measured noise level.”

## Reasons for preferring $L_{Aeq}$ to $L_{A10}$ for measurement of noise

As seen above the Regulation 2005 states that for the measurement of noise emissions “the noise level measured must be  $L_{10T}$ ”. This unit,  $L_{A,10}$  means the noise levels exceeded for 10% of the time noise is measured.

Discussions with noise policy staff at the NSW Department of Environment and Conservation confirmed that  $L_{A10}$  has been increasingly avoided as an approach to

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<sup>35</sup> ACT Chief Minister's Department (2006) *Dragway Frequently Asked Questions*, CMD website.

<sup>36</sup> ACT Legislative Assembly Hansard, Estimates, 16 May 2005, p.19 at <http://www.hansard.act.gov.au/hansard/2005/comms/estimates01.pdf>

<sup>37</sup> NSW EPA (2004) *Noise Guide for Local Government*, p.15.

measurement of noise pollution and that the alternative unit  $L_{Aeq}$  is “international best practice” applied in Europe, the US, and parts of Asia such as Singapore.

The NSW *Noise Guide for Local Government* (2004) continues:

“In measuring the level of the noise source the  $L_{Aeq}$  descriptor is now used. Before the introduction of the *NSW Industrial Noise Policy* in 2000, the  $L_{A10}$  descriptor was used. ( $L_{A10}$  measures the level exceeded for 10% of the time.)

Reasons why the  $L_{A10}$  descriptor has been superseded include the following:

- $L_{Aeq}$  is supported as a better measure of the affect (sic) of noise (e.g. the World Health Organization uses  $L_{Aeq}$ ).
- There is a general worldwide move towards the use of  $L_{Aeq}$  as the preferred descriptor of source noise for most situations.
- $L_{Aeq}$  is a measure of energy and can be mathematically manipulated, while  $L_{A10}$  is a statistical descriptor which cannot be accurately added to or subtracted from other  $L_{A10}$  measures.”(p.16)

The *Noise Guide* explains the deficiencies of  $L_{A10}$  in measuring specific noise from vehicles:

“However the  $L_{A10}$  level is not as responsive as the number of noisy vehicles may occupy less than 10% of the measurement period, resulting in the  $L_{Aeq}$  level exceeding the  $L_{A10}$  level.” (p.15)

An analogy can be suggested at this point. The 10% threshold is equivalent to stating that police we will not measure the top speed of a vehicle on a public highway as long as that speed does not occur for more than 10% of the time. The car can travel at 260 km/h as long as it does not do so for more than 10% of the time that measurement is taking place, in spite of an apparent speed limit of 110 km/h.

The Draft EPP for Dragway Noise is unlikely to be effective in controlling and regulating noise from the Dragway as it selects and applies an excessively cautious threshold of operation based on an inappropriate selection of noise measurement units. In particular, with the proposed event credits points system, the  $L_{Aeq,T}$  limits embedded in the policy will most likely remain inoperative, as the noise standard (gauged using  $L_{A10,T}$  is unlikely to be violated. This regulatory loophole will exist because of the failure of the EPP to tailor the units of measurement selected to the particular nature of dragway noise, that is very short bursts of loud noise produced by drag races (including burnouts).

This point is reiterated by Professor Hyde of ANU:

“the  $L_{Aeq,T}$  measure alone is unable to capture the disturbance effect of noise. The complex regulatory system proposed precludes this measure coming into force unless and until the noise standard is exceeded. Yet that standard invokes the  $L_{A10,T}$  measure. We are therefore faced with the following possibility. If races are staggered, so that noise peaks occupy less than 10% of the total time, the initial trigger to incur a penalty point cost is not activated. In that case, the maximum penalty points incurred would not exceed one point (if the  $L_{A1,T}$  exceeds 30dB above the standard). Typical times between races depend on the vehicle class.”

“Our measurements of race frequencies at the Western Sydney International Dragway suggest that this scenario is not unlikely: the fraction of time due to burnouts and races varies between 3.3% (Top Fuel vehicles, including a burnout prior to each race) and 10% (Super Sedans, without burnouts). These data reveal the startling possibility that the  $L_{Aeq,T}$  measure will not be operative as the  $L_{A10,T}$  measure will ignore the drag noise, so that noise standards will not be violated, despite noise levels of 100dB and higher.”

An examination of Professor Hyde's submission is instructive as he took the trouble to attend a dragway meeting at the Western Sydney International Dragway where a range of noise levels were recorded and used as the basis of calculations of the likely impact of a Canberra Dragway under the proposed regulatory regime in the Draft EPP. Prof. Hyde concluded:

“The sound levels, measured by  $L_{Aeq,T}$  at the loudest point (adjacent to the track) are extraordinarily high. Indeed they are at the maximum end of the scale proposed in the EPP. Yet, with the proposed points system, these  $L_{Aeq,T}$  levels are inoperative, as the noise standard (gauged using  $L_{A10,T}$  is unlikely to be violated. This clear noise loophole is due to the very short bursts of loud noise produced by drag races (including burnouts).”<sup>38</sup>

Thus Professor Hyde came to the conclusion

“If Environment ACT wishes to protect ACT residents from the noise pollution to be generated, they must implement noise measurements using  $L_{Aeq,T}$ , whether or not the  $L_{A10,T}$  measurements exceed the noise standard.”<sup>39</sup>

It is the EDO's submission that a more appropriate approach to selection of noise units to measure noise from a source that emits impulsive peaks is that recommended by noise policy officers of the NSW EPA in discussions with us, that is, a combination of  $L_{Aeq}$  and  $L_{Amax}$  or  $L_{A1}$ . The latter unit,  $L_{Amax}$  – is the absolute maximum amount of noise level in a sample recorded in dB(A) or as “The A-weighted sound pressure level that represents the maximum noise level measured over the time that a given sound is measured”.

Our submission is that it would be more appropriate for the ACT EPA to apply  $L_{A1}$  rather than  $L_{A10}$ , because this unit of measurement is designed to give an indication of average peak noise levels. According to the *NSW Noise Manual for Local Government*:

“The  $L_{A1}$  is the sound pressure level exceeded for 1% of the measurement period. This descriptor provides an indication of the average peak noise level.”

In this context then it is relevant to return to the Benbow Acoustic Consultants report (2004) which stated:

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<sup>38</sup> Professor Stephen Hyde (2006), *Dragway Noise Draft EPP - Observations and Modelling*, Submission to Environment ACT, June 8, 2006, unpublished Adobe Acrobat document, Research School of Physical Sciences and Engineering, Australian National University, at p.9.

<sup>39</sup> Hyde, op.cit., at p.9.

“the  $L_{Max}$  noise levels will still be high, especially during temperature inversion and windy conditions...The  $L_{Amax}$  results indicate that excessive noise impacts will be apparent under noise enhancing meteorological conditions. This is especially so without the implementation of noise controls and management practices.”<sup>40</sup>

### **Implication: No effective limitation on number of events because the EPP contains an Inappropriate Threshold**

The General EPP (1998) suggests that EPPs are designed to provide a framework for environment protection which: “makes the administration of environment protection transparent.”<sup>41</sup> However the proposed Dragway noise EPP fails this test of transparency due to the complexities surrounding the selection of noise measurement units.

The Dragway Noise EPP applies three different approaches to noise measurement:  $L_{A1,T}$ ,  $L_{A10,T}$  and  $L_{Aeq,T}$ . Their complex interactions tend to make the operation of the EPP rather more opaque than transparent. The event credits system proposed in the Dragway EPP is unlikely to apply due to the selection of a time averaging approach to noise measurement which is inappropriate for the short but intense bursts of noise from a dragway.

The EPP states :

“The conditions described below would be applied only to events that generate noise in excess of the noise standard at the compliance point(s). There are no restrictions on events which do not exceed the noise standard at the compliance point(s).”<sup>42</sup>

Having examined the proposed EPP in detail, Professor Stephen Hyde, Research School of Physical Sciences and Engineering, Australian National University states in his submission to the EPA:

“The threshold for ‘penalties’ due to noise are designed for continuous, steady noises. Drag races can easily circumvent noise protection legislation and policy due to this loophole. This means that the noise ‘protection’ measures will not be in place for even the loudest events.”<sup>43</sup>

### **The proposed compliance regime is not set out in the EPP**

Other than the system of event credits, the Draft EPP does not set out a proposed compliance and enforcement regime. This is indicative of EPAs broader failure to

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<sup>40</sup> Dick Benbow & Associates Pty Limited (2004) *Environmental Noise Impact Assessment: Proposed International Dragway, Block 52, Majura ACT*, Prepared for Sport & Recreation ACT, at p.69.

<sup>41</sup> Environment ACT (1998) *General Environment Protection Policy*, p.4.

<sup>42</sup> *Draft Dragway Noise EPP*, p.7.

<sup>43</sup> Professor Stephen Hyde (2006), *Dragway Noise Draft EPP - Observations and Modelling*, Submission to Environment ACT, June 8, 2006, unpublished Adobe Acrobat document, Research School of Physical Sciences and Engineering, Australian National University.

produce or publish a Compliance policy. The NSW EPA, like Commonwealth DPP and the NSW DPP, have a Prosecution policy. However the ACT's EPA has no formal compliance or prosecution policy other than the brief statements contained in the *General EPP* (1998).

Another option for the EPA would be to indicate that it will apply Ayres and Braithwaite's pyramid of enforcement options as an explicit regulatory strategy. This involves explicitly communicating to the regulated party the likely enforcement options that will be implemented by the regulator ranging from negotiation, warning letters, PIN, notice to correct, civil action, to criminal prosecution.

The interrelationship between the complex noise regime proposed and the issue of non-compliance is unpacked by Professor Hyde in his submission to the EPA. That document states:

“potential polluters will suffer no greater penalty than the possible loss of a single extra point – out of a total point allocation of 26 p.a. – for gross noise abuses. Some punitive aspect to the control measures must be introduced to reassure affected residents that their environment will not be readily polluted to excessive levels.”

Prof Hyde states “when we compare those estimates of penalty points with those that would be incurred if the  $L_{Aeq,T}$  measure is used, regardless of whether the noise standard is violated. These data give the equivalent time-averaged measures and penalty points listed in Table 2. In the absence of an initial threshold set by the noise standard, a typical drag event would cost at least 4 points (plus an additional point – possibly – due to the excessive  $L_{A1,T}$  noise level.”

It appears to be the case that EPA does not have a strong record in relation to taking enforcement action against persistent noise polluters. Verification of this is difficult as the EPA's Annual Reports are not readily accessible on its website and thus one cannot obtain readily information regarding the extent of enforcement activity undertaken. In this context we note with concern the proposed reliance upon self-monitoring as the primary means of information gathering in relation to noise emissions.

The modus operandi of Environment ACT inspectors is typically to await until after the completion of an event before obtaining detailed noise monitoring information. In fact, because the EPA does not employ substantial acoustical science expertise in house, detailed monitoring is typically contracted out to experts such as from the Acoustics and Vibration Unit at the Australian Defence Force Academy. This lack of in-house capacity severely restricts the capacity of the EPA to react in a timely fashion to serious breaches of noise pollution controls. In summary, the record to date has been that noise complaints are typically addressed after the event.

## Conclusion

The fundamental difficulty that the EDO has with the regulatory and policy approach proposed in the EPP is that it amounts to little more than a glorified exemption from noise pollution standards that would normally apply in the ACT.

Further, the EPP purports to be, and passes itself off as, part of the regulatory regime for pollution control in the ACT. However, the *Environment Protection Act 1997* specifically states (s.30) that although such policies can be made they are instruments of an administrative, rather than legislative, character. This means that they are purely advisory rather than legally binding.<sup>44</sup> In other words, Environment ACT is proposing that a major development with very serious noise pollution consequences is to be regulated principally by means of a non-binding policy document.<sup>45</sup>

This document is unlikely to be effective in controlling and regulating noise from the EPP as it selects and applies an excessively cautious threshold of operation based on an inappropriate selection of noise measurement units. In particular, with the proposed event credits points system, the  $L_{Aeq,T}$  limits embedded in the policy will most likely remain inoperative, as the noise standard (gauged using  $L_{A10,T}$  is unlikely to be violated. This regulatory loophole will exist because of the failure of the EPP to tailor the units of measurement selected to the particular nature of dragway noise, that is very short bursts of loud noise produced by drag races (including burnouts).

The regulatory and policy approach proposed by the *Draft Dragway Motor Sport Noise Environment Protection Policy* (EPP) is fundamentally flawed. From its starting assumption, which seeks to accommodate the noise from a dragway as an inevitable consequence of what is mistakenly considered to be an otherwise beneficial activity, it flies in the face of abundant evidence of ecological unstainability, to incorporate a host of dubious methodological sleights of hand, and finally arrive at a policy position that threatens to unravel the overarching sustainability objectives of ACT government policy. It threatens, in its future operation, to render the statutory objects of the *Environment Protection Act 1997* purely symbolic.

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<sup>44</sup> This conclusion is supported by the statement in the *General EPP* (1998) which states: "As policies and guidelines, the EPPs are not legally binding." (p.6).

<sup>45</sup> It is recognized that a future environmental authorisation may draw heavily on the contents of the EPP. However there is no guarantee that it will do so.