

Level 9
89 York Street
Sydney NSW 2000
Email: edonsw@edo.org.au
Webpage: www.edo.org.au

Tel: (61 2) 9262 6989
Fax: (61 2) 9262 6998

Alison Schumacher
A/Threatened Species Coordinator
Biodiversity Conservation Policy Section
Department of Environment and Conservation
Sydney NSW 2000

12th July 2005

Dear Alison,

Draft Threatened Species Regulations

Thank you for the opportunity to comment on the proposed *National Parks and Wildlife Amendment (Threatened Species) Regulation 2005*, *Threatened Species Conservation Amendment (Listing Criteria) Regulation 2005*, and the *Threatened Species Conservation (Savings and Transitional) Amendment (Significant Effect) Regulation 2005*.

The Environmental Defender's Office (EDO) would like to submit the following comments on the proposed regulations, following on from issues discussed at our meeting with the Department of Environment and Conservation (DEC) on 6th June 2005.

National Parks and Wildlife Amendment (Threatened Species) Regulation 2005

Routine Framing Practice Activities

The EDO welcomes the tightening up of the routine farming practice activity defence, under proposed clauses 96 and 96A. We welcome the exclusion of defence for activities on non-agricultural land; and the limitation on activities in clause 96A. It is entirely appropriate that activities (such as those aimed at protecting crops or infrastructure) that are likely to result in harming protected fauna or threatened species or communities, be properly licensed and not fall under an exemption.

We also welcome strengthened licensing requirements relating to trade in native plants and animals in clause 96A(1).

Penalty Infringement Notices

We note that Penalty Infringement Notices (PINs) will be available for offences under Part 8A of the *National Parks and Wildlife Act 1974*. The EDO acknowledges that PINs can be a useful penalty for minor one-off offences. However, we reiterate our concern that a PIN may be available for an offence of intentional damage. The DEC must take offences of knowingly causing damage, for example to critical habitat, seriously. Intentional offences should warrant



more serious penalties, and not allow an offender to 'write off' a minor fine as part of the cost of the development. The availability of PINs for intentional offences undermines deterrence.

The EDO recommends that this issue be clarified in clear, publicly available, compliance and enforcement guidelines specifying that for intentional or continued offences, more serious penalties will be considered.

We understand that DEC is in the process of developing an enforcement policy that will be based on the EPA "Prosecution Guidelines." We note that Section E of the current EPA guidelines relates to penalty notices, and contains the following summary:

Penalty notices: Summary

12.11 Penalty notices are appropriate where:

- (a) the breach is minor;
- (b) the facts are apparently incontrovertible;
- (c) the breach is a one-off situation that can be remedied easily; and
- (d) the issue of a penalty notice is likely to be a practical and viable deterrent.

12.12 It is not appropriate to issue penalty notices where:

- (a) the breach is on-going and not within the alleged offender's capacity to remedy quickly;
- (b) the penalty prescribed on the notice would be clearly inadequate for the severity of the offence;
- (c) the extent of the harm to the environment cannot be assessed immediately;
- (d) the evidence is controversial or insufficient such that if a Court heard the matter, it would be unlikely to succeed;
- (e) a period of 14 days has elapsed since the alleged breach;
- (f) negotiations to find a resolution to the problem which is the subject of the breach are being conducted already with the EPA;
- (g) a direction via notice has been issued by the EPA to perform specified work within a time-frame and the time limit for such performance has not expired;
- (h) at least one of the motivations for issuing a penalty notice to public authorities is to avoid the consultative procedures set out in the [Premier's Memorandum No. 97-26 *Litigation Involving Government Authorities*](#); and
- (i) multiple breaches have occurred.

EDO would strongly support similar provisions being included in an enforcement policy for threatened species offences. The policy would obviously need to be tailored to types of offences as set out in the legislation, rather than to tiers of offences as per the *Protection of the*



Environment Operations Act 1997. The EPA policy also sets out “Principles of Prosecution” in Section B, which should be adapted and applied to threatened species law enforcement. The revised policy should be clearly available on the DEC website (linked to the threatened species pages, rather than the EPA pages).

A further matter, as discussed at the meeting on the 6th June, relates to the delegation of the power to impose PINs. EDO seeks clarification as to who this power will be delegated to, for example, threatened species officers or rangers. The revised DEC policy should refer to relevant officers.

Notwithstanding the safety net of the guidelines on PINs, procedures should be in place to ensure that PINs are issued consistently across NSW. Inconsistency has been a hallmark of the approach to compliance relating to native vegetation and water law across the state, and DEC faces reputation and legitimacy issues if this is repeated here. It is suggested that any decision to proceed with a PIN for offences relating to intent or *mens rea* be approved by the Central Enforcement Branch, and further that monitoring and review procedures be put in place.

Threatened Species Conservation Amendment (Listing Criteria) Regulation 2005

The EDO recognises the benefits of greater consistency of listing criteria with the those adopted under the Commonwealth *Environment Protection and Biodiversity Conservation Regulation 2000* and by the IUCN.

As discussed at the meeting, it is important to ensure that the listing criteria does not have an adverse effect on the nominations process. For example, if community members are strictly required to present information according to all the criteria, it may be difficult for a member of the public to access and provide the necessary data. This problem has become apparent at a federal level where nominations under the *EPBC Act* have been unsuccessful due to lack of access to required information. The nominations process should be flexible to enable all nominations to be considered.

Where information relating to certain criteria is incomplete, the Scientific Committee should take a precautionary approach and ‘fill in the gaps’ where necessary. Where data relating to certain criteria suggests there are threats of serious or irreversible environmental damage, lack of full scientific certainty in relation to other criteria should not be used as a reason for postponing measures to prevent environmental degradation. This is consistent with object 3a of the *Threatened Species Conservation Act 1995* which is to promote ecologically sustainable development.

Furthermore, the Scientific Committee should undertake a review of the current lists, to determine which listed species should now be declared critically endangered.

Threatened Species Conservation (Savings and Transitional) Amendment (Significant Effect) Regulation 2005

“Eight part test”

This regulation provides that amendments made to s94 by the *Threatened Species Conservation Amendment Act 2002*, in relation to factors determining significant affect, will not apply to



applications not finally determined before commencement of the amendments. Such transitional provisions are appropriate.

EDO would welcome the commencement of all outstanding amendments and the consolidation of the legislation. It is currently confusing for interested members of the public to access and interpret provisions of the legislation and amending legislation.

Should you require any further comment, please contact Rachel Walmsley, Policy Officer on 9262 6989 or rachel.walmsley@edo.org.au.

Yours sincerely,
Environmental Defender's Office

Jeff Smith
Director

