A Community Legal Centre specialising
in public interest environmental law.

19 March 2010

Via email Rebecca.mellow@sa.gov.au

Dear Madam

Re: Natural Resources Management (Review) Amendment Bill 2010

The Environmental Defenders Office (SA) Inc.(EDO) welcomes the opportunity to provide comment with respect to the Natural Resources Management (Review) Amendment Bill 2010. The EDO is a community legal centre specialising in public interest environmental law. Our functions include legal advice and representation, educational services and the promotion of policy and law reform in environmental law.

Whilst the Amendment Bill provides clarity on a number of issues around the operation of the Natural Resources Management Act 2004 (the Act) and is generally supported some proposals are not. Our objections to some of the amendments are discussed below. We have also recommended further amendments to the Act to improve areas such as the goals of economic sustainable development and natural resources management integration, planning processes and compliance.

The following proposed amendments to the Act are not supported by the EDO.

Clauses 19 & 20 (1)

This amendment removes the use of concept statements including the requirement of public consultation with NRM groups before they are prepared. Boards would be able to proceed to prepare a draft plan without any initial consultation with NRM groups.

Clause 22 (1)

Legislated review should be required more regularly than every ten years. Retaining the current 5 year review period will help to ensure important changes

in the regions and relevant research are incorporated into planning processes under the Act.

We make the following further comments on the Act generally.

Management and Protection of land and Water resources

The preamble of the Act identifies two key objectives namely ecologically sustainable development and integrated natural resources management.

Despite the bold intentions of the Act further work needs to be done to translate ecologically sustainable development into practical outcomes as the Act says little on this matter. We recommend that either sustainability criteria be written into the Act or they are incorporated within Natural Resources Management plans. Section 3A of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) may be useful in this regard. Such criteria may address, for example, trade-offs between economic, environmental and social considerations.

Of equal importance, the Act requires amendment to accomplish a fully integrated scheme for natural resources management. There remain many Acts and related administrative bodies which may influence natural resources management outside of the new administrative framework. This presents a major challenge to the goal of integrated natural resources management. Specifically the Act requires further integration with legislation covering pastoral lands, water resources, vegetation management, mining and petroleum activities, national parks / regional reserves, coastal and marine management, development control and protection of environmental quality and indigenous perspectives. With respect to the Development Act 1993 in particular we recommend that there be legislative change requiring consequential amendments to Development Plans following on from NRM planning processes.

Planning

Public participation and access to information are important elements of a robust system of community consultation.

We refer to section 79 of the Act which covers the preparation of regional plans and community consultation and in particular subsection (6) (b) and subsections (9) to (13) inclusive.

It is critical that there is an adequate time frame for submissions to be lodged in respect of a proposed plan or amendments to an existing plan. Section 79 currently allows for a minimum submission period of two months except where amendments are covered by section 81 (8). In the case of substantial matters such as original plans and amendments other than those covered by section 81 (8) we suggest a more appropriate minimum period is three months. Short time frames for consultation put at risk important principles of accountability and public participation.

Section 79 also provides for the holding of a single public meeting to gather views on a proposed plan or amendments to an existing plan. In our view this process is inadequate. We suggest that section 79 be amended such that there is provision for the calling of several public meetings with perhaps varying focus to be held in locations across the region.

Prior to these meetings the public should be given the opportunity to have explanatory information on the planning processes to be used, perhaps by way of discussion papers or community information sessions. This information should be provided in addition to copies of the proposed plan or amendments to an existing plan. This would save valuable time at public meetings as hopefully the public would be better informed as to the details of the process used in developing or amending a plan and what has guided the development of particular provisions within a plan.

In relation to the availability of copies of plans and amendments these should be available from a common website in addition to the website for the prescribed body.

Finally, sufficient resources must be made available to ensure community consultation is carried out properly and to an adequate level. This will help to ensure that the planning process is comprehensive, transparent and accountable.

Compliance and Enforcement

Civil Remedies

Section 201 of the Act is largely based on section 104 in the Environment Protection Act 1999 (“ the EP Act”). Subsection 5 lists those parties who are able to commence applications in the ERD Court. Part (c) refers to actions commenced “ by any person whose interests are affected by the subject matter of the application”. Part (d) refers to actions commenced “ by any other person with the leave of the ERD Court.” Subsection 6 provides that the ERD Court , before granting leave under section 201 (5) (d), must be satisfied that the application is not an abuse of the process of the Court, that the orders sought are likely to be made and the proceedings are in the public interest.

The EDO has had considerable experience assisting an incorporated environmental group to institute proceedings pursuant to section 104 of the EP Act. In particular we sought to have the group granted standing pursuant to section 104 (7) (b) . This is the equivalent of section 201 (5) (c) of the Act. After a great deal of legal argument the Supreme Court determined that our client, an incorporated body, is not a person whose interests are affected by the subject matter of the application.

An incorporated body may be able to achieve standing under section 201 (5) (d) but this is by no means certain.

Therefore in order to improve the rights of third parties to bring appropriate applications we recommend that section 201 (5) (c) and (d) be repealed and there be a new section 201 (5) (c) inserted which reads " by any person aggrieved " and this could be defined in a similar way to the definitions contained in section 487 of the EPBC Act and corresponding provisions in the Administrative Decisions (Judicial Review) Act 1977.

The EDO sought to take action on behalf of an incorporated group in order to minimise the risk of adverse costs orders affecting individual members of the group. The spectre of adverse costs orders is a major disincentive for parties seeking to bring actions of this type. For this reason we make the following comments in relation to other parts of section 201.

Subsection 13 allows the ERD Court to make security for costs orders. In our view this can be a strong disincentive to the bringing of proceedings particularly by affected persons. We submit that this subsection should be repealed.

Subsection 14 allows the ERD Court to make orders for compensation to be paid by a party who is unsuccessful in litigating a matter if the party sued has suffered loss or damage as a result of the litigation. Again we submit this can be a significant disincentive to the bringing of proceedings by affected persons and we believe that this subsection should be repealed.

Appeals

Section 202 outlines the rights of appeal under the Act. The rights of appeal are mostly vested in "owners" or other persons the subject of a decision under the Act. We suggest that the Act be amended such that appeal rights are granted to occupiers who also would clearly have an interest in matters such as usage rights in respect of water.

Affected third parties should also be granted appeal rights given the often very public nature and impact of resource management particularly water use. Alternatively, the Act could be amended to include a system of public notice and consultation similar to section 38 of the Development Act. Such a system often raises the concern that spurious actions may be instituted thereby leading to congestion in the courts. To counter this concern we suggest that section 202 could be amended to include a provision allowing the ERD Court to make costs orders against third parties who embark on matters where there is no prospect of success.

Please contact me should you have any queries regarding this submission.

Yours faithfully

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