



Environmental Defender's Office ACT Inc.



Ph: (02) 6243 3460 Fax: (02) 6243 3461 Email: edoact@edo.org.au GPO Box 574 Canberra ACT
2601 www.edo.org.au ABN 32 636 009 247

19 April 2013

Gungahlin Strategic Assessment
GPO Box 158
Canberra ACT 2601

By email: EDDCommunity@act.gov.au

Dear Sir/Madam,

Gungahlin Strategic Assessment Draft Reports, Public Consultation April 2013

The Environmental Defender's Office (ACT) Inc ('EDO') is a community legal centre specialising in public interest environmental law. We provide legal representation and advice, take an active role in environmental law reform and policy formation, and offer educational publications and programs designed to facilitate public participation in environmental decision-making.

This submission comments on the *Gungahlin Strategic Assessment Consultation Draft Biodiversity Plan* (the *Draft Biodiversity Plan*) and the *Gungahlin Strategic Assessment Report*. These reports are an outcome of the agreement entered into on 2 October 2012 between the Commonwealth Department of Sustainability, Environment, Water, Population and Communities, and the ACT Government's Economic Development Directorate and its Environment and Sustainable Development Directorate. It has been prepared by the Solicitor for the EDO, assisted by volunteers. It does not constitute legal advice.

As a public interest law centre we strongly support the implementation of efficient and effective environmental laws in the ACT for the benefit and wellbeing of the ACT community. The *Planning and Development Act 2007* (ACT), if implemented correctly, has the capacity to meet the requirements for comprehensive, engaging and coherent strategic planning to meet the ACT's growing sustainability challenges.¹ Strategic environmental assessments (SEAs) of large scale developments and processes are an integral part of the regulatory context for sustainable development, and are often a touchstone for public perceptions of environmental planning systems more generally.²

1 A. Hawke et al, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, (October 2009) recommendation 18.

2 Australian Network of Environmental Defenders Offices, Submission in response to Productivity Commission Major Project Development Assessment Processes Issues Paper (March 2013) Available at: http://www.edovic.org.au/downloads/files/law_reform/edo_vic_productivity_commission_major_projects_assessment.pdf.

The EDO supports appropriate measures to improve the effectiveness and efficiency of Australian planning systems and strategic assessments.³ Our view is that the efficacy of planning processes should be judged on whether they incorporate comprehensive environmental impact assessment leading to sustainable development outcomes. An appropriate level of resources needs to be allocated to support the assessment process. Adequate planning, and the implementation of the assessment plan, including any recommendations concerning water quality, biodiversity conservation, climate change adaptation and greenhouse gas emission abatement, and economic and social issues, should also be a feature of the process.

We thank you for providing this opportunity to comment as impact assessment processes should include effective and frequent public consultation, engagement and appropriate accountability. In our view, early and open engagement that genuinely seeks to clarify issues of concern to stakeholders is likely to enhance the prospects for consensus to be achieved, rather than for issues to escalate at a later stage into a formal legal dispute resolution process.

We suggest in the event issues are raised in stakeholders' submissions that indicate genuinely-held concerns about the adequacy of the assessment process or the impact of the proposed developments, that independent accredited alternative dispute resolution specialists with expertise in sustainability issues be retained soon after the completion of this consultation process, to facilitate detailed negotiations amongst stakeholders to resolve those issues, and continue to be retained as circumstances require during the adaptive management and participatory reporting process that should be established to monitor the implementation of the *Biodiversity Plan* (discussed below).

The consultation sessions facilitated by Mr Mark Butz of Futures by Design in early 2013 were very well run, fair, energetic and constructive, and reflected Mr Butz's considerable and well-recognised expertise in facilitating learning and in fostering group responsiveness and respectful interactions. We thank you for funding those sessions, but they were primarily information-exchange opportunities, with Ms Karina Carwardin and Dr Peter Cowper of *Umwelt (Australia) Pty Ltd* outlining the content of their reports and inviting feedback. This was appropriate because when the sessions were run many attendees had not yet had an opportunity to read the *Umwelt* reports,⁴ as they had only recently beforehand been released. Those sessions did not provide an opportunity for issues raised to be discussed in detail and a way forward negotiated with stakeholders. ACT and Commonwealth Government officials did not actively engage in the discussions and may not have had a mandate to do so.

Stakeholders now have this opportunity to provide detailed comment, and it is important that the views expressed continue to be worked through in a constructive, fair way. Alternative dispute resolution (ADR) in the environmental law and sustainability sphere is a growing area of policy and practice, and its development is to be encouraged. We urge you to consider establishing an ADR process to resolve issues early in the planning stage for Gungahlin, so that sustainable development is more likely to be achieved. We consider that SEAs should reflect precautionary, creative and iterative processes, rather than the current trend towards 'streamlining' approval processes. Best practice standards,⁵ and the safeguards recommended in the Hawke Review need to be abided.

³ COAG Reform Council 2012, *Review of capital city strategic planning systems*, COAG Reform Council, Sydney, 214–59.

⁴ *Umwelt Pty Ltd, Biodiversity Plan: Consultation Draft, prepared for ACT Economic Development Directorate and ACT Environment and Sustainable Development Directorate*, Canberra (March, 2013) *Umwelt Pty Ltd, Gungahlin Strategic Assessment Report: Consultation Draft, prepared for ACT Economic Development Directorate and ACT Environment and Sustainable Development Directorate*, Canberra (March, 2013); *Umwelt Pty Ltd, Preliminary Risk Assessment, Gungahlin Strategic Environmental Assessment: Consultation Draft, prepared for ACT Economic Development Directorate and ACT Environment and Sustainable Development Directorate*, Canberra (March, 2013)

⁵ See for example, Australian Network of Environmental Defenders Offices, *Background Briefing Paper: Environmental Standards & Their Implementation In Law* (June 2012), Available at: <

http://www.edo.org.au/edong/images/stories/law_reform_submissions/20122013/121123coagcthaccreditationstandardsanedosubmission.pdf>18 – Attachment A; The International Association of Impact Assessment has also developed a series

Although the SEA does refer to adaptive management, future steps need to be precautionary and permit iterations in the planning approach.

Our brief assessment of the efficacy of the Gungahlin SEA follows below.

- The draft *Gungahlin Strategic Assessment Biodiversity Plan* says that direct impacts on matters of national environmental significance ('MNES') have either been avoided or minimised. We believe that the approach taken in the report is largely consistent with the robust and scientific 'improve or maintain' test with regard to environment and heritage that was advocated in the Hawke review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The application of this test is necessary to achieve ecologically sustainable development and is regarded as a best practice standard.⁶
- We strongly support the significant direct and indirect biodiversity offsets proposed in the *Draft Biodiversity Plan*. We query however, whether the lack of comprehensive baseline data in relation to the biodiversity values of the assessed areas, and the presence or absence of some species has been addressed with a rigorous regard to the precautionary principle.
- The *Draft Assessment Report* only notes climate change briefly. We are concerned that the SEA does not address carbon offsetting. The World Bank has recognized climate change as one of the most significant threats to the global economy.⁷ ACT Planning laws do not require adequate assessment of, or conditions to address, greenhouse emissions and climate change impacts for major projects. The Australian Government has rejected the Hawke Review recommendation for 'a requirement to consider cost-effective climate change mitigation opportunities as part of strategic assessments'.⁸

We are very concerned that the draft reports do not address in detail the mitigation and abatement of greenhouse gas emissions (GHGE), nor consider the impact of the further development of the Gungahlin region on the achievement of the statutory targets in the *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT). Those targets include a 40% cut in emissions, based on 1990 levels, by 2020; 80 per cent by 2050; and zero net emissions by 2060. We recommend that the ACT Government develop a carbon offsets policy to complement the national carbon price and related GHGE-reduction policies, to better ensure the achievement of the ACT's statutory GHGE targets.

- We note that water quality and water management issues are addressed briefly in the *Draft Assessment Report*. Much more work seems to be needed in this area.
- In relation to bushfire risk management, we note and welcome the references in the *Draft Biodiversity Plan* to the establishment of Inner Asset Protection Zones (IAPZ) outside reserved and avoided areas. We note that the Outer Asset Protection Zones (OAPZ) will be established 'where possible' outside avoided and reserved areas, and within those areas where no other alternatives exist. We urge that no Asset Protection Zones be established within any avoided or reserved areas. There are always alternatives, but an economic cost attaches to those, and those costs should be regarded as a necessary sacrifice for ecologically sustainable development and an investment in the provision of future ecosystem services.
- Cumulative impacts are addressed in the *Draft Biodiversity Plan*, and adaptive management is proposed. We note however, that although a third party auditor will promote

of 'performance criteria' for a good-quality SEA process. These are broadly summarised as integrated, sustainability-led, focused, accountable, participative and iterative. See 'SEA Performance Criteria', *IAIA Special Publication Series 1*, <<http://www.iaia.org/publications-resources/downloadable-publications.aspx>>

6 A. Hawke et al, above n 1., para 3.45, recommendation 6 (2)(b)(ii).

7 See The World Bank, *Turn Down the Heat: Why a 4C Warmer World Must Be Avoided* (2012).

8 Response to the Independent Review of the EPBC Act (2011), rec. 10.2 ('not agreed')

transparency and accountability, there should be more public participation during the reporting process. In accordance with the Productivity Commissions Issue Paper, *Commonly-used Principles of Good Governance and Regulatory Design*⁹ and the Hawke Review indicating best adaptive management and strategic practices, public consultation and engagement must be undertaken in an ongoing and effective manner.¹⁰

The reporting framework proposed in the *Draft Biodiversity Plan* includes a public annual report highlighting the progress of the implementation of each of the actions; conservation outcomes of the previous year assessed against the relevant biodiversity measures, and the consistency of each Precinct Code with the requirements of the Plan. There will also be a concurrent review of both the relevant biodiversity measures and the Plan every four years. The *Draft Biodiversity Plan* states in section 5.3 that

'The critical function of the adaptive approach to effective implementation and management of the offsets is to allow for a feed-back of knowledge into the decision making process. This allows for the Plan to be responsive to changes that may not have been anticipated.'

The *Draft Biodiversity Plan* also states that these uncertainties will include the timeframe for implementation, unforeseen influences and direct/indirect offsets.¹¹

As we have argued in previous submissions, and most recently in our submission to the ACT Budget Consultation process being run by the Chief Minister and Treasury Directorate,¹² all land management agreements, Conservator's Directions, and monitoring and enforcement information ought to be made publicly available. Such transparency aids accountability and ensures weaknesses in policies or enforcement strategies are detected and addressed in a timely manner. For example, information about the health of biodiversity in Canberra's protected areas could be made available in an annual *ACT State of the Parks Report*. Transparency and the opportunity for public comment ought to be made available for matters that are in the public interest. Public participation is a critical process needed to inform high-quality decision-making. Canberra's network of volunteers is a resource that could be better harnessed to assist with the implementation of monitoring, assessment and reporting policies and strategies.

- We note that beyond the 20 year timeframe discussed in the *Draft Biodiversity Plan*, programs will be continued subject to 'successfully meeting stated objectives and the prevailing imperatives of the day'. We believe the adaptive management plan described is insufficient in its detail, commitment and specific allocation of resources to ensure an ecologically sustainable outcome for the Gungahlin region beyond 20 years. There appears to be a lack of a framework and only ill-defined funding schemes for adaptive management after the 20-year period.

9 Productivity Commissions Issue Paper, *Commonly-used Principles of Good Governance and Regulatory Design (2013)*, 8–9. The Commission's proposed assessment criteria include: clear, justifiable regulatory objectives; consistency with other regulations; cost-effectiveness; proportionate and flexible regulatory requirements; clear and predictable processes; open and transparent processes; appropriate opportunities for public participation and review of decisions; clarity in roles and responsibilities; accountable decision-makers; appropriately skilled and resourced institutions; regulatory outcomes consistent with objectives; regular review and evaluation.

10 A. Hawke et al, above n 1, 240–44.

11 ACT Government, ACT Government Environment and Sustainable Development Directorate, draft Gungahlin Strategic Assessment *Biodiversity Plan* (2013) 57.

12 EDO (ACT), submission regarding the Budget Consultation Process 2013-14, April 2013. Available at: <http://www.budgetconsultation.act.gov.au/__data/assets/pdf_file/0003/441372/103-Environmental-Defenders-Office-ACT.pdf>

In summary, we make the following recommendations:

- Independent, accredited alternative dispute resolution specialists with expertise in sustainability issues be retained soon after the completion of this consultation process, to facilitate detailed negotiations amongst stakeholders to resolve issues of concern.¹³
- no Asset Protection Zones should be established within any avoided or reserved areas
- policy responses should be included in the SEA to better address the challenges of climate change and achieving the GHGE reduction standards in the *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT)
- much more assessment work will need to be done on water quality and water management issues
- public engagement must be built into the annual and four-yearly reports proposed as part of the monitoring and evaluation strategy to facilitate adaptive management in accordance with best practice standards
- strong commitments and funding certainty are required during and beyond the 20-year lifespan of the Plan to ensure effective strategic assessment and adaptive management in accordance with best practice standards.

Please contact the writer should you wish to discuss any matter arising.

Yours sincerely

Environmental Defender's Office (ACT) Inc

Camilla Taylor
Principal Solicitor

¹³ An illustration of the growth in this area of work can be seen in ADR specialist John Haydon's résumé (found at http://www.ecodirections.com/pdf/john_haydon_cv.pdf)