



environmental defender's office new south wales

Submission to the Natural Resource Management (Climate Change) Inquiry

December 2007

The EDO Mission Statement

The EDO's mission is to empower the community to protect the environment through laws, recognising:

- *the importance of public participation in environmental decision making in achieving environmental protection*
- *the importance of fostering close links with the community*
- *the fundamental role of early engagement in achieving good environmental outcomes*
- *the importance of indigenous involvement in protection of the environment*
- *the importance of providing equitable access to EDO services across NSW.*

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Submission sent to:

Standing Committee on natural resource Management (Climate Change)
Parliament House
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Sydney NSW 2000

Submission to the Natural Resource Management (Climate Change) Inquiry

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment to the Natural Resource Management (Climate Change) Inquiry of NSW Parliament. The EDO is a community legal centre specialising in public interest environmental law.

Consistent with EDO's area of expertise, our comments relate to the following term of reference:

(b) Options for ensuring ecologically sustainable natural resource use, taking into particular account the impacts of climate change.

Our key recommendation is that natural resource management laws in NSW must better implement the principles of ecologically sustainable development in order to address the impacts of climate change.

Natural resource management laws are a fundamental tool in addressing climate change impacts. For example, in relation to mitigation and emissions reduction, the introduction of land clearing laws in NSW and Queensland will be crucial to the task of Australia meeting its equivalent Kyoto target of 108% of 1990 emissions by 2012. Furthermore, in relation to adaptation to impacts, water management legislation has the key function of setting sustainable diversion limits in the short and long term that take into account increasing climatic variability.

A healthy, functioning environment provides invaluable benefits to farmers and the broader community. To ensure that ecosystem services (such as clean water, clean air, and carbon sequestration) are guaranteed for the benefit of all, it is essential to ensure natural resource management is sustainable. Natural resource management is a broad term covering a wide range of potential activities and land use (including management of native vegetation, water, biodiversity, fossil fuels, forestry and so on). Each of these activities has a greenhouse gas emission impact. It is essential that a strong sustainability framework is in place to guide resource use and management in the long term.

The following comments relate to how natural resource management laws in NSW should better implement the key principles of ecologically sustainable development in order to effectively address climate change impacts.

The principles of ecologically sustainable development relevant to climate change.

Ecologically sustainable development (ESD) is a long-standing and internationally recognised concept. The concept has been affirmed by the 2002 *World Summit for Sustainable*

Development; and has been included in over 60 pieces of NSW legislation.¹ Furthermore, NSW has accepted the principles and objectives of ESD in the *National Strategy for Ecologically Sustainable Development*.² The concept was developed in response to a global realisation that rates of exploitation of natural resources are not environmentally sustainable. The overarching aim of ESD is therefore to achieve a level of development that meets the needs of the present without compromising the ability of future generations to meet their own needs.³ In particular, the concept of ESD attempts to make it clear that environmental impacts are no longer seen as separate from economic and social considerations.⁴

However, it is apparent that ESD is not being substantively implemented in NSW. It is often merely one of a number of considerations that a decision-maker need have regard to, and in some circumstances ESD is not directly considered at all.⁵ Considering the significant potential impacts of climate change on Australia, ESD must play a key role in natural resource management and planning and decision-making. The EDO submits that ESD should be the guiding philosophy for natural resource management in NSW. To that end, putting ESD into operation as a means of addressing the impacts of climate change requires decision-makers to properly consider and implement the key principles of ESD. These are discussed below.

The precautionary principle

The precautionary principle is a core principle of ESD. Indeed, it has been incorporated in over 18 international instruments.⁶ The traditional definition of the precautionary principle as accepted in NSW is:

*If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent degradation.*⁷

Although there is now a large body of scientific evidence that demonstrates that human-induced climate change is already impacting on the planet,⁸ there is of course significant uncertainty implicit in predicting the precise consequences of climate change on weather conditions, biodiversity, sea level rises, etc. This uncertainty triggers the precautionary principle and required its implementation in the context of climate change.

The precautionary principle is therefore an important legal principle for natural resource management in NSW in order to prepare for the range of potential climate change impacts.

¹ Justice Paul Stein, 'Are decision-makers too cautious with the precautionary principle?' (2000) 17 *Environmental and Planning Law Journal* 3 at 22.

² The strategy is found at <http://www.environment.gov.au/esd/national/nsesd/index.html> (6 November 2007).

³ World Commission on Environment and Development, *Our Common Future* (1987) at 43.

⁴ For example, see: The 2002 *World Summit for Sustainable Development* and the *National Strategy for Ecologically Sustainable Development*, available at <http://www.environment.gov.au/esd/national/nsesd/index.html>.

⁵ See Part 3A of the EPA Act.

⁶ Rosemary Lyster, 'The relevance of the precautionary principle: Friends of Hickinbrook Society Inc v Minister for the Environment' (1997) *Environmental and Planning Law Journal* 14(5) at 392.

⁷ *Protection of the Environment Administration Act 1989*, section 6(2)(a).

⁸ For example, see Intergovernmental Panel on Climate Change Fourth Assessment Report, 16 November 2007.

This will involve precautionary measures being taken even in the absence of full scientific certainty about the environmental effects of an activity.

In this context, the EDO submits that it is necessary to give due legislative weight to the precautionary principle, especially when there are potential issues relating to water, biodiversity and climate change. Currently, the principle is only given regard as a matter of procedure. That is, the principle, as an element of ESD, must be considered when making decisions that could potentially impact on threatened species, water and the environment generally.⁹ This requires the decision-maker to consider the potential impacts of a project, even where these are subject to uncertainty. However, this procedural approach says nothing about the final decision (ie, the ecologically sustainable outcome). That is, as long as these potential impacts are given due regard, a decision contrary to the science may be made.

To ensure that the precautionary principle leads to better environmental outcomes, there needs to be a limit on the discretion of decision-makers to approve land uses or development proposals that will potentially generate significant greenhouse gas emissions. The step forward is thus a re-characterisation of the precautionary principle as a principle that must be applied as a matter of law. It must act as a check on discretionary decision-making to require the refusal of developments or mandatory conditions. Such a risk-averse approach will go some way to ensuring that the impacts of climate change are minimised in NSW.

Inter-generational equity

The principle of inter-generational equity is an acknowledgement of the need for the present generation to ensure that the integrity of the environment is not compromised for future generations. This is particularly pertinent in relation to climate change. Climate scientists predict that the impacts of climate change will be felt even more intensely over the coming century, with anticipated temperature increases, in best scenarios, of between 2 and 4 degrees by 2100 if greenhouse gas emissions remain at current levels.¹⁰ This will have significant impacts on future generations and will affect their amenity, standard of living, health and may also lead to the displacement of millions of people. Therefore, the current generation must adopt a caretaker role to minimise the impacts of current activities. The EDO submits that the principle of inter-generational equity must remain at the forefront of thinking when making decisions relating to natural resource use and climate-affecting activities, such as the development of new coal-fired power stations and water allocations.

The EDO notes that we are beginning to see the courts grapple with, and apply, the concept of inter-generational equity. For example, in the case of *Anderson & Anor v The Director-General of the Department of Environment and Conservation & Ors* [2006] NSWLEC 12, Justice Pain invalidated a permit to destroy Aboriginal cultural artefacts on the basis that there was a failure to consider the principle of inter-generational equity. This highlights the increased importance placed on ESD principles in the Land and Environment Court.

⁹ For example, the principle must be 'considered' under S79C of the *Environmental Planning and Assessment Act 1979*.

¹⁰ Dr Barry Pittock, "Scientific Issues in Decision Making Context" 2004, CANA conference.

Conservation of biodiversity

The conservation of biodiversity is a central principle of ESD. Biodiversity is defined as the variety of life and incorporates genetic, species and ecosystem diversity.¹¹ The essence of the principle involves ensuring that the rate of loss of existing species, genetic diversity and ecosystem processes should not be substantially different from natural rates of loss. Climate change presents significant dangers to biodiversity and will have a measurable impact on the further decline of many species and habitats. Several studies have shown unequivocally that the increase in greenhouse gases in the atmosphere will have detrimental impacts on biodiversity.¹² Indeed the Australian Greenhouse Office has found that climate change is already impacting on the functioning of biological systems.¹³

Therefore, in order to ensure that Australia's unique biodiversity is preserved, the EDO believes that the biodiversity principle should be more consistently factored in when making decisions that may affect threatened species and their habitats. To substantively adopt the principle in NSW, it must act to prohibit developments that will have significant impacts on threatened species and critical habitat.

Improved implementation of this principle also requires strengthening of the *Threatened Species Conservation Act 1995*, and retaining the ban on broadscale clearing under the *Native Vegetation Act 2003*. Further exploration of "bio-links" and land management strategies to assist climatic migration of species (where possible) and create viable refuges against potential impacts, should be investigated.¹⁴

For further detail on biodiversity initiatives such as the NSW Biobanking scheme, previous EDO submissions are available at <http://www.edo.org.au/edonsw/site/policy.php>.

Polluter Pays principle

The polluter pays principle is of particular importance in the context of climate change. The principle requires that those who generate pollution should bear the full life cycle costs of that pollution. This is currently the case for non-greenhouse pollution in NSW under the *Protection of the Environment (Operations) Act 1997*. Polluters are required to hold an environmental protection licence, for which there is a fee, in order to pollute. These licences can be amended or revoked at any time, as can the pollution thresholds. There is no right to compensation in these circumstances. On the other hand, the proposed emissions trading scheme (ETS) for greenhouse gas emissions will depart from the polluter-pays principle. The proposed ETS will involve the free allocation of permits to some emitters and to trade-exposed energy intensive industries. Furthermore, these permits will take the form of

¹¹ Mark Diesendorf & Clive Hamilton, *Human Ecology, Human Economy* (1997) at 72.

¹² See Lesley Hughes, 'Climate change and Australia: Trends, projections and impacts', *Australian Ecology* (2003) 28 423-443 and Will Steffen, "Stronger evidence but new challenges: climate change science 2001-2005", March 2006, Department of the Environment and Heritage- Australian Greenhouse Office.

¹³ Will Steffen, "Stronger evidence but new challenges: climate change science 2001-2005", March 2006, Department of the Environment and Heritage- Australian Greenhouse Office".

¹⁴ For example, DSE Victoria has undertaken research into the benefits of establishing biolinks between reserves to assist certain species respond to climatic changes.

property rights, entitling the holder to compensation for a reduction in the number of their permits. This is clearly inconsistent with the polluter-pays principle.

The relevance of the polluter pays principle in relation to NRM in NSW is likely to play out in relation to high emission industry funding offset projects. Such offsets may include, for example, carbon sequestration through planting vegetation and possibly in the future, through avoided deforestation projects. It is essential that a robust legal framework is established to reward landowners who undertake stewardship or carbon sequestration projects in recognition of the public benefit of providing ecosystem services (as noted above). However, it is equally important that any NRM activity that may be a carbon offset project be designed to achieve optimal environmental outcomes. In this context it is essential that any such project be: ecologically sustainable (for example not result in undue water diversion), be measurable, additional, provide permanent benefits, and be monitored and enforced. Reliance on offsets is not a substitute for onsite emission reduction by industry.

The EDO submits that the polluter-pays principle should inform decision-making at all levels of government in NSW, and that the limitations of offset schemes be addressed in regulation. Any suggestion that compensation should be payable to greenhouse gas emitters as a result of government regulation is inconsistent with ESD. For further detail, please refer to previous EDO comment on offset project limitations available at: <http://www.edo.org.au/edonsw/site/policy.php>.

Market mechanisms

A key element of ESD is the promotion of market mechanisms as a means of integrating environmental, social and economic considerations. Market mechanisms are particularly relevant to climate change, as they can provide incentives to reduce emissions at minimal cost. Trading schemes such as the European Union Emissions Trading Scheme and the US Sulfur dioxide scheme have already been established with some success. An Australian emissions trading scheme is also proposed. The EDO supports market mechanism in general, and appropriately designed emissions trading in particular, as one of a suite of measures that should be used to tackle climate change.¹⁵

In conclusion, the EDO is strongly of the opinion that the substantive incorporation of the principles of ESD in NSW will ensure that sustainable natural resource management is facilitated, which in turn will help address the projected impacts of climate change and lead to real reductions in greenhouse gas emissions.

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¹⁵ The EDO has commented extensively on the two proposed emissions trading schemes. Our submissions can be found at www.edo.org.au