Save Bastion Point

protect this coastal environment from inappropriate development

9 April 2010

Executive Officer
Environment and Natural Resources Committee
Parliament House
Spring Street, East Melbourne VIC 3002

By email: enrc@parliament.vic.gov.au

Dear Executive Officer,

Submission: Inquiry into the EES process in Victoria

1. The Save Bastion Point Campaign (SBPC) is a coalition of community groups and individuals that has been involved in an exhaustive Environment Effects Statement process under the Environment Effects Act 1978 ("Act") for over six years. Our involvement has been frustrating, time consuming, costly and ultimately disillusioning.

2. The story is one of a community participating extensively and in good faith in an EES process over a long period of time, the result of which was essentially ignored by the Minister for Planning when it came time for his decision. It is the wide discretion afforded to the Minister in the Act that facilitated this perverse outcome. The Minister’s excessive discretion under the Act will be the focus of this submission, as we believe it lies at the core of many of the problems with the Act.

3. Firstly, by way of background:

   a. Currently there is a boat ramp at Bastion Point in Mallacoota in far East Gippsland. It is old and in a state of disrepair. Proposals for upgrading the boat ramp have existed for a long time, at least since 1988. The SBPC, along with most of the community, recognise the need for an upgrade of the existing boat ramp, but are concerned that any upgrade to the boat ramp must be appropriate and sympathetic to the local environment. SBPC has consistently and actively been involved in the debate surrounding the proposal to upgrade the boat ramp.
b. On 17 August 2000, the then Minister for Planning, the Hon. John Thwaites, decided that an Environment Effects Statement (EES) under the Environment Effects Act 1978 was required for the boat ramp proposal. The East Gippsland Shire Council (‘EGSC’) was required to prepare this EES.

c. The EES was exhibited between 4 and 16 July 2007 and detailed an ocean access boat ramp facility that was extremely large and high impact, and in excess of what was required at the site. Written submissions were invited from interested members of the public, and SBPC put in an extensive written submission against the proposal.

d. On 11 September 2007, an EES Inquiry (the Inquiry) was appointed to consider the EES prepared by EGSC. The Inquiry initially consisted of Mr Nick Wimbush (Chair), Mr Robin Saunders and Mr Leon Collett, but Mr Barry La Fontaine subsequently replaced Mr Collett. The Inquiry held directions hearings on 12 September 2007 in Mallacoota and on 20 February and 31 March 2008 in Melbourne. SBPC attended those hearings and made submissions on how the Inquiry should be conducted.

e. The Inquiry hearings were conducted over 14 days between the dates of 14 July and 7 August 2008, with the first 5 hearing days taking place in Mallacoota. SBPC and individual members made submissions to the Inquiry at the public hearings. SBPC acted as the main opponent at the Inquiry hearings, and engaged the Environment Defenders Office and Ms. Emily Porter, barrister, to represent it at the hearings. SBPC also engaged seven experts to provide written and oral evidence to the Inquiry on the issues of native vegetation, coastal geomorphology, marine ecology, geology, economics and social impact. Overall, SBPC spent approximately $50,000 on appearing and calling evidence at the Inquiry. SBPC is a not for profit community group and relied entirely on donations and fundraising events to raise these funds to participate in this process.

f. In October 2008, the Panel Inquiry provided its report on the EES to the Minister for Planning. This was not released to the public at this time. This report was 198 pages long and contained an extensive series of well thought out, well reasoned recommendations. We urge the Environment and Natural Resources Committee to read this report, and the subsequent Ministerial Assessment. The Panel Inquiry recommended against all options proposed by East Gippsland Shire Council for an ocean access boat ramp at Bastion Point, concluding that there were unresolved environmental effects associated with the project and also that the facility would result in no overall societal benefit.

1 http://www.dse.vic.gov.au/DSE/nrenpl.nsf/LinkView/A684ED3F5775D64DCA256F2A000EDE6592FBC7C133A6F520CA2572DA007FAB8B)
It was also concerned about the safety of what was proposed, in that boats exiting the proposed facility might be put at risk. This Panel Inquiry report is available on the Department for Planning and Community Development website. Some relevant quotes from the report of the Panel Inquiry are as follows:

- "The overwhelming weight of information received during the Panel is that Option 3 is likely to lead to more inexperienced boat operators putting to seas in unsuitable conditions" (p 47)
- "The Panel finds that while the advantages for safety arising from Option 3 are considerable, they are more than offset by the unacceptable risks introduced by Option 3". (p 148)
- "The environment effects of Options 1, 2 and 3 as exhibited, Options 3a and 3b, and Option LS1 are such that there is no overall societal benefit in progressing these options further and they should be discarded". (at p 4)
- "The Panel finds that Option 3 meets none of the evaluation objectives well, and most poorly. Overall it is unacceptable; having no demonstrated overall societal benefit, and should not be considered further" and "The Panel finds that the Do nothing option meets all of the evaluation objectives well ... Overall it has considerable net community benefit, and is the only acceptable option presented in the EES". (p 151)

g. On 11 June 2009, more than seven months after receipt of the Inquiry report, the Minister for Planning released his 13-page assessment concluding that the proposed boat ramp facility should go ahead.

4. When the announcement was made, the members of SBPC and many others in the community were extremely shocked. We all felt so disillusioned and frustrated that all of our work and efforts that had resulted in such a well-thought-out, comprehensive set of Inquiry recommendations had been essentially ignored by the Minister for Planning in a 13-page cursory response with no further explanation.

5. As a result, Friends of Mallacoota (one of the groups that made up Save Bastion Point Campaign), has filed proceedings in the Supreme Court of Victoria for Judicial Review of the assessment of the Minister for Planning. The members of SBPC believe they have been denied natural justice in the way the Minister for Planning made his decision and that he misunderstood his task under the Act. One could have sympathy for the Minister in saying that the Act is so brief, so non-descript and so inconsequential that not even the Minister understands what it requires!
6. Our main criticisms of the Act and the EES process are as follows:

Regulation of the proponent for projects that require assessment

7. The EGSC did not have the necessary expertise or capacity to manage its role in the EES process effectively. It was poorly organised and under-resourced. This resulted in lengthy delays in the process, several revisions of the EES documentation and multiple adjournments of the hearing at the request of the EGSC. Some amendments to the EES were submitted well after the public exhibition period had closed and only days before the public Inquiry hearings commenced. This led to considerable extra costs and raised issues of procedural fairness to community submitters.

8. The proponent was a self-described ‘reluctant proponent’ for the EES and denied any responsibility for the finished product. It would not commit to management of the proposed facility or provide any indication as to who would pay for the construction and maintenance of the facility. Similar to the Victorian Desalination Project EES, the proponent for the purposes of the EES was not intended to be the body who was intended to eventually construct the facility. This was very unworkable in the practical sense.

RECOMMENDATION 1: The Act should be amended to require the proponent for the EES to be the actual company or body that intends to construct the project.

9. The Panel also had significant criticisms of the EES process conducted by EGSC. It found that it had engaged in ‘design on the run’ (Panel Report p77), and that the process followed by EGSC had engendered a large amount of distrust in the community (Panel Report 146).

RECOMMENDATION 2: The Act should be amended to include clear, not negotiable consultation obligations on proponents. Currently these requirements exist in the Ministerial Guidelines, which are non-binding, not enforceable, and are in practice regularly departed from. They are treated as recommendations, rather than as requirements by both the Minister for Planning and the proponents of projects.
Inequality in the system

10. At the EES inquiry public hearing, community members and groups in opposition to the proposal were significantly disadvantaged compared to a proponent who has a very large budget both for legal representation and expert evidence. SBPC is a not-for-profit community group reliant purely on donations and fundraising, and for this reason has very restricted resources.

RECOMMENDATION 3: That there be an allocation of some public funds to community groups to assist in expert opinion and legal representation in EES panel inquiry hearings.

11. Our experience throughout the process was that manipulation was possible by those who were key advocates of the development. For example the steering committee appointed by the proponent was not representative of community views, did not represent the broader community and was dismissive of a range of legitimate community concerns with the proposal.

12. The Project Manager for the EES appointed by EGSC held a directorship in a company closely associated (through directorship and cross-ownership) with an abalone aquaculture company of a principal lobbyist for the development. This individual was aggressive and dismissive towards community members expressing concerns over the proposed development. The Inquiry Panel expressed the opinion that had the EGSC engaged a neutral consultant to run the community engagement program from the start, it would have led to more acceptable results. (see p75 of the Inquiry report.)

Inadequate communication and community consultation

13. Whereas consultation and communication are important components of the Assessment Guidelines requirements, the proponent failed to adequately implement and adhere to these guidelines. As mentioned above, the Guidelines must be incorporated in to the Act so they have legislation power and are enforceable against proponents who want to 'pick and choose' which of the guidelines they incorporate in to their processes. Community consultation during the preparation of the Bastion Point boat ramp EES was far from satisfactory. Views that were expressed repeatedly throughout the preparation of the EES were for the most part completely ignored. Provision of reliable information by the proponent to the public was also inadequate, which led to confusion and distrust.
14. There was no community consultative group appointed. Instead the proponents appointed a steering committee on which there were 2 community members, both of whom were in favour of the major development - these people did not represent broader community views or identify serious and valid concerns that may have influenced the decision to proceed with the desired outcome. There was a definite perception in the community of bias in the proceedings.

15. The Panel noted in its report at page 77 that by failing to engage with the community effectively, EGSC had missed the opportunity to address significant issues raised by the community. For example, by not considering viable options such as a smaller, less intrusive development, the opportunity to resolve the issue amicably and effectively was missed.

**RECOMMENDATION 4:** That an EES process incorporates truly independent expert peer review. This should include a structured process where the community can submit its concerns in relation to incomplete or unsatisfactory studies, and challenge conclusions.

**RECOMMENDATION 5:** Clear, mandatory steps for consultation should be included in legislation. These should include an obligation by proponents to engage with the community at a very early stage to try to generate a design that would result in widespread community support. This was certainly an opportunity that was available to the EGSC in the boat ramp EES, but not an opportunity that was taken up by them, as it was not required by the legislation.

**Time frames and excessive costs**

16. The EES process for the Bastion Point boat ramp has gone on for almost 10 years. It was in 2000 that the then Minister for Planning announced that an EES would be required, 2004 before the proponents began preparing the EES, and mid 2007 before the EES was placed on public exhibition (after being sent back to the proponents on several occasions before being declared adequate for public exhibition). In August 2007 an independent Panel of Inquiry was appointed by the Minister, but due to requests for adjournments by the proponents, it was not until July 2008 that the Inquiry hearings began. The Panel completed its report in October of that year, but it was not until June 2009 that the Planning Minister released the Panel Report, along with his own Assessment. The proponents are now undertaking the final design phase. There has not yet been an application for Consent under the *Coastal Management Act*. 
17. This is an inordinately lengthy time frame that has been exhausting for the community, and costly in terms of time and money. This has contributed to the escalating costs to rate and tax-payers\(^2\) and to the strong disillusion within the community of the EES process.

**RECOMMENDATION 6:** That the legislation is amended to ensure that adequate resources are available to undertake an EES process before one is commenced, so it can be undertaken in a timely fashion.

**RECOMMENDATION 7:** The EE Act must be amended to remove the discretion that the Minister currently has to limit or lengthen timelines in EES processes. The legislation should contain clear time frames that must be adhered to for each stage of the assessment process. If these are not adhered to by the proponent, the project should be abandoned. Both the community and proponents deserve to have some certainty as to how long each stage of the assessment process will take, and the expected length of the whole process. This would breed greater confidence in the EES process in Victoria.

18. In order to effectively challenge the proponents, the community had to raise in excess of $50000. It has raised a similar amount now in order to challenge the Ministers assessment in the Supreme Court of Victoria. Costs could have been substantially reduced by a fairer representation of the community in the process, and a genuine attempt to incorporate its concerns in the preparation of the EES. In relation to this, see above recommendations 3 and 5.

**Discretion of the Minister and susceptibility to political influence**

19. In our case, as previously stated, the Minister for Planning in his assessment performed a very dramatic turn-around from the conclusions of his own Inquiry Panel in approving the boat ramp.

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\(^2\) In 2008 the then Mayor, Cr. Meredith Urie, stated that Council’s costs for the Panel hearing for expert evidence, preparation and presentation of EES documentation were $462,000 and legal costs were $175,000 a total of $637,000. In 2010 the EGSC is incurring further costs in preparing the design plans. All these costs have been met from local, state or federal funds.
21. We do not understand the political intricacies that could entice the Minister for Planning to act in the manner that he has and approve a development that is so clearly lacking in merit and support. We understand this Committee is not the forum to express our despair at the state of politics in Victoria. But we do want to cite the case of the boat ramp as an example of political objectives having greater weight in decision-making than do environmental outcomes, and ask for changes to the legislation to prevent this from occurring in future.

22. One way to rectify this is through removing or significantly reducing the Minister’s discretion to essentially ignore the community and the findings of his own panel. The current system does not result in binding recommendations to the Minister for Planning but rather a series of recommendations that can easily not be followed by the Minister.

RECOMMENDATION 8: That the legislation is amended so that significant barriers are placed in the path of the Minister for Planning in departing from the recommendations made by his own EES Inquiry panel. If the Minister decides to ignore a recommendation of the Inquiry, he must give written reasons for this decision, these reasons should be made public and be subject to scrutiny. In certain circumstances community members should be able to appeal this decision to a further decision maker.

23. In the instance of the Bastion Point boat ramp, the community feels that the Minister for Planning followed a statutory process to consult, (including appointing a Panel Inquiry and undertaking a long and costly hearing) the whole time having already made his decision that
the project would proceed. He merely ‘went through the motions’ of consultation, enticing
the community to raise and expend significant funds and volunteer hours to participating in
the EES process, the result of which would ultimately be ignored by the Minister and his
Department. The groups participated in these processes in good faith that that contribution
would be worth while and would in some way influence the outcome. The result of the Panel
Inquiry process was reflective of this massive community contribution. But the eventual
Minister’s assessment acts as a total disincentive for these community groups and others
across Victoria to participate in public planning processes in future. Public confidence in these
processes has been significantly undermined. This is contrary to the public interest and must
be rectified.

We thank the Committee for the opportunity to make this submission and advise that a member of
our organisation is happy to appear before it and make oral submissions if this would be of
assistance.

Yours faithfully

Jenny Mason
On behalf of the Save Bastion Point Campaign