ENVIRONMENTAL DEFENDERS OFFICE (SA) INC.
A Community Legal Centre specialising in public interest environmental law

10 February 2011

Via email community.affairs.sen@aph.gov.au

Dear Sir/Madam

Re: Inquiry into Wind Farms

The Environmental Defenders Office (SA) Inc (the EDO) welcomes the opportunity to provide a submission with respect to this Inquiry.

The EDO is a community legal centre specialising in public interest environmental law and has fifteen years experience in litigating environmental matters and participating in environmental law reform processes. EDO functions include legal advice and representation, law reform and policy work and community legal education.

The EDO fully supports the development of renewable energy sources in our community provided the regulatory framework for assessing and monitoring projects such as wind farms sufficiently considers potential environmental impacts. This submission provides an overview of the regulatory framework which currently applies to wind farms in South Australia. Our analysis includes proposals for reform where in our view the regulatory system inadequately addresses potential environmental impacts.

SOUTH AUSTRALIAN PLANNING SYSTEM

DEVELOPMENT ACT 1993

Proposals for wind farms are dealt with through the planning system which is set up under the Development Act 1993. The EDO is concerned to ensure that such proposals are properly scrutinised in this system so as to ensure as far as possible that biodiversity is conserved, native vegetation is not cleared unnecessarily and the effects on those in the vicinity are minimised. Potential issues include impacts on amenity and health due to size, noise and light and degradation, together with possible fragmentation and destruction of wildlife and habitat.

In July 2003 a Ministerial Plan Amendment Report (PAR) was finalised which inserted objectives and principles into local area Development Plans to encourage and guide wind farm development.

The changes provided objectives encouraging the development of renewable energy sources in appropriate locations, and inserted detailed principles of development control within local area Development Plans to assist relevant authorities in the assessment of wind farm applications.

The principles included such matters as ensuring wind farms are sited, designed and operated in a manner that:
(a) does not significantly detract from significant visual and landscape character elements of the area;
(b) utilises elements of the landscape, materials and finishes that minimises visual impact;
(c) minimises the potential for adverse impact on areas of native vegetation, conservation, environmental, geological, tourism or heritage significance;
(d) does not impact on the safety of aircraft and the operation of airfields and designated landing strips; and
(e) minimises the potential for nuisance or hazard to nearby property owners/occupiers, road users and wildlife.

The EDO supports the insertion of these sections and recognises that they are considered in conjunction with other relevant provisions in Development Plans and general planning principles. However given that appropriate siting of wind farms is fundamental to minimising environmental impacts we suggest that consideration be given to the development of further policy on separation distances between residences and wind farm facilities.

As stated, one of the major issues when assessing wind farm proposals is the potential for noise impacts. Section 25 of the Environment Protection Act 1993 sets out a general duty of care for the environment. Various policies and guidelines have been prepared by the Environment Protection Authority (EPA) which indicate the standard of care that is likely to be required to secure compliance with the general environmental duty. These include the Environment Protection (Noise) Policy 2007 (the Noise Policy) which came into operation on 31 March 2008. Part 7 of this policy refers to guidelines to establish noise limits from a number of sources including wind farms. The EPA first prepared Wind Farms Environmental Noise Guidelines in 2003. In 2009 these Guidelines were updated but it is not clear that these latest guidelines have been formally adopted as part of the Noise Policy as yet. However they are of importance as they point to current thinking in this area.

The Guidelines set out noise criteria for new wind farm developments. However both sets of Guidelines state that they are not intended to apply to landowners who have entered into an agreement with a wind farm developer to site a turbine or turbines on their land, with a full understanding of the likely impacts. In relation to residences on land the subject of an agreement, generally the Guidelines will be sufficiently complied with if the noise level does not result in sleep disturbance. If there is a written agreement stating that it will not result in adverse health impacts, then the EPA is unlikely to consider that there is unreasonable interference (paragraph 2.3).

The difficulty here is that landowners may sign such agreements without being properly informed, hence there may be inadequate consideration of noise impacts by the EPA. Landowners may not properly read and understand the agreements nor receive comprehensive advice on their contents.

The EDO suggests that there be a requirement that before signing any agreement landowners must receive full and proper legal advice on its nature and substance.

With staged or cumulative development the Guidelines state that the noise to consider should be based on the original site without wind farms (clauses 2.4 and 2.5) . Therefore the noise generated on site from an existing wind farm should not be taken into consideration when determining noise criteria for later development. However, cumulative impacts can in some cases be significant and in our view should be taken into consideration when new projects are being assessed.

Decisions to approve private wind farms may be appealed through the Environment, Resources and Development Court if they are category 3 developments under the Development Act. Most private proposals for wind farms are likely to be category 3 developments.

Some proposals may however be dealt with under other provisions such as those dealing with major developments and crown developments. Where a wind farm proposal is dealt with under the major development provisions the EPA is not required to comment. Wind farms are not currently listed as a matter of environmental significance and therefore referral to the EPA is not mandatory. However there are provisions concerning the preparation of environmental impact statements and other environmental reports which compel consideration of adverse impacts on the environment. For example section 46B(4)(d) states that *"the EIS must include a statement to meet conditions that should be observed in order to avoid, mitigate or satisfactorily manage and control any potentially adverse effects of the development on the environment".* We suggest that consideration be given to listing wind farms as a matter of environmental significance, thereby making referral to the EPA mandatory.

Section 48E of the Development Act provides that there are no appeal rights with respect to decisions made pursuant to the major development provisions. The EDO has long held the view that this provision should be repealed. Similarly if a proposal is dealt with as a crown development pursuant to section 49 there is no prescribed referral to the Environment Protection Authority and as with major developments there are no appeal rights.

NATIVE VEGETATION ACT 1991

In addition there may be a requirement for a wind farm developer to seek approval to clear native vegetation under the Native Vegetation Act 1991 (the Native Vegetation Act) . However the Native Vegetation Act only covers pre-existing native vegetation. Therefore intentionally planted native vegetation is not covered. In addition exotic plants are not covered. Clearance by wind farm developers of these types of vegetation without the need to seek approval could result in a loss of biodiversity and general amenity.

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

A wind farm proposal may also need to be referred under the Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act) for approval . A Bilateral Agreement signed by both South Australia and the Commonwealth authorises that where a matter is referred under the

EPBC Act the assessment process to be used is that set out in the major development provisions of the Development Act. The EDO is of the view that this has narrowed the scope for opinion. Furthermore there are no appeal rights pursuant to section 48E of the Development Act.

Please contact the writer should you have any queries in relation to this submission.

Yours faithfully

Coordinator/Solicitor

Environmental Defenders Office (SA) Inc