

Chapter 4. Let's build a wind farm in an environmental zone where industry is prohibited.

Where the developer and their consultants endeavour to prove that wind turbines are in keeping with the aims and objectives of an E3 (Environmental Management) zone and other fairytales.

The Department, in rejecting the initial Jupiter EIS, gave as one of its key reasons in the letter of rejection (16/10/15 – unpublished, obtained under GIPA¹):

“Under the *Goulburn Mulwaree Local Environmental Plan* (LEP), the **northern portion of the project is prohibited**. While Clause 89 of the *Environmental Planning and Assessment Act 1979* allows a consent authority to approve a State Significant Development application that is not wholly prohibited, the EIS contains insufficient consideration of:

- the project against the aims, objectives and other provisions of the LEP, or reasons why the project should be approved notwithstanding the prohibitions in the LEP; “ (bolding added)

Departmental senior management did not add that into the rejection letter for effect. They face a formidable challenge to justify the use of clause 89 and were seeking arguments in support. These were not forthcoming.

Mr Marcus Ray, Deputy Secretary Planning Services, reinforced this in his letter of 31/03/16 to a community member on behalf of Secretary McNally:

“Accordingly, in any revised EIS, the Department has asked EPYC to provide further consideration of the project against the aims, objectives and other provisions of the LEP, and further justification about why the project should be allowed to proceed notwithstanding the prohibitions in the LEP.”

No meaningful justification has been offered.

The relevant sections of the Goulburn Mulwaree LEP define the zone thus:

1 Objectives of zone

- To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.
- To provide for a limited range of development that does not have an adverse effect on those values.
- To facilitate the management of water catchment areas, environmentally sensitive land and areas of high conservation value.

2 Permitted without consent

Environmental protection works; Extensive agriculture; Home occupations

3 Permitted with consent

Agriculture; Air strips; Animal boarding or training establishments; Camping grounds; Caravan parks; Cemeteries; Child care centres; Community facilities; Depots; Dwelling houses; Eco-tourist facilities; Emergency services facilities; Entertainment facilities; Environmental facilities; Farm buildings; Forestry; Home-based child care; Home businesses; Home industries; Information and education facilities; Recreation areas; Recreation facilities (indoor); Recreation facilities (outdoor); Research stations; Roads; Rural workers' dwellings; Secondary dwellings; Signage; Stock and sale yards; Tourist and visitor accommodation; Water recycling facilities

4 Prohibited

Industries; Intensive livestock agriculture; Multi dwelling housing; Residential flat buildings; Retail premises; Rural industries; Seniors housing; Service stations; Serviced apartments; Warehouse or distribution centres; **Any other development not specified in item 2 or 3** (bolding added)

¹ Obtained after many months with departmental support against strong opposition from EPYC Pty Ltd and their advisors

The objectives of the zone quite clearly are in conflict with the development of a wind farm and clause 4 prohibits any industries. To make it even clearer, clause 4 closes with: "**Any other development not specified in item 2 or 3**" (bolding added)

That means no wind farms.

So, theoretically the Department could recommend approval of a wind farm partially in the E3 zone, but the Council will not even consider a DA for a corner store.

Let us emphasise. **All 31 turbines in the Goulburn Mulwaree LGA are proposed for the E3 zone.**

Section 89E (Consent for State Significant Development) of the ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 says in part:

“(1) The Minister is to determine a development application in respect of State significant development by:

- (a) granting consent to the application with such modifications of the proposed development or on such conditions as the Minister may determine, or
- (b) refusing consent to the application.

(2) Development consent may not be granted if the development is wholly prohibited by an environmental planning instrument.

(3) Development consent may be granted despite the development being partly prohibited by an environmental planning instrument.” (comments relating to mines omitted)

Clause 2 clearly implies that zoning E3 and a wind farm are incompatible.

Clause 3, uses the strong word “despite”, ie. you may approve after very, very careful consideration.

Did the framers of clause 3 envisage the section of an industrial development in a prohibited zone to cover 1368 hectares with 31 industrial structures extending 55 stories into the sky, many from the highest hills in the Project Area.

Did the framers of clause 3 envisage a development roughly equivalent to the whole Biala wind farm, recently positively assessed by the Department, being built in an E3 zone?

If, given this extreme example of industrial encroachment into environmental zones, the Department fails to reject the application under clause 1, then clause 3 in section 89E is superfluous.

ERM leads off its argument with:

“The Project is permissible as development for the purpose of ‘electricity generating works’ in the RU1 Zone pursuant to GMLEP”

ERM proves that true statements can also be totally misleading.

In a number of places in the EIS, ERM, in relation to Jupiter PA in the Goulburn Mulwaree LGA, says something similar to:

“ that portion located within the Goulburn Mulwaree LGA is zoned ‘RU1 - Primary Production’ and ‘E3 - Environmental Management’ under the Goulburn Mulwaree Local Environment Plan 2009.”

Or:

A portion of the PA that is located within the Goulburn Mulwaree local government area (LGA) contains land zoned E3 -Environmental Management

Or:

Objectives of Goulburn Mulwaree Local Environment Plan 2009 - RU1 Primary Production and E3 Environmental Management Zones

Or:

Under the provisions of the GMLEP, the PA is partially zoned 'RU1 – Primary Production' and partially 'E3 - Environmental Management' (refer *Figure 4.6*).

Or:

Table 6.4 Objectives of Goulburn Mulwaree Local Environment Plan 2009 - RU1 Primary Production and E3 Environmental Management Zones

(table 6.4 then goes on with 2 pages of justification why the wind farm is allowed in the GMLGA RU1 Zone before creeping up to a section on E3)

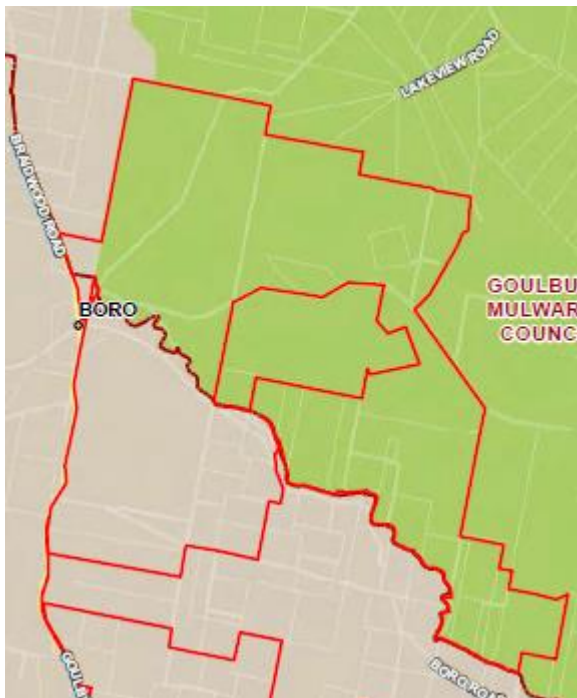
Or:

The Project is permissible within the RU1 zone under the *Goulburn Mulwaree Local Environment Plan 2009* (GMLEP) and is consistent with the objectives of this land zoning under the GMLEP.

These are also examples of true but totally misleading statements.

If you have followed ERM's arguments so far, you would be forgiven for assuming that the portion of the Jupiter wind farm in the Goulburn Mulwaree LGA was primarily in the RU1 zone, given the principal emphasis on RU1 in many areas of the EIS. You would be mistaken.

From a section of the Zoning map ERM provides² you find:



The **only section** of the Project Area in the Goulburn Mulwaree LGA (GMLGA) zoned RU1 **is the tiny grey portion** to the north of Boro. **All 31 turbines and infrastructure are contained within the green E3 section.** The only usage of the RU1 portion is to connect the Northern Access Point to the E3 portion of the DA via a few metres of gravel track.

² Page 4.19. Main section EIS

The portion of the PA in the GMLGA referred to above as RU1 is more likely 1%. I'd expect much more than 1% of the Christmas trifle if I was offered a portion. I'd feel cheated.

So, for ERM to lead off its E3 justification argument with:

“The Project is permissible as development for the purpose of ‘electricity generating works’ in the RU1 Zone pursuant to GMLEP”³

begs the question: Of what relevance is this except in the cause of deception?

The second line in its justification argument states:

“The Project is consistent with the zone objectives which apply to the RU1 Zone pursuant to GMLEP”

This begs the same question: Of what relevance is this except in the cause of deception?

Through another set of claims that stretch credibility we arrive at the main argument. Rather than write reams in response, let me just highlight some words, allowing the reader to make their own judgements as to believability and relevance, interspersed with some comments.

The Project is not permissible within the E3 - Environmental Management Zone under the GMLEP. However, the Project is **considered to be consistent** with the objectives of the E3 zones of the GMLEP as detailed in *Table 6.4*. In particular:

- The **potential** impacts of the Project within this zone are **localised** and **do not diminish** the options regarding land and resource use and nature conservation in the future. While the Project will have a **limited impact on ecological values**, this **can be managed and mitigated** through a biodiversity offset package in perpetuity, **ensuring that ecological values are improved or maintained as a result of the Project**.

- The Project has been **designed to minimise visual impacts** to the extent practicable, including within the E3 zoned parts of the PA. The **visual impacts are considered to be acceptable** and **can be reduced through landscape mitigation measures** as detailed in Chapter 11.

No proposed NSW wind farm ever had greater visual impact. The impact in the E3 zone is particularly severe. The Roseview and parts of the Lakeview subdivisions overlook the E3 zone. Other submissions will demolish the **acceptability** of the visual impact on these properties and the futility of the suggested **mitigation** measures.

- Construction undertaken for the Project will **reduce the existing risk of erosion** and **improve water management** in the area, consistent with the objective of facilitating the management of water catchment areas in the E3 zone.

Please explain to all how carving access tracks across the PA will reduce the existing risk of erosion.

- Furthermore, the total PA which falls within the **E3 zone is minimal** in comparison to the total area of the PA and total area of the E3 zone in the Goulburn Mulwaree LGA. The total area of the E3 zone in the Goulburn Mulwaree LGA is 73,436 ha. The PA occupies a total of 1,368 ha within this zone, or 1.9 % of the total E3 zone area within the Goulburn Mulwaree LGA. The development footprint within this part of the PA in the E3 zone is much smaller again and calculated at 23.4 ha. As such, the **estimated** impact of the development footprint within the Goulburn Mulwaree LGA E3 zone is **almost negligible** as it equates to approximately 0.032% of the total area of the E3 zone in the Goulburn Mulwaree LGA and only 1.71% of the PA area that is located within the Goulburn Mulwaree LGA.

But consider:

The development visiprint covers 1368 hectares.

The development soundprint much larger

See further about the development airprint

³ Page 6.20. EIS Main Section

Section 89E(3) of the EP&A Act, provides that:

“Development consent (for State Significant Developments) may be granted despite the development being partly prohibited by an environmental planning instrument.”

Don't put words within quotation marks that aren't in the quotation.

Accordingly, SSD development consent for the Project, which has been recognised by the SRD SEPP as being of State significance, can still be granted notwithstanding the partial prohibition on that part of the PA zoned E3 - Environmental Management Zone. This **reflects legislative recognition** that the '**broad public interest** in the establishment of viable renewable energy sources' must be balanced against 'geographically narrower concerns' related to potential localised impacts of the Project (Chief Justice Preston of the NSW Land and Environment Court set out in *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59 (12 February 2007)).

Whilst Preston CJ's 10 year old judgement is a fallback for the Department and wind farm developers when all else fails, to use it here is just deceptive.

His Honour's judgement was primarily on the subject of visual impact. There was no mention of E3 in the Taralga case. Did ERM get his Honour's permission to extend his judgement to the justification of a wind farm in an E3 Zone.

It is considered appropriate that the Project be approved as SSD in accordance with s89E(3) of the EP&A Act based on:

- the significant benefits that the project will deliver in providing renewable energy and reducing carbon emissions;
- the overall consistency of the Project with the E3 zone objectives as set out above;
- in relation to the E3 zone, the majority of the potential impacts of the Project are likely to be localised and would not diminish the options regarding land and resource use and nature conservation in the future. While the Project will have a limited impact on ecological values and areas of high conservation value, this can be managed and mitigated through a biodiversity offset package in perpetuity, ensuring a net zero loss of ecological values as a result of the Project;
- visual impacts to residential dwellings surrounding the Project can be reduced through landscape mitigation measures as detailed in *Chapter 11*; and
- the stringent measures proposed to appropriately manage and mitigate impacts as detailed in this EIS.

That summary represents the whole argument put forward by ERM, some irrelevant to the specific issue, mostly unproven claims.

The project is consistent with E3 zone objectives but has impacts on that zone. Inconsistent?

The portion of the PA located within the Goulburn Mulwaree LGA is mapped in its entirety as containing terrestrial biodiversity and is zoned E3 zone under Goulburn Mulwaree LEP 2009. However detailed ecological investigations detailed in *Chapter 9* identify that the ecological values apply to a much more limited area and not across all of the LEP 2009 E3 zoned / mapped terrestrial biodiversity areas. Development footprint impact on glossy black cockatoo habitat is 7.2 ha, being 1.7 % of the total mapped glossy black cockatoo habitat in the area. Further the primary use of the land is for rural / agricultural land use activities.

In summary, there is justification for relying upon s89E(3) for approving an otherwise partly prohibited development because the wind farm is State Significant Development that has significant policy support, is largely consistent with the E3 zone objectives, and identified impacts will be appropriately mitigated and managed.

Let me summarise that: Goulburn Mulwaree environmental planners got it wrong

There is a trendy section in all recent wind farm EISs where they talk about the development footprint which is defined as that part of the PA occupied by roads, the turbine bases, laydown areas and infrastructure, the argument being that all the rest was available for traditional agricultural activities. The Jupiter development footprint is, of course, underestimated.

The first objective of the GMLEP which prohibits wind farms in E3 zones states:

“To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values”

In Table 6.4, in answer to this objective ERM states:

“The ecological assessment identifies that 427 ha of Glossy Black-cockatoo habitat has been mapped in the E3 zone. The development footprint impact in the E3 zone is 8.1 ha, being only 1.9% of the total mapped glossy black cockatoo habitat area within this zone.”

(or is it 7.2 ha as above. I know I’m being picky but ERM and Cloustons gives me so many opportunities; DNV GL, not so much.)

Unfortunately, Glossy Black-Cockatoos do not walk around at ground level. They fly through whirling industrial structures, so the sweep of the blades under all wind conditions must be considered – the development airprint we can call it. Departmental management will laugh it off as another meaningless error. Ask a flock of glossy blacks.

The glossy black habitat in the E3 zone alone should force the removal of all turbines in that zone. Similar habitat within the Jupiter viewshed caused the removal of a number of turbines from the Capital precinct.

Those in the community who will suffer once again are those overlooking the E3 zone. eg. Roseview and Lakeview residents. You can just hear the real estate salesman at the time: “You will be overlooking an E3 zone. That means no industry”

Those who support wind farms on environmental grounds need to be consistent and reject them when environmental issues are paramount. Not to do so would be hypocritical.

There is one word missing from this feeble attempt to justify the building of 31 industrial structures in an E3 zone – precedent.

The lack of precedents quoted in the EIS would indicate there are none.

Attempting to develop a wind farm in an area where over one third of it is prohibited is just one more nail in the Jupiter coffin. Reject the application

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