

29 May 2012

Director, Planning Operations Coordination
NSW Department of Planning & Infrastructure
GPO Box 39
SYDNEY NSW 2001

Dear Director

Amendments to the Standard Instrument 2012 – New Zone E5 and subzones

As a community legal centre specialising in public interest environmental law, EDO NSW welcomes the opportunity for comment on proposed amendments to the Standard Instrument. The Department's two proposed amendments would:

- 1) 'Insert E5 Environmental Protection as a new environmental zone in the Standard Instrument;' and
- 2) 'Remove the prohibition of subzones' in Local Environmental Plans (**LEPs**).¹

These are addressed in turn below.

1) New Standard Instrument Zone – E5 Environmental Protection

EDO NSW strongly supports the proposal for a new environmental protection zone to allow local councils and communities to better protect lands for conservation purposes. We do so with the following recommendations.

The new zone should fit within hierarchy of existing environmental zones

The present numbering of environmental zones in the standard instrument, E1-E4, reflects the relative level of environmental protection provided by those zones. To clarify to councils and the community where the new zone sits in this hierarchy, the Department should consider naming the zone 'E1A' instead of E5. (This is on the understanding that the intended level of protection and environmental sensitivity for the proposed zone 'E5' lies between E1 and E2.) For consistency though we continue to refer to the new zone as E5 below.

Roads should be permitted only with consent

The proposed E5 zone requires roads to be permitted, with or without consent. To reflect the purpose and objectives of the proposed zone, and provide proper

¹ NSW Department of Planning and Infrastructure email notice, 'Draft amendments to the Standard Instrument: Have your say', 16/5/2012.

council and community oversight of roads proposed in E5 areas, we suggest the new zone should only permit roads 'with consent'.²

Interaction of LEPs with State Environmental Planning Policies (SEPPs) should be clarified

We note that LEP provisions can be overridden by SEPPs, so LEPs do not provide the final word on what kind of development is allowed in each zone.³ For example, we note LEP provisions can be overridden by approvals granted for State Significant Development (SSD) and State Significant Infrastructure (SSI).⁴

State significant development is still subject to LEPs to some extent. In brief, where an environmental planning instrument (EPI) (such as an LEP) wholly prohibits the development on the relevant land, consent cannot be granted to that development. Where an EPI only partly prohibits the SSD, consent may be granted.⁵ In addition, if the SSD is wholly or partly prohibited, the project proponent or the Director-General of Planning can propose changes to an LEP in order to permit the development.⁶

The SEPP (*Mining Petroleum Production and Extractive Industries*) 2007 (**Mining SEPP**) also states that it prevails over any other EPI (including LEPs) to the extent of any inconsistency (explored below).⁷

A consequence of various SEPPs overriding the proposed E5 zone is that, without amendments that clarify the zone's operation, lands zoned for 'environmental protection' could still be subject to certain inappropriate development. An example of this relates to mining, as discussed below.

All mining should be prohibited in E5 zones

It is understood that surface mining and petroleum production would not be permissible in E5 zoned land. This is because:

- under the Mining SEPP, surface mining and petroleum production can be carried out only with consent on land for which agricultural and industrial uses are permitted (with or without consent)⁸ but

² The case of *Conservation of North Ocean Shores Inc v Byron Shire Council & Ors 167 LGERA 52; [2009] NSWLEC 69*, in which EDO NSW acted, involved inappropriate road developments proposed through a habitat zone. It demonstrates the importance of council decisions on such matters, public scrutiny of those decisions, and consistency between developments and zone goals. See http://www.edo.org.au/edonsw/site/casework_key_past.php#splendour.

³ For example, an LEP might prohibit residential development in a particular zone, but a SEPP might allow such development if it achieves one of the SEPP's aims. This is because SEPPs tend to deal with matters of State significance and can override local planning controls in order to deliver State significant development or State planning objectives. See EDO Factsheet 2.1.3b, *LEPs and SEPPs – The Standard LEP*, available at http://www.edo.org.au/edonsw/site/factsh/fs02_1_3b.php.

⁴ That is, developments under Parts 4.1 and 5.1 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) respectively. SSD and SSI are defined in the *SEPP (State and Regional Development) 2011*. See EDO factsheet 2.3.1b, at http://www.edo.org.au/edonsw/site/factsh/fs02_1_3b.php.

⁵ EP&A Act, s 89E (2) and (3).

⁶ EPA Act, s 89E(5); EPA Act, Part 3 Division 4B.

⁷ Mining SEPP, cl 5(3): 'Subject to subclause (4), if this Policy is inconsistent with any other environmental planning instrument, whether made before or after this Policy, this Policy prevails to the extent of the inconsistency.' Subcl 4 refer to the Major Projects SEPP 2005, Coastal Wetlands and Littoral Rainforests SEPPs.

- proposed zone E5 prohibits agricultural and industrial uses.

However, with regard to mining and extraction that may be State significant, as noted above, s 89E of the EP&A Act states that wholly prohibited SSD cannot be approved, whereas partially prohibited development can be. Also the proponent or Director-General can propose rezoning to permit SSD where it is otherwise prohibited.

Furthermore, it is understood that underground mining *would* be permissible in E5 zoned land, as currently proposed. This is on the basis that, under the Mining SEPP, underground mining can be 'carried out on any land' with development consent.⁹

We oppose provisions allowing underground mining on land zoned as 'environmental protection'. The Standard Instrument's new zone should explicitly prohibit all mining, petroleum production and extractive industries (including underground mining). We would also support clarification that State significant mining and extraction projects do not override an E5 zoning prohibition. This is recommended on the basis that:

- Underground mining is inherently incompatible with the objectives¹⁰ and purpose of E5 zoning – to 'provide for zoning of land assigned for conservation but outside of national parks and nature reserves'.¹¹ We note that mining is prohibited in national parks, in accordance the *National Parks and Wildlife Act 1974* (NSW).¹² Prohibition in E5 zones will complement this policy.
- The expansion of mining and coal seam gas (**CSG**) industries in NSW must be balanced with appropriate zoning options for local councils and communities to protect high conservation value land. Indeed this is the purpose of the proposed new zone.
- Allowing underground mining in an E5 zone may appear to give councils flexibility to approve mining on a case-by-case basis. However, many such projects would be 'SSD' and councils would not be the consent authority.¹³ This means the Planning Minister or delegate (such as the Planning Assessment Commission) could approve underground mining of land that is declared an environmental protection zone.

⁸ See Department of Planning, LEP Practice Note (2009), *Environmental Protection Zones* (PN09-002), p 8. See also Mining SEPP, cl 7(1): 'Development for any of the following purposes may be carried out only with development consent: ... (b) mining carried out: (i) on land where development for the purposes of agriculture or industry *may be carried out* (with or without development consent), or...'. (emphasis added); cl 7(2)(a) is expressed in similar terms regarding petroleum production.

⁹ See Department of Planning, LEP Practice Note (2009), *Environmental Protection Zones* (PN09-002), p 8. See also Mining SEPP, cl 7(1): 'Development for any of the following purposes may be carried out only with development consent: (a) underground mining carried out on any land'.

¹⁰ 'To protect areas of high ecological, scientific, cultural and aesthetic values.

To prevent development that could destroy, damage or otherwise have an adverse effect on those values.'

See Draft Practice Note, *Zone E5 Environmental Protection*, Attachment 1.

¹¹ Department of Planning & Infrastructure, Policy Statement, *Draft amendments to the Standard Instrument 2012* (May 2012).

¹² Section 41(1): (1) 'It is unlawful to prospect or mine for minerals in a national park or historic site, except as expressly authorised by an Act of Parliament.' ...

¹³ See SEPP (State and Regionally Significant Development) 2011.

- Prohibiting underground mining would promote certainty, and consistency with the policy of not allowing surface mining (see below).

To give effect to a prohibition on underground and other mining in E5 zoned land:

- the E5 zone in the Standard Instrument should *explicitly prohibit* all mining, petroleum production and extractive industries, including underground mining; and importantly
- the Mining SEPP should be amended, and the Standard Instrument should include explicit provisions, to clarify that the Mining SEPP does not override an E5 zoning. For example, the Mining SEPP could list all mining etc in E5 zoned land as *prohibited development* under Schedule 1 (see also SEPP cl 9)
- if there is potential for conflict with Ministerial directions (s 117 EP&A Act),¹⁴ those directions should be amended, or zoning provisions clarified, to allow E5 zoning to prevail – due to the land’s ecological, cultural or scientific values.

Protecting E5 zoned land from all mining, petroleum production and extractive industries is appropriate, and is strongly supported. This should include underground mining. To avoid doubt, as suggested, all types of mining should be expressly and wholly prohibited in the new environmental protection zone.

As noted above, the ongoing expansion of mining and CSG industries in NSW must be balanced with appropriate zoning options for local councils and communities to protect high conservation value land, and its ecological, cultural and scientific values.

Guidance and review of local additional objectives, uses and zoning operation is needed

To ensure that any local objectives for E5 zoned land are ‘consistent with the core objectives’,¹⁵ and that any additional uses are suitable for the new zoning category, the Department should provide local councils with further guidance on these matters.

The Department should also require a review of the operation of the new E5 zoning after a certain period (such as 12 months to 3 years, based on the zone’s anticipated use).

¹⁴ Eg, Direction 1.3 – *Mining, petroleum and extractive industries*, which requires consultation with/approval from Department of Primary Industries where a planning proposal affects potential development of state significant resources, and justification from council of any proposed inconsistency.

¹⁵ See Standard Instrument 2006, Land Use Table, Direction 1.

2) Introduction of Subzones

There is very limited information provided on the second proposal, to allow subzones in the Standard Instrument. It is understood that this proposal is intended to make the Standard Instrument more flexible.¹⁶ However, this may also dilute the effectiveness of existing zoning provisions, including prohibitions in existing zones. We do not support this proposal on the basis of the limited information provided.

It is not clear, for example, whether any protections are proposed to limit the scope or intent of available subzones, to ensure they are sensitively applied. The reasons for allowing subzones, as distinct from increased use of local environmental provisions (overlays) or split zoning, could also be articulated.¹⁷ For example, the Department's previous practice notes identify several benefits of local environmental provisions which avoid creating subzones.¹⁸

For further information, please contact Nari Sahukar, Policy Solicitor, EDONSW on (02) 9262 6989 or nari.sahukar@edonsw.org.au.

Yours sincerely,
EDO NSW

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¹⁶ '...councils were concerned that prohibition of subzones limited their ability to address local issues.' Department of Planning & Infrastructure, Policy Statement, *Draft amendments to the Standard Instrument 2012* (May 2012).

¹⁷ On split zoning see, eg, Department of Planning Practice Note (March 2011), *Preparing LEPs using the Standard Instrument: standard zones*, 'Lots with more than one zone'; and LEP Practice Note on *Environmental Protection Zones* (2009), 'Split Zone considerations'.

¹⁸ See, eg, Department of Planning, LEP Practice Note on *Environmental Protection Zones* (April 2009, p 2/10): *The benefits of this approach [use of local environmental provisions] include: The intended conservation or management outcomes for land can be clearly articulated in the LEP; Areas are clearly defined and controls streamlined; Sub-zones are not created. (These are not permitted under the standard instrument).*