Submission on the review of the Native Vegetation Regulation

prepared by

EDO NSW
24th August 2012

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Executive Summary

EDO NSW welcomes the opportunity to provide comment on the review of the Native Vegetation regulatory scheme. We have been involved in the development of the native vegetation legislation, regulation and assessment methodology since 2003.[1]

This submission has been prepared with input from the EDO NSW science team and ecologists on the expert scientific register. This submission is also informed by our participation in two OEH field trips to Lake Macquarie and Forbes, a Sydney OEH workshop, and meeting with OEH. We appreciate the opportunity to be involved in this level of detailed consultation on technical issues.

Native vegetation provides a range of valuable ecosystem services relating to soil, water, salinity and biodiversity, and is an essential element of a healthy productive landscape. EDO NSW supports an efficient system that encourages landholders to manage their native vegetation to improve and maintain environmental outcomes. We support efforts to work cooperatively with landholders to get PVPs in place in a more timely manner. We also support proposals to improve information delivery and education for landholders.

The proposed amendments to the regulation and assessment methodology have some potential environmental benefits. For example, the changes may result in improved assessment of acidic soils, clarification of the exclusion of clearing in core riparian areas, a move to better salinity data and a requirement for salinity risks to be assessed in coastal areas as well as inland areas.

However, the proposed changes give cause for concern in relation to maintaining other environmental standards. **EDO NSW cannot support any changes that undermine the integrity of the 'maintain or improve' environmental outcomes test.**

The key changes to the *regulation* are focussed on expanding the categories of clearing where a formal approval is not required – i.e., clearing that can be done under a routine agricultural management activity (RAMA). The changes envisage that a greatly increased range of clearing activities will be done under RAMAs. We are concerned that it will be difficult to know how much clearing will be done under the new RAMAs. It will be impossible to know whether the new Codes of Practice are

[1] Previous submissions on native vegetation are available at: http://www.edo.org.au/edonsw/site/policy_submissions.php#3. For example, see: **Submission on the Environmental Outcomes Assessment Methodology under the Native Vegetation Act 2003**, 4 February 2011; **Draft Ecological Harvesting Plan Guideline for Endangered Ecological Communities** 16 August 2010; **ANEDO Submission on Australia's Native Vegetation Framework - Consultation Draft** 31 March 2010; **Review of the Native Vegetation Act 2003** 02 October 2009; **Submission on the review of the Environmental Outcomes Assessment Methodology** 29 April 2009; **Submission on the Draft Native Vegetation Regulation 2004 and the Environmental Outcomes Assessment Methodology** January 2005; **Productivity Commission Draft Report into the impacts of native vegetation and biodiversity regulations** January 2004**; and Productivity Commission Inquiry into Impacts on Native Vegetation** July 2003

being complied with, for example in relation to clearing of invasive native species, thinning and for environmental works. In addition, there is no provision for assessing cumulative impacts of clearing under RAMAs and/or clearing under new fast-track clearing rules. Therefore, under the proposed changes, it will be difficult to determine whether the Act is maintaining or improving environmental outcomes as legally required.

The changes to the environmental outcomes assessment methodology (EOAM) are focussed on reducing assessment requirements in order to (1) speed up assessment times, and (2) to align the methodology with other tools such as for biobanking. In relation to the first issue, the proposed assessment short-cuts and fast-track options are potentially a retrograde step in native vegetation management. The NV Act was introduced in 2003 to address serious problems associated with the previous *Native Vegetation Conservation Act 1997* and SEPP 46 – particularly in terms of exemptions that were allowed for clearing of 2 ha and 7 trees per year. The proposed changes that are intended to facilitate clearing of small clumps and scattered paddock trees signal a return to a weakened system that permits incremental loss of native vegetation. In relation to the second issue, proposed changes to potentially allow trading of biobanking credits, and change the definition of "low condition" vegetation to facilitate more clearing and more offsetting, weaken the EOAM. A foundational strength of the EOAM has been the mechanism in the tool to identify 'red light' vegetation that cannot be cleared. This is fundamental to the ecological integrity of the scheme and this integrity will be severely eroded if the tool is brought into line with proposed changes to biobanking tool – for example, allowing offset trading between vegetation formations. We also have concerns about mechanisms for amending the methodology.

EDO NSW submits that this review presents an opportunity to establish a best practice standard for assessment methodologies, and is not an opportunity to weaken current standards.

We also have serious concerns about implementation of the proposed changes. There are a range of data and resourcing issues that need to be addressed to justify any changes. These include further information on:

- Compliance and enforcement in relation to new codes of practice and RAMAs
- Data showing that proposed changes to the EOAM do not result in a weakening of environmental standards as stated by OEH.
- What extra resources will be provided to CMAs to improve administration of the Act and regulation.

Our comments relating to **private native forestry** are in a separate submission.

Summary of key recommendations

1. Retain the ban on broadscale clearing unless it maintains or improves environmental values in the *Native Vegetation Act 2003*.
2. Appropriately limit the use of RAMAs and balance any expansion of RAMAs with a practical record-keeping requirements.
3. Put in place processes for monitoring and data collection in relation to the proposed changes in order to assess whether activities continue to meet objectives of the NV Act, and cumulative impacts are assessed.
4. Establish a best practice standard for biodiversity assessment by maintaining core protections provided by the EOAM, and by bringing the biobanking assessment methodology up to meet the higher standard.
5. Ensure the EOAM protects the most valuable remnant and threatened vegetation.
6. Ensure any offsets are ecologically rigorous and justifiable.
7. Ensure that there is public consultation and requirements for expert scientific input into any changes of the Regulation, EOAM or Codes of Practice.
8. Provide CMAs with additional resources and training to increase capacity to make PVPs in a more timely manner.
9. Provide CMAs with additional resources and staff with expertise in communications.
10. Have a clearer separation of roles with OEH/EPA undertaking compliance activities and CMAS focussing on extension, incentives and cooperative work with farmers.

We also make a **number of technical recommendations** in relation to specific clauses of the regulation and proposed sections of the EOAM in the body of this submission.

This submission addresses the following:

Part 1 – The purpose of the Native Vegetation Act 2003
Part 2 – Proposed changes to the Native Vegetation Regulation 2005
Part 3 – Proposed changes to the Environmental Outcomes Assessment Methodology (EOAM)
Part 4 – Compliance and Enforcement

Part 1 - The purpose of the Native Vegetation Act 2003

It is noted on the OEH website that: "The review is not examining the *Native Vegetation Act 2003*. Issues raised during the review about the Act will be collated and presented to the government for further consideration." EDO NSW strongly submits that the Act should not be opened up for debate. The "ban on broadscale clearing unless it maintains or improves environmental outcomes" must remain in legislation. In this context, any private member's bills aimed at repealing the NV Act must not be supported.

It is essential that the ban on broadscale land clearing in the Act is supported by the Regulation and the EOAM. While the Act itself is not being amended, many of the proposed changes have the potential to undermine the objectives of the Act.

The NV Act was introduced in 2003 to address serious problems associated with the previous NVC Act and SEPP 46, particularly in terms of the exemptions that were allowed for clearing of 2 ha and 7 trees per year. We are concerned that the latest proposed changes - such as the proposed measures to increase the use of RAMAs and facilitate the clearing of small clumps and paddock trees - signal a return to a weakened system that permits incremental loss of native vegetation. The fact that the data shows that small patches on the coast and paddock trees further west require approval[2] is what differentiates the current scheme from previous schemes that failed to protect native vegetation.[3]

We therefore recommend that a strong legislative ban on broadscale clearing is continued, and that any changes to the regulation or methodology must be justified ecologically, rather than in terms of administrative streamlining. Any weakening of environmental outcomes in the regulation or EOAM cannot be supported as it would be inconsistent with the objective of the Act.

[2] In the OEH Sydney workshop, data was presented indicating that a high number of applications related to areas of less than 2ha or to single paddock trees. For example, it was indicated that 42% of applications in Central CMAs and 67% of applications in Coastal CMAs were for areas less than 2ha; and in the Lachlan and Murray CMAs the most prevalent type of PVP was for paddock trees. EOAM Review. PADACS Data Analysis, OEH workshop, 31st July 2012.

[3] See: *Performance audit: regulating the clearing of native vegetation* . The Audit Office of New South Wales, 2002 for a summary of the failures of the previous regime.

Part 2 – Proposed changes to the Native Vegetation Regulation 2012

Key changes to the *Native Vegetation Regulation 2003* are principally focussed on expanding the scope of clearing that can be done without requiring formal approval, i.e., clearing under routine agricultural management activities (RAMAs). Key changes are discussed below.

Definition of landholding

The proposed definition refers to a contiguous area of land in the same ownership. From an environmental management point of view this may benefit from an expansion to 'ownership or management', which could encompass for example, family farming enterprises where different family members own different parcels of contiguous land.

Routine Agricultural Management Activities

It is noted in the Regulatory Impact Statement (RIS) that "*it is very difficult to determine the number of times that clearing is undertaken under a RAMA. The Native Vegetation Report card does not report on activities exempted or excluded from the Act*" (p11). Notwithstanding this problem, the proposed changes envisage a significant expansion in the use of RAMAs.

We submit that the trade-off for greatly expanding RAMAs must be a requirement for basic record keeping and data collection of clearing under RAMAs. This is discussed further below.

Rural infrastructure

Clause 24 inserts a new meaning of rural infrastructure. EDO NSW recommends that OEH should provide further guidance to landholders on whether this definition covers change in land use. Further clarification may also needed as to whether this definition applies where landholders may have a fenced block of bushland, not currently used for agricultural purposes, that is not otherwise covered by the proposed cl 28.

We support the reference to clearing to the "minimum extent necessary" under RAMAs being included in the regulation (cl 25) as well as the Act. As part of the broader monitoring program that needs to be put in place in relation to the use of RAMAs (discussed below), there should be data sought on whether RAMAs are currently being done to the minimum extent necessary or simply cleared up to the maximum distance.

We note that there is a slight rewording of infrastructure buffer distances (cl 26). The buffer distances set for the Western Division (cl 26 (1)) and the Central Region (cl 26(2)) are unlimited lists. In contrast, a limited list is set out for buffer distances in the Coastal Region (cl 26 (3)). However, for small holdings the list is again unlimited (cl 26(4)). This is inappropriate as there should be more explicit controls on small

holdings as the impact of RAMAs could be more significant on a smaller area.[4] Consequently EDO NSW recommends that the list of buffer distances for small holdings in clause 26(4) should be a limited list, similar to the limited list for coastal holdings.

Obtaining construction timber

The proposed changes remove the requirement to use construction timber obtained under a RAMA within 18 months and to undertake restoration (cl 27). According to OEH, the rationale for the changes was that the requirement was a) confusing and b) difficult to enforce. In relation to the former, EDO NSW submits that an 18 month limit on use is a clear rule and should remain. Removing this requirement could lead to stockpiling. In relation to the latter problem, the need for improved record-keeping, compliance and enforcement is discussed further below. Removing all requirements is against the intent of the original provisions, for example in terms of stockpiling for future sale.

Non-rural and public infrastructure

The new RAMA for any permanent boundary fence (cl 28) is not opposed. Regarding the new RAMA for construction of a shed (cl 29), EDO NSW supports the limitation of this RAMA to a single shed, and not multiple sheds. The telecommunications RAMA that is extended to apply to all land (cl 32) should have the same threatened species provisions as per crown land management infrastructure (cl 30(2)(a) and (b).

RAMA Codes of practice

A new group of RAMAs is proposed that allows clearing without approval if the clearing is done in accordance with a code of practice (new Division 3). These new Code-based RAMAs are intended to give landholders more flexibility by not requiring approval for activities deemed to be low impact or low risk in relation to:

- Clearing of feral native plant species (cl 33)
- Clearing of invasive plant species (cl 34)
- Clearing for environmental works (cl 35)
- Thinning of native vegetation (cl 36)

It is intended that the Codes will be made by publicly exhibited Ministerial orders (cl 37). It has been indicated by OEH that the Codes may either be state-wide or developed by individual CMAs.

These proposed changes carry a significant risk. Unless there is scrutiny of the environmental standards in every Code and monitoring of whether Codes are actually being complied with, environmental outcomes are at risk. There is a danger of divergent standards in neighbouring CMA Codes. It is also of concern that Codes (by way of Orders) can be changed relatively easily and with no consultation if the subjective opinion of the Minister is that a change is minor.

[4] We also note that small holding is defined as less than 10ha, and this is smaller than what most LGAs would consider minimum size for rural-residential.

EDO NSW recommends that landholders be required to keep a basic record of what activity they did, on what date, and a short summary of how this activity met the requirements of the Code. Landholders could be assisted in doing this task by being provided with 1 page pro-forma forms that they could fill out. It is in the interests of landholders to keep such records, for example to demonstrate compliance in response to any inquiries from OEH/EPA.

Extension of other RAMAs

RAMAs have also been extended in relation to clearing for:

- Dual occupancy or secondary 'dwellings' (cl 42)
- conservation purposes (cl 43)
- scientific licences (cl 44)
- pest animals (cl 45)
- planted native vegetation (cl 46)

These changes are largely to address the current administrative implications of having dual consents required under other environmental legislation and are supported where other legislation already provides appropriate assessment.

However, in relation to planted native vegetation (cl 46) – a timeframe should be applied – or requirements to prove when vegetation was planted. For example, this RAMA should only apply to vegetation younger than a certain age (e.g. 50 years or without hollows). The stated driver for this proposed RAMA, i.e. to avoid perverse outcomes such as the planting of exotic species for wind-breaks to avoid application of the NV Act, is reasonable. A requirement to record the purpose of planting would therefore also be appropriate to avoid perverse outcomes (for example, if vegetation was planted for erosion control it would make no sense to clear that vegetation). Planting of native species should be encouraged. We recommend that OEH should develop a list of activities for which planted native trees could later be removed (for example, wind breaks) to provide clarity and certainty for landholders. Further information should also be provided to landholders on how this relates to definitions of remnant and regrowth.

Special provisions for vulnerable land

The new RAMAs have been listed in relation to limitations on RAMAs on protected riparian land (cl 51(g)-(m)). EDO NSW does not support the increased use of further RAMAs on protected riparian land.

Procedure for amending EOAM - Role of the NRC

The proposed regulation replaces the requirement to consult with the Natural Resources Commission (NRC) on changes to the assessment methodology with a broad public consultation requirement (cl 17). While this may avoid the situation where the NRC is legally required to examine very minor changes and can therefore focus on more material changes, it is of concern that their expert advice is somewhat devalued under the changes. We strongly support a transparent public consultation

process for any changes, but also support an ongoing legislative role for the NRC whereby their expert advice must be taken into account.

The current regulation includes a special provision for minor variations (cl 27). As submitted previously, the process for making minor variations to the EOAM should be set out in regulation and not included in the tool itself where the process is less transparent and more easily changed. This is discussed further below.

Clearing for conservation purposes

Clause 19 expands the current special provisions for long term environmental benefits (cl 28), and provides for a new exemption for broadscale clearing for "conservation purposes". The term "conservation purposes" is not defined in the regulation and it was indicated by OEH that CMAs may need to develop policies to define conservation works. EDO NSW recommends that a clear and consistent list of activities should be developed to more clearly define what is contemplated under this exemption. There are divergent views on what constitutes "conservation agriculture", and this provision should only apply to a clear list of verified conservation practices that benefit the range of environmental values. Clarification should also be provided to landholders on how this links with "environmental works" RAMA.

PNF changes

The amendments to PNF include: extension of PNF to certain Crown land where timber rights no longer exist (cl 3); amendments to activities on PNF PVP land (Division 4); and changes to process for amending PNF code of practice (cl 23). These are discussed in our separate submission on PNF.

Natural Resource Management Plans

The Draft Regulation includes a new mechanism for the Minister to make natural resource management plans for protected regrowth (instead of using interim protection orders), and removes the requirement to register a PVP on title (cl 53). The rationale for this change is to make the system administratively easier.

While this may be administratively simpler and set a more consistent standard for protection extending beyond the 15 year term of individual PVP, it potentially reduces the security of the protection. While there could be some benefits from this clause for protected vegetation after fire or the expiration of a 15 year PVP, by removing property level management record requirements and putting them in a regional plan, it increases the likelihood that a landowner will not be aware of their individual responsibilities. There will be less certainty for new landholders because the information will not be linked to land title. There will be no way of them knowing when for example, previous RAMAs were done. Natural resource management plans can also be changed by the Minister, which may reduce certainty and cause confusion for successive owners at the property level.

These issues could be addressed by continuing a requirement of recording information on title, and also by requiring record keeping in relation to a range of planting and clearing activities.

Land use zones excluded from the Act

There has been some clarification of land use zones that are excluded from the Act (schedule 2). These zones will need to be revisited in light of current planning reforms, which includes new zones.[5]

General recommendations

In addition to the specific recommendations noted above in relation to specific clauses of the regulation, we recommend the insertion of a new clause that sets out record-keeping requirements for landholders in relation to a range of clearing activities.

We also recommend that OEH puts in place a process to monitor and assess how the new RAMAs are used in practice. It is essential that data be collected on Code-compliance. In the absence of data it will be impossible to determine whether a) the Act is being complied with, b) the cumulative impacts of clearing under RAMAs and c) the changes are "maintaining or improving environmental outcomes" as legally required.

[5] For example, see new "enterprise zones": *A New Planning System for NSW Green Paper*, NSW Government, July 2012.

Part 3 – Proposed changes to the Environmental Outcomes Assessment Methodology

We note that the revised version of the methodology is in a clearer, more comprehensible format. We strongly support the EOAM being published in a version that is more readily understood by landholders and encourage the development of further explanatory materials.

The purported aims of the changes to the EOAM are 1) to simplify, streamline and reduce assessment requirements where possible and 2) to make methodologies more consistent between native vegetation and biobanking.

Streamlining assessment

EDO NSW supports an efficient application of the methodology to support the timely development of PVPs. At the introduction of the regulation in 2005, it was never intended that PVPs would take an unduly long time to prepare. However, the methodology itself is not the sole contributor to the current variability in assessment time. Proper resourcing and adequate staff training and staff numbers are essential for improving CMA administration of the Act.

Generally speaking, the changes that are intended to improve efficiency involve: relaxing of monitoring criteria and reporting processes, a significant shift from protecting remnant vegetation to allowing revegetation, and providing fast-track assessment pathways. EDO NSW is concerned that first, the evidence base to justify these specific changes is unclear (for example, feedback from CMAs during the consultation does not indicate that there is any backlog of PVPs awaiting action); and second, evidence has not been presented to guarantee that the same level of environmental protection will be maintained.

Consistency of methodologies

The current review of the NV Act and the concurrent review of the biobanking scheme provide an opportunity for revising both assessment methodologies. There is an opportunity to put in place a best practice robust methodology to objectively assess whether actions maintain or improve environmental outcomes. Unfortunately, the proposed reforms represent a lowest common denominator approach whereby the controls in the NV tool are being weakened to match biobanking standards, instead of biobanking standards being improved to meet the native vegetation scheme standard. For example, the proposed EOAM removes true 'red lights' for anything more than 90% cleared and not in low condition and replaces it with biobanking 'red flags' for High Biodiversity Value areas which allows an accredited expert forms a view of whether there areas can be cleared.

EDO NSW has made a detailed submission relating to the weaknesses of the proposed biobanking assessment methodology.[6] If the proposed changes are made, and the native vegetation methodology is weakened to bring it in line with the

[6] See **Submission the Review of the NSW Biodiversity Banking and Offsets Scheme** 9 July 2012, available at: http://www.edo.org.au/edonsw/site/policy_submissions.php#2.

biobanking assessment methodology, then the EOAM will no longer be consistent with the objective of the NV Act to "ban broadscale clearing unless it maintains or improves biodiversity values."

Our comments in relation to the revised methodology are set out below.

Chapter 2 – Assessment of broadscale clearing proposals

Offset principles (2.7)

EDO NSW supports inclusion of a list of offset principles. However, we submit that the proposed list of principles should be amended to clarify that offsets must be directly linked to impacts in relation to species cleared, and it should be made clear to landholders that offsets are to be managed in perpetuity. We note that the proposed principles differ from the proposed Commonwealth offset standard currently being developed under the EPBC Act.[7] The state based standards may need to be revised in the near future to meet the federal standard.[8]

Minor variation and more appropriate local data (2.8)

The minor variation process should be set out in the regulation, not the EOAM. Inclusion in the tool means that it is more easily changed and not subject to the same level of scrutiny. Also, as previously submitted, in order to ensure the ecological integrity of the scheme for maintaining and improving environmental values, there must be a clear list of situations where minor variations are not permitted. For example, EDO NSW strongly opposes the application of the minor variations mechanism to species that cannot withstand further loss (2.8.5).

These variation processes are currently applied where clearing would be refused by the normal assessment. EDO NSW submits that the use of more appropriate local data would also be appropriate where new threatened species (for example) have been identified by local communities or local government and reported to CMAs, regardless of whether these records had been incorporated into the formal data sets.

Where a minor variation is used for areas that would fall under the streamlined assessment process there are relaxed assessment and reporting requirements (2.8.4). Given that this involves the standards being lowered on two fronts, this is completely unacceptable. It is essential that monitoring and reporting requirements are maintained or there will be no way of assessing whether the changes are actually maintaining or improving environmental values.

Accredited assessors and accredited experts (2.9)

EDO NSW supports robust accreditation processes for personnel using the EOAM. However, the corollary of this is that CMAs must be given the additional resources

[7] EDO NSW has been involved in expert workshops convened by SEWPaC on the proposed Commonwealth offset standard, see: *ANEDO submission on the Draft EPBC Act Environmental Offsets Policy* 21 Oct 2011.

[8] For example, revision may be required in light of current COAG reforms to environmental laws and standards – see: COAG Communique April 13 2012.

needed to properly train a sufficient number of staff to do on-ground applications in a timely manner.

Databases (2.10)

We strongly support the proposal to have the databases containing environmental information published on the OEH website.

Chapter 3 – Invasive native species assessment

The management of INS under the current scheme has permitted the clearing of a significant amount of woody vegetation in NSW. This is supported by the map of PVPs provided by OEH, which shows 3.3m ha of INS clearing out of a total of 4.2m ha under PVP (including 714,000ha under incentive PVPs). The mean annual loss of woody native vegetation in NSW from 2006-2010 was 87,740ha.[9] Comparison of the five years before the implementation of the NV Act (2000-2004) with the five years post the implementation of the NV Act (2006-2010) shows there has been a 20% increase in the total loss of total native woody vegetation in NSW AND a 5% drop in the total amount of native vegetation cleared for the first time.[10]

We note that the INS management provisions are not significantly different in the revised version of the EOAM, and continue to allow significant clearing. As the current scheme already allows clearing, it is unclearing why there needs to be further fast-tracking.

As discussed above, it is proposed that certain INS activities can be done as a RAMA in accordance with a code of practice. We have concerns about consistency of standards in different CMA codes, amendment of codes, and enforcement of codes. The RAMA option assumes CMAs will do “extension” around INS rather than implementing PVPs. The current problem of estimating clearing done under RAMAs will be exacerbated and could include extremely large areas if INS becomes a largely unmonitored RAMA.

We support the inclusion of an assessment process flow chart to assist landholders in understanding the process.

Chapter 4 - Thinning to benchmark stem densities

Thinning PVPs currently account for 32 PVPs covering 3,000ha.

The discussion paper expands on the proposal to include a new RAMA for thinning vegetation (draft Clause 36). As noted, we have concerns about the consistency, application and enforcement of codes.

We recognise that some thinning in previously impacted landscapes may have some value, if it is done in a mosaic to assist regeneration or restoration. However,

[9] Analysis of the Land clearing rates from the Commonwealth Department of Climate Change and Energy Efficiency by Dr Phil Gibbons. See: National Greenhouse Gas Inventory - Kyoto Protocol Accounting Framework: http://ageis.climatechange.gov.au/QueryAppendixTable.aspx.
[10] Ibid.

thinning should be used cautiously and should not be allowed in small areas. The current proposal is to not allow thinning in areas below 1ha but we submit that this area is too small.

Overall the process described could support environmental outcomes, however it requires significant assessment skills by landholders, and we note the following concerns:

- The area that may be thinned can be up to 80% of the total area of thickened vegetation. Undertaking this amount of thinning would significant change the habitat available for small birds for example. A smaller proportion of the total area allowed to be thinned on a single occasion would be more appropriate.
- There is nothing to suggest that thinning cannot be done in EECs. Thinning in these areas should require additional consideration and only be done in limited circumstances where it can be clearly demonstrated that the thinning is necessary to improve the condition of the EEC.
- 4.3.6 allows for shortfall of stem classes to be made up from adjacent classes or areas. Where there is such a short fall, thickening is unlikely to be a problem and therefore thinning should not be allowed.
- The EOAM discusses that thinning will only maintain or improve environmental outcomes if there is no clearing of stems >30cm, however section 4.3.9 allows for additional clearing of stems <30cm where there is 'an excess' number of stems in the >30cm class. Allowing such clearing seems inconsistent with the view that thinning will only maintain or improve environmental outcomes if there is no clearing of stems >30cm

Our specific comments on the draft Code of Practice are:

- In relation to our concerns about consistency, Steps 4 and 5 seem to contemplate that thinning would be allowed for trees with DBHOB above 20cm which is inappropriate and inconsistent with the rules stated in the text. We note that the revised EOAM chapter on thinning discusses the 'maintain or improve' test being met if no trees greater than 30cm are cleared. However, the Namoi Code of Practice refers to a 20cm threshold.
- We support the need for keeping diary records, as part of our broader recommendation about record keeping and reporting RAMA use.
- The Appendices provide the details on what can be thinned. The details proposed for each Code would need to be reviewed individually.
- The Appendices refer to vegetation communities rather than species. This significantly increases the risk of misidentification, does not support the statement that the policy should only be applied to trees, and does not adequately consider species requirements of the different communities.

Chapter 5 – Pasture cropping systems

We note that the 90% threshold for native species richness from the current clause 28 has been reduced under some conditions. Any threshold is of concern if the methodology does not properly consider the quality of the site survey process (including seasonality, best time spring or early summer), resilience, land use immediately prior to survey, and assessment technique. A decision on whether to

allow pasture cropping should be based on whether pasture cropping will maintain or improve environmental outcomes, on that site.

In terms of whether species richness or the definition of poor condition should be used, given the methodology is greatly increasing the number of areas that will be included in 'poor condition,' moving away from species richness is likely to generate a poorer environmental outcome.

EDO NSW supports the inclusion of a standard buffer from any water body. The note refers to 50m but the actual EOAM refers to 30m. We submit that 50m would provide greater protection for riverbanks.

The chapter asks whether there should be restrictions on the application of fertiliser. We would strongly support such restrictions as application of fertilisers is known to favour introduced species over native grasses and would therefore undermine the 'maintain or improve' requirement.

The *Managing native grasslands – Discussion paper* was developed because "in some cases, the details of the NV Regulation do not support landholders automatically proceeding with existing rotational farming as they establish a requirement for approval… This is not the intent of the NV Act"[11]. We recognise that there can be long term environmental benefits for previously degraded native grasslands managed under certain rotational cropping/grazing practices however this will need to be determined on a site by site basis.

In relation to grasslands, the discussion paper provides 3 options on how to address this situation. The options do not appear to be mutually exclusive and appear to go further than responding to the stated problem.

Option 1 - "Better assessment of grasslands with low conservation value for continuing agricultural use" has two sub-options: A) creating a new RAMA to allow clearing of low-condition native grasslands; or B) requiring a simple Property Vegetation Plan. EDO NSW strongly supports the requirement for a simple PVP as it ensures that an assessment of condition and whether the action could legitimately be considered 'continuing use' and an assessment of the grassland is done by an accredited assessor, and means that there is a record of any clearing undertaken.

Option 2 - "Improved assessment of proposals to clear native grasslands". This option relates to changes proposed in the EOAM as discussed above.

Option 3 - "More flexibility in managing weeds in native grasslands". This is designed to be addressed by the proposed environmental works RAMA and seems reasonable.

[11] OEH (2012) Review of the Native vegetation regulation: managing native grasslands discussion paper, pg 4

Chapter 6 – Streamlined assessment of low risk categories of native vegetation clearing

EDO NSW has serious concerns about the ecological integrity of the new processes proposed in Chapter 6. The policy driver is purported to be the aim to decrease regulatory requirements for low risk clearing. However, the proposed changes confuse "low risk" with "low environmental value". As noted at the beginning of this submission, the NV Act was introduced to prevent the incremental clearing of single trees and 2ha clumps that occurred under the previous regime. While we support simplifying administrative and regulatory requirements where possible, we cannot support a retrograde step in terms of environmental outcomes.

Our general concerns on assessing impacts and offsets include:[12]

- The chapter fails to consider cumulative impact of small areas of clearing either on the same property or within the region.
- Table 6.2 introduces minimum requirements for offsets and revegetation. This is a significant change from previous requirements. Of particular concern is that in overcleared landscapes (>70-100% cleared) 50% of the offset must be revegetation. In an overcleared landscape revegetation is valuable but only if existing vegetation is protected. A more appropriate way to deal with this might be to set the minimum offset and then require revegetation. The problems with the move to revegetation are further exacerbated by the proposal to allow revegetation to be undertaken within existing vegetation where that vegetation is below 75% of benchmark. This table is also referred to for small clumps and very small areas.
- The proposal also includes % cleared requirements – i.e. at least 50% must be in an equal or greater % cleared than the vegetation to be cleared or where there is less than 70% cleared offsets may be in vegetation types up to 10% less cleared. This promotes ongoing decline of the most cleared vegetation types in favour of more common ones.
- 6.2.10 provides principles for deciding the best configuration of offsets. The principles are sound, however the first principle (revegetation amongst existing vegetation) is of concern in the context of this reducing the total vegetated area and by failing to provide a link to the principle of regeneration being more appropriate than revegetation.
- The loss of hollows is a key threatening process (KTP) under the *Threatened Species Conservation Act* 1995 and paddock trees almost inevitably have hollows of some kind.
- Given that OEH is essentially trialling a new process that has not been demonstrated to maintain current environmental standards, there should be a trigger for review if perverse outcomes are being observed. Monitoring and reporting is essential to determine the environmental effect of these changes.

[12] See also our previous comments on this proposal: **Submission on the Environmental Outcomes Assessment Methodology under the Native Vegetation Act 2003**, 4 February 2011.

Paddock Trees

A key driver for these changes appears to be the conversion to precision agriculture (now called conservation farming). This is what has lead to the de-valuing of paddock trees and small areas in particular as farmers try to drive the paddocks in straight lines. While we recognise other environmental benefits from certain farming practices (for example, water savings from centre pivot irrigation), the proposed changes seriously devalue the ecosystem services, for example the soil conservation and biodiversity habitat role, provided by paddock trees. This is discussed further below.

In essence the proposal is to replace the current assessment with a streamlined approach that requires a 5:1 offset ratio for trees without hollows and a 10:1 offset ratio for trees with hollows greater than 5cm. We were told by OEH that this change is driven by the disproportional amount of time it takes to complete a paddock tree PVP (5-6 days compared with 2 days for INS or incentive PVPs). In contrast, comments by CMA staff were that they didn't believe the streamlined system would create significant time savings but it did provide greater flexibility for them.

The ratio approach is not entirely unreasonable (it would replicate current results for 88% of the existing PVPs). However there are 2 main problems with the approach. First, the initial assumption that paddock trees should be considered low condition (because they are isolated and therefore 'unviable'), is clearly not supported by the literature.[13] Second, 10% of the PVPs that do not match the current situation are due to threatened species requirements.

These problems are compounded by the fact that offsetting requirements would now be met using revegetation as noted, which clearly does not provide the same benefit as mature vegetation of providing hollows. There is a requirement to threatened species offsets to provide the same habitat features as the area cleared, however the revegetation type doesn't have to be like for like, it merely has to be within a range of the same % cleared.

One way to improve this situation could be to specify additional requirements for paddock tree offsets, namely to have an offset that consists of an equivalent number of paddock trees or small clumps that are reconnected (by revegetation) either to each other or to surrounding areas of vegetation and protected in perpetuity. There could also be a list of species to which this streamlined process should *not* apply as the offset requirements are known to be larger than the 10:1 ratio, for example, superb parrot.

[13] There are a number of papers demonstrating the values of scattered paddock trees (Manning et al) and small patches (Gibbons and Boak). Paddock trees are a very important habitat resource in fragmented landscapes and contribute to functional connectivity for many species across fragmented landscapes. Small patches (<1ha and <2ha) represent around 40% and 50% respectively of the remaining native vegetation in some woodland communities, so are very important for the conservation of these communities. See also our previous comments on this proposal: **Submission on the Environmental Outcomes Assessment Methodology under the Native Vegetation Act 2003**, 4 February 2011.

We reiterate our previous recommendation that paddock trees should only be considered low condition if there are signs of visible damage.[14]

We support the protection provided for paddock trees within 30m of 3rd order and above streams. This is a positive reform but should go further and protect paddock trees within 30m of all waterways.

Similarly, we strongly support the qualification that the streamlined assessment will not apply to trees that provide habitat for threatened species that cannot withstand further loss.

Small Clumps

The revised streamlining process will not automatically red light EECs despite the methodology not applying to vegetation types that are >90% cleared. We submit that streamlining should not be used for EECs.

The revised EOAM assumes that <2ha is not viable (despite condition) and applies to clumps <4ha in low condition. There are some woodland community EECs where 40-50% of the remaining patches are <2ha so there is an increased risk of significant impact to EECs through this streamlining process.

We submit that there is a significant risk of negative cumulative impact from this process as there is no limit to the number of small clumps than can be cleared.

Furthermore, 6.3.9 sets out the offset ratio required however there is significant discretion to reduce these ratios in relation to the presence of hollows. This discretion introduces a significant uncertainty into the methodology and relies on assessors adequately observing hollows of 5cm in size.

Small Areas

The new streamlined process is intended to apply to very small areas that may in fact be up to 10ha in area where vegetation is <30% cleared. This is not a very small area. Similar to our comments in relation to small clumps, this process for small areas also allows incremental clearing of fragmented EECs.

Of further concern is that the process allows for clearing of very small areas that are contiguous with other vegetation, i.e. landholders can progressively clear large patches of vegetation.

6.4.1 states the clearing meets the 'maintain or improve' test if it is to be carried out in an area for which HGL data is available. We recognise that this data is the highest quality salinity mapping data available, however we submit that the presence of the data should not be the driver. The 'maintain or improve' test should relate to the *risk* identified by the data. However, this statement does not match with text elsewhere or

[14] Single paddock trees where: Visible damage to root stock, trunk or branches of the tree indicates that the tree is unlikely to survive >5 years from the time of assessment by a qualified assessor. See: **Submission on the Environmental Outcomes Assessment Methodology under the Native Vegetation Act 2003**,4 February 2011, available at: http://www.edo.org.au/edonsw/site/pdf/subs/110204eoam_amendments.pdf.

what was indicated at the OEH briefing that the salinity chapter would not need to be applied where HGL data is not available. This should be clarified to state that where HGL data is available, the risk matrix produced by that data must be used; and where HGL data is not available, streamlining cannot be used.

The proposed process allows visual assessment (as opposed to detailed survey techniques) for site value. We submit that this is inadequate for a 10ha site. The proposed changes do not require landscape value assessment because it is purported that it has negligible impact. We strongly disagree and refer to our previous submission in relation to 'stepping stone' connectivity function in the landscape.[15]

The requirement that vegetation types must be greater than 0.25ha will potentially be problematic in ecotonal areas, partly because smaller patches are more prevalent and partly because these smaller patches are likely to be on the edge of their range and therefore important to maintain.

Table 6.7 provides offset ratios for different types of clearing and different types of offsets. From the examples provided at Forbes, the proposed changes allow for smaller overall offset areas, and less remnant native vegetation being protected in favour of revegetation. We note that revegetation does not immediately provide habitat function for fauna species, and runs the risk of the offsetting being a "lending bank"[16], with a time lag too long to allow native fauna to move or adapt.

Chapter 7 - Water Quality and aquatic biodiversity

We support the clarification in the guideline that clearing should not occur in a water body or within Zone A (Table 7.2), however the distances specified for Zone A significantly reduce the protected area under the current EOAM and previous riparian protection policies. We therefore recommend excluding clearing from zone B also.

We do not support the provision for paddock trees to be cleared without restriction in unmapped streams and stream order 1 and 2.

Chapter 8 - Prevention of land degradation

Land clearing is allowed in Land and Soil Capability Classes 7 and 8 (high risk) with accredited expert devised management actions. We recommend that this should only be allowed through a transparent and limited minor variation process so there is a public record of the justification and the actions required.

Chapter 9 - Prevention of salinity

We strongly support the use of HGL data in the first instance and are pleased that high hazard land uses still create a red light.

[15] Ibid.

[16] See Bekessy 2010 *op cit*. See also our previous submission on proposed changes to the EOAM.

Similar to our recommendation in relation to land degradation, where clearing is allowed in Dryland Salinity Hazard Classes 7 and 8 (high risk) with accredited expert devised management actions, this should only be allowed through a transparent and limited minor variation process so there is a public record of the justification and the actions required.

Chapter 10 - Biodiversity Values

There has been a major shift in the basis of assessment of biodiversity impacts and values. The previous EOAM stated:

> "**5.2.1 The improve or maintain test** Clearing of overcleared vegetation does not improve or maintain environmental outcomes for biodiversity, unless the vegetation is in low condition. Overcleared vegetation is native vegetation that: 1. occurs in a Mitchell Landscape that is more than 70% cleared; or 2. is a vegetation type that is more than 70% cleared; or 3. is an ecological community listed as 'critically endangered' or 'endangered' under the *Threatened Species Conservation Act 1995* (NSW) or listed as 'critically endangered', 'endangered' or 'vulnerable' under the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth). Offsets cannot be used to balance the impacts of clearing overcleared vegetation that is not in low condition."

The current EOAM states that "Proposed clearing may only be considered to improve or maintain environmental outcomes for biodiversity where the clearing site does not impact on an area of high biodiversity conservation value and the impacts of clearing on biodiversity values are offset in accordance with the rules and requirements in Section 10.8 of this EOAM." The definition of 'high biodiversity conservation value' in the proposed methodology (10.4.1) does reflect the previous overcleared definition. However, we note that the biobanking methodology allows a process for clearing these areas and lowers the bar for what can be considered 'low condition' vegetation. This is a prime example of where the EOAM is being weakened to a lower biobanking standard.

The 'maintain or improve' test allows clearing to impact on high biodiversity conservation value areas if 'an accredited expert is of the opinion that the clearing may be regarded as maintain or improving values (defined in 10.5). The full expert report should be made publicly available in these situations.

In assessing vegetation zones (10.2.2), we submit that the 100ha circle assessment provides a more detailed assessment and is a valuable tool to ensure biodiversity attributes are properly assessed and offset. The 100ha assessment circle for vegetation zones should be (re)introduced to both the EOAM and the biobanking tools. EDO NSW does not support indiscriminately "using the CMA subregion in which *most* of the proposal occurs". We submit that if the vegetation assessment does not always result in vegetation zones according to CMA subregion, the "rounding up" rules should be more clearly stated, so that, for example, if 49% of the impact occurs in a CMA subregion, that subregion does not get excluded from the assessment.

We note that the calculation of the Site Value score (Equation 10.1) is no longer multiplied by *Zone Area* (the total area of the vegetation zone in hectares). We do not support this change, as it means that the relative size of vegetation in good or low condition is no longer reflected in the Site Value. This will not result in a like-for-

like offset, and there is a risk that larger areas of good condition vegetation will be offset by vegetation in a worse condition. In addition, we do not support the change in Site Value (10.2.3) or Landscape Value (10.2.7) weighting (as also proposed in the biobanking methodology changes), as this will skew results in favour of a lower offset ratio being generated. EDO NSW submits that this change does not result in an easier or more streamlined assessment from a methodology point of view, but merely decreases the scientific rigor of the methodology.

In calculating the change in Site Value with offset (10.2.5), we note that the formula does not take into account the time lag associated with management actions and the actual generation of the biodiversity attribute. In this way, the formula is overly simplistic, and in the short term at least, does not provide an accurate representation of the value of the offset. We recommend a standard discounting factor be introduced to the change in Site Value at the offset site[17]. We also submit that more detailed guidance should be given if assessors are able to include additional and/or more tailored management actions, in recognition of the fact that a Site Value score can be inflated by numerous management actions, which could effectively result in an offset of an inappropriate size/condition. We submit that there should be a maximum percentage increase in Site Value from management actions. In other words, there should be a minimum size/condition requirement for the biodiversity attributes of the offset area *at the time of the assessment*.

In Landscape Value assessment (10.2.6), we do not agree that additional gains (Table 10.9) should be achieved by locating the offset in a riparian zone. Clearing in a core riparian zone is not allowed, and so an offset located in a riparian zone is subject to the principle of additionality. In addition, we do not support the changes to relative weightings (as also proposed in the biobanking changes) of Landscape value attributes (Table 10.10). The very principle of offsetting generating a like-for-like outcome is challenged by these changes, and in this instance the changes serve to increase the relative value of offset credits, effectively making it easier to offset a larger impact. In our opinion, if there are to be relative weights, we submit that they occur in order to increase the value of the offset. For example, weightings could be used to generate greater offset requirements for clearing that occurs in riparian zones, or high condition vegetation zones.

In general, EDO NSW is concerned with the validity of the tools associated with the EOAM, and specifically with the Vegetation Benchmarks Database, Overcleared Landscapes Database and the Threatened Species Profile Database. There needs to be a system in place that automatically updates the respective databases for each impact approved. If the data is not current (for example, the overcleared landscapes database has not been updated since 2007), EDO NSW has a real concern that incremental, cumulative impacts will result in NSW becoming a highly degraded landscape, especially in areas such as Lachlan CMA, which is already a 81-90% cleared landscape, but which is processing a large number of paddock tree PVPs each year. We consider it an integral component of any program that the data be appropriately managed and updated.

[17] Maron M, Hobbs R, Moilanen A, Matthews J, Christie K, Gardner T, Keith D, Lindenmayer D, McAlpine C (2012) Faustian bargains? Restoration realities in the context of biodiversity offset policies *Biological Conservation* 155: 141-148

We note that the requirement for a site visit to assess ecosystem credits has been removed (10.3.2, Step 2). EDO NSW is strongly opposed to a shift away from visual data validation in favour of relying on data generated from tools such as the (out-dated) Threated Species Profile Database. Even the most highly experienced assessment officer is capable of incorrectly assessing site attributes from a desk, and despite the potential time savings generated from minimising field work, we consider it essential to the proper assessment of both the impact site and the offset site. We also do not accept the definition of cryptic flora being flora that requires seasonal survey. We do not accept the new rule of allowing an accredited expert to consider the credit requirements of so-called cryptic flora to be ecosystem (rather than species) credits. In general, we do not agree with a reduction in species-specific assessment (where assessment of a particular species would drive the offset requirement), as this risks offsets being generated that are not specifically targeted at protecting vulnerable threatened species.

EDO NSW submits that if the definition of low condition is expanded to include native vegetation with a Site Value score of 34 or lower (10.4.2), then there should be a rule that states that no offset should be allowed with a Site Value score of 34 or lower.

Viability of biodiversity values should be demonstrated for offset sites. Using the same rules as for determining “low or not viable” (10.5.2), EDO NSW submits that assessors should demonstrate that the offset site is *not* low viability or not viable.

EDO NSW strongly objects to the introduction of a discount for offsetting vegetation not in low condition, and calling it a “security gain” (10.7.1, Table 10.11). We recognises that it is essential to provide recognition to landowners who manage their native vegetation so that it does not degrade, however we do not agree that this is the appropriate way to do so. The “security gain” essentially results in an offset that has an effective area smaller than what would have previously been required. In other words, a larger impact area can be offset with a smaller offset area. This is a perversion of the like-for-like rule. EDO NSW submits that offset credit calculations are already enhanced by the additional scores provided by calculating management actions (and that these management actions may or may not protect threatened species because of a undetermined lag time before biodiversity attributes actually come into effect). By discounting with a “security gain”, this further decreases the likelihood that offsets will be able to provide appropriate biodiversity attributes because effective offset area will be reduced. We consider the lag time effect a fundamental flaw to the principles of offsetting, and cannot support a change that further reduces the functional offset area.

As noted in relation to the proposed Chapter 6, offsetting rules should not allow vegetation types to be offset with other vegetation types, even if those vegetation types have a percent cleared value up to 10% lower than the vegetation type impacted (10.8.1). As consistently submitted, EDO NSW does not support “trading up” of species or vegetation type and submits that this will result in offsets that are not like for like, as well as contributing to the cumulative reduction in native vegetation across all vegetation types.

Part 4 – Compliance and Enforcement

In 2002, the Auditor-General undertook an audit of compliance and enforcement of native vegetation laws in NSW. Two pertinent findings were:

- *information on clearing of native vegetation was inadequate to regulate effectively*
- *no system was in place to monitor and report on regulation of native vegetation.*[18]

In 2006, the Auditor General undertook a follow up audit of compliance and enforcement of native vegetation laws in NSW. It was concluded that the relevant department had made progress but that the department then had to "*establish a record of enforcement actions that are numerous, visible and successful*" in order to implement the ban on broadscale clearing introduced by the NV Act.[19]

The findings of the Auditor-General are relevant to the proposed reforms under consideration in this review process. If adequate monitoring and reporting is not put in place it will be impossible to regulate effectively, and that "numerous, visible and successful" enforcement actions are needed to effectively implement the ban on broadscale clearing.

The emphasis of the current reforms is on 'extension' work by CMAs, rather than on strict enforcement of the Act. We recognise that the vast majority of landholders do the right thing and do not deliberately breach legislation. We also recognise that there is a need to improve communication with landholders to ensure there is a better understanding of the purpose and ambit of the laws.

However, we have an overarching concern that the reforms greatly expand the clearing activities that can be done without any assessment, reporting or monitoring or process for measuring outcomes. Overall, compliance activities will be made more difficult with the new RAMAs, for example, it will be less easy to determine exempt paddock scale clearing using satellites. It will be difficult to tell whether the new laws are better understood and whether they are being complied with.

EDO NSW recommends that given the significant expansion of clearing activities that do not require assessment, the trade-off must be that some minimal record keeping requirements are imposed on landholders. This is essential in order to determine if the revised scheme actually meets the objective of the NV Act.

Landholders could be assisted in this task so that it is not onerous. OEH should develop user-friendly 1 page forms that could be filled out by landholders that record basic information. The information required should include: date, location, type of clearing activity, relevant RAMA etc. Where a Code of Practice is being followed,

[18] *Performance audit: regulating the clearing of native vegetation* . The Audit Office of New South Wales, 2002.
[19] *Performance audit: regulating the clearing of native vegetation: Follow-up of 2002 performance audit* The Audit Office of New South Wales, July 2006, p3.

landholders could fill in an additional page to indicate how their activity accorded with the relevant Code.

As noted above, it is in the interest of landholders to keep a basic record to assist them in responding to any compliance inquiries, and it is essential for the functioning and ongoing implementation and review of the Act.

In relation to enforcement where assessment has taken place, we are concerned about the current enforcement of existing PVPs. EDO NSW has received feedback that in one CMA it was estimated that 60% of farmers had not implemented their PVP requirements. A more relaxed approach to compliance will exacerbate this existing problem and mean that the Act will not be maintaining or improving environmental outcomes on the ground.

We submit that there are two critical issues that need to be addressed:

First, to do "extension" and education work properly, CMAs will need a significant increase in **resources** and staff with communications expertise. This is in addition to the increased resources needed to train and skill up an increased number of field staff to work with landholders on developing PVPs.

Second, OEH/EPA must maintain a clear compliance role, including a compliance presence in rural communities in order for the native vegetation offence provisions to maintain a deterrence factor.[20] We submit that it is appropriate that there be a clearer **separation of duties** whereby OEH/EPA have the compliance role, and CMAs have an extension role. Patchy implementation to date indicates that CMA officers are put in a difficult position and understandably prefer to focus on cooperative work with landholders in their local community, rather than be required to do compliance work. There is a need for both extension *and* enforcement. We therefore recommend that OEH/EPA undertake comprehensive compliance activities and CMAS focus on extension, incentives and cooperative work with farmers.

For further information, please contact Policy & Law Reform Director Rachel Walmsley on Rachel.walmsley@edonsw.org.au or (02) 9262 6989.

[20] For a discussion of the importance of deterrence in an effective compliance regime, please see our previous submission: *Submission to the NSW Department of Environment and Climate Change (DECC) on the Draft Native Vegetation Compliance and Enforcement Strategy*, 6th February 2009.