

21 July 2014

Manager - Community Planning
NSW Rural Fire Service
Locked Bag 17
Granville NSW 2142.

By email: 10.50@rfs.nsw.gov.au

Dear Manager – Community Planning,

DRAFT 10/50 Vegetation Clearing Code of Practice

As a community legal centre specialising in public interest environmental law, EDO NSW welcomes the opportunity to comment on the NSW Rural Fire Service's (RFS) *Draft 10/50 Vegetation Clearing Code of Practice (draft 10/50 Code)*.

EDO NSW has a number of concerns about the draft 10/50 Code relating to the likely environmental impacts that will arise from implementation of a code that potentially overrides threatened species and native vegetation legislation and is self assessable. Rather than requiring consideration of vegetation clearing to be based on likely bushfire risk and appropriate assessment, the draft 10/50 Code proposes to allow extensive clearing based purely on proximity to residential structure or high risk facilities. This undermines the current system of risk based management, with expert input from the RFS.

Some key concerns are outlined below in relation to environmental objectives, self-assessment, mapping, clearing of riparian areas and slopes, and the use of herbicides.

Environmental objectives

The Second Reading Speech for *Rural Fires Amendment (Vegetation Clearing) Act 2014 (amended Act)* expresses the requirement for a balancing act between protecting properties from the threat of bushfire and 'legitimate environmental objectives'. In EDO NSW's view, this requirement is not adequately or robustly addressed in the amended Act or draft 10/50 Code rules. 'Legitimate environmental objectives' necessarily include the protection of threatened species and native vegetation.

To illustrate, a relevant object of the NSW *Native Vegetation Act 2003 (NVA)* is section 3(b) 'to prevent broadscale clearing unless it improves or maintains environmental outcomes'. The draft 10/50 Code permits all vegetation to be cleared within 10 metres of a residential structure or high risk facility, and vegetation excluding 'trees' to be cleared within 50 metres of such buildings. Some clearing

around dwellings and rural infrastructure is already permitted under the NV Act, however, the draft 10/50 Code potentially allows for the further clearing of high conservation value native vegetation, threatened flora species and endangered ecological communities that will not be subject to a 'maintain or improve' environmental outcomes test.

Furthermore, the draft 10/50 code contains no legislative link to the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC). The EPBC is fundamental to the preservation of native vegetation and species habitat, and it is reasonable to assume that proposed 10/50 areas may include threatened vegetation species or provide habitat for EPBC-listed species.

Recommendation: The Code should be redrafted to address interaction with the NV Act in rural areas, and to explicitly provide reference to the EPBC Act and explain how the definition of trees, self-assessment tools, proposed 10/50 mapped areas, and buffer zones do not limit its application.

Self-assessment

As EDO NSW has recently submitted in relation to the proposed *Native Vegetation Self Assessable Codes*,¹ self-assessable codes are not capable of being effectively monitored or enforced. As a result they are not capable of adequately implementing environmental objectives such as the "maintain or improve environmental outcomes" test otherwise required by the NV Act and the *Threatened Species Conservation Act 1995*.

EDO NSW is highly concerned about the proposal to allow the draft 10/50 Code to be self assessable with no requirement to submit a report describing the work undertaken. The result will be that there will be no clear indication of where 10/50 Code clearing has actually occurred. Proposed mapping will provide relevant agencies with documentation regarding the location of potential clearing, but the lack of formal approval processes for clearing will inevitably increase the risk of non-compliance and objectives not being met.

Mapping

Areas where self-assessed clearing will be allowed are proposed to be mapped and available on the RFS website as a 10/50 Vegetation Clearing Entitlement Area. The draft 10/50 Code notes that these maps will be available once the 10/50 Code is finalised. The result is that public consultation is being held on these proposals without any clarity on the areas that will be affected by them. It is understood that 'Bush Fire Prone Land Maps' that are publicly available on local council websites are likely to provide the foundation for the 10/50 Vegetation Clearing Entitlement Areas.

Recommendation: The RFS should clarify whether these maps will be used as the foundation for the 10/50 Vegetation Clearing Entitlement Areas, and exactly how the code maps will differ.

¹ EDO NSW, 'Submission on the Draft Landholder Guides and Draft Orders to implement self-assessable codes under the *Native Vegetation Regulation 2013*' (2014) 3.

Recommendation: The RFS should also clarify immediately whether buffer zones under the proposed maps will be extended when the code is implemented. If buffer zones are to be extended, the 10/50 Code must be re-exhibited for public consultation so that communities can identify the impact that an extended buffer zone could have on species and communities. Re-exhibition of the Code is also necessary so that local councils can determine its impact on planning controls, notably including tree preservation orders. Increased zones could have significant impacts in urban and peri-urban and coastal areas of high conservation biodiversity value.

Without these maps and accurate zoning information being made publicly available, it is not possible to comment on the likely impacts of the draft 10/50 code. This undermines the whole public consultation process.

Definitions

EDO NSW is concerned about the definition of a 'tree' under the draft 10/50 Code and the amended Act. A 'tree' is defined as a perennial woody plant with a single stem or trunk, 3 or more metres high and with a circumference greater than 30 centimetres when the plant is measured at 1.3 metres above ground. This definition fails to accurately define tree species present in NSW, fails to recognise the different growth patterns of trees and fails to recognise that many trees in NSW are slow growing and so would not meet this definition until they are many years old and already providing significant habitat value.

To provide just a single example of the problems arising from the current definition of 'tree', *Eucalyptus stricta* (Blue Mountains Mallee Ash), is a small eucalypt species that grows as a mallee, i.e. with multiple stems from underground lignotubers, to less than 5m. Under many growing conditions, this species would not meet the definition of a tree and could therefore be cleared within 50m of residential structure or high risk facility. Similarly, not all trees provide the same level of fire risk and clearing fire resistant species may in fact encourage the growth of more fire enhancing species (for example changes from rainforest to open sclerophyll forests).

Recommendation: EDO NSW recommends that the draft 10/50 Code should be modified to more appropriately to protect perennial woody plants within the proposed definition of a 'tree'. We note this may involve correcting the definition of 'tree' that was included in the amended Act (s 100P).

Clearing in riparian zones

Additional environmental impacts are likely to result from the unassessed clearing that is proposed to be allowed in riparian zones under the draft 10/50 Code. Clearing near prescribed streams is usually restricted to require a buffer zone of 20 metres or more between the clearing and the top of bank of the prescribed stream.² These riparian zones are designed to protect important native vegetation and maintain

² NSW Government, 'How the PADACS program and assessment tools operate' <<http://www.environment.nsw.gov.au/vegetation/nvat.htm>>.

water quality. The draft 10/50 Code proposes to allow clearing to 10 metres of a 'prescribed stream' (part 7.6). This is at odds with well-established NSW environmental and planning policy and has potential to create unacceptable land and water impacts.

Recommendation: EDO NSW recommends that the Code be consistent with current 20 m riparian buffer zones.

Clearing on slopes

EDO NSW is also concerned about the proposal to allow clearing on slopes as steep as 18 degrees, albeit with some limitations. Current forestry regulations prohibit clearing on slopes with a gradient steeper than 30 degrees. These restrictions are in place to protect slopes from erosion and instability. The proposal to allow clearing on slopes as steep as 18 degrees, and steeper if 75% of the original canopy cover is retained, has no scientific justification and significantly increases the risk of negative environmental impacts. EDO NSW does not support self-assessed clearing on slopes greater than 30 degrees.

Use of herbicides

EDO NSW is concerned that the code as drafted has the potential to increase the use of certain herbicides, and the environmental and individual risks need further consideration. The draft 10/50 Code should contain explicit reference to the NSW *Pesticides Act 1999* and an explanation of its relationship with the proposed herbicide guidelines. The Code should also provide more comprehensive detail regarding penalties for inappropriate use of pesticides and guidelines for its responsible use.

For further information please contact rachel.walmsley@edonsw.org.au or 02 9262 6989.

Yours sincerely,

EDO NSW



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