

7th November 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,

10/50 Vegetation Clearing Code of Practice Review

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

In July 2014, EDO NSW identified a number of concerns about the draft 10/50 Code relating to the likely environmental impacts that would arise from implementation of a code that proposed to override threatened species and native vegetation legislation and was self-assessable.

Our concerns were well-founded as the implementation of the 10/50 Code has resulted in significant clearing of urban vegetation. Rather than requiring consideration of vegetation clearing to be based on likely bushfire risk and appropriate assessment, the 10/50 Code is now allowing extensive clearing based purely on proximity to residential structure or high risk facilities. This undermines the previous system of risk based management, with expert input from the RFS.

Since the code commenced, the EDO NSW community legal advice line has received a large number of calls from concerned residents, neighbours and local councils. Callers have come from a range of local government areas (LGAs), including for example: Pittwater, Tweed Shire, Ku-ring-gai, Lake Macquarie, Sutherland Shire, Hornsby, Penrith, Blacktown, Blue Mountains and Great Lakes. There is a significant body of local evidence already showing that the 10/50 Code is resulting in excessive clearing of important habitat, for little discernable safety benefit. There is a genuine concern that the policy is being used to increase property values, rather than for its purported hazard reduction purpose.

In addition to habitat destruction, the 10/50 Code is having other unforeseen outcomes. Hornsby and Gosford City Councils have rejected a development application and a subdivision application respectively, due to the potential clearing that could be done around the proposed developments under the 10/50 Code.¹ Pittwater and Tweed Shire Councils have also indicated that some development applications may be rejected due to potential impacts of 10/50 clearing.²

¹ For example, see: *Johnson v Hornsby Shire Council* (2014) NSWLEC 1215 (decided 21 October 2014), available at: <http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=174853>

² "Authorities knock back homes to avoid tree "massacres" under new laws" *Sydney Morning Herald* November 3, 2014.

A fundamental flaw of the 10/50 Code is that there is no clear scientific basis for developing the 10/50 Code, particularly appropriate mapping of vulnerable areas and species, such as threatened species, protected ecological communities and high conservation value areas. In the absence of detailed mapping and ecological assessment, it is simply not possible to design a system that allows self-assessable clearing while appropriately protecting environmental values.

Recommendation: Based on the implementation of the 10/50 Code to date, the code should be repealed and the previous requirements for RFS expert assessment prior to clearing should be reinstated.

In the event that the 10/50 Code is not repealed, significant changes will be required to address the environmental concerns arising from the code's implementation. Our key concerns in relation to environmental objectives, self-assessment, mapping, clearing of riparian areas and slopes, and the use of herbicides, are reiterated below.

Environmental objectives

The Second Reading Speech for *Rural Fires Amendment (Vegetation Clearing) Act 2014 (amended Act)* expressed 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 10/50 Code. '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 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 NVA, however, the 10/50 Code allows for the further clearing of high conservation value native vegetation, threatened flora species and endangered ecological communities that are not subject to a 'maintain or improve' environmental outcomes test.

Furthermore, the 10/50 Code contains no legislative link to the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)*. The EPBC Act is fundamental to the preservation of native vegetation and species habitat, and it is reasonable to assume that 10/50 areas may include threatened vegetation species or provide habitat for EPBC-listed species. The EDO NSW community legal advice line has already received queries relating to the clearing of federally listed ecological communities under the guise of the 10/50 Code.

Recommendation: The Code must not override the requirements of the NSW *Threatened Species Conservation Act 1995* and must maintain protections for threatened species, ecological communities and critical habitat.

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

Self-assessment

As EDO NSW submitted in relation to the proposed *Native Vegetation Self Assessable Codes*,³ 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 NVA and the *Threatened Species Conservation Act 1995*.

EDO NSW is highly concerned that implementation of the 10/50 Code is self-assessed with no requirement to submit a report describing the work undertaken. The result is that there is no clear record of where 10/50 Code clearing has actually occurred, other than reports by concerned residents. Mapping provides 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.

Recommendation: That all 10/50 Code clearing must be reported to the RFS.

Mapping

Areas where self-assessed clearing is allowed are mapped and available on the RFS website as a 10/50 Vegetation Clearing Entitlement Area. The initial public consultation was conducted before the mapping was finalised and therefore there was no clarity on the areas affected in each local area. We note that since the commencement of the Code:

the NSW RFS has reviewed the way the 10/50 Code of Practice is applied in some areas, especially near areas of bushland which generally pose less of a risk of a bush fire. The entitlement area near these areas has been reduced. Local councils also have the ability to redesignate smaller parcels of bushland. This may also reduce the area covered by the 10/50 rule.⁴

Despite these reductions, EDO NSW has received numerous calls about significant clearing events. The cumulative impact of clearing is having a significant impact, for example in LGAs such as Mosman and Pittwater. It has become apparent that certain vegetation communities are at risk from these cumulative impacts – for example, littoral rainforest.

Recommendation: The RFS should clarify the mapping and in particular, the use of buffer zones. It remains unclear what buffer zones are applied where.

Recommendation: If buffer zones are changed, the 10/50 Code must be re-exhibited for public consultation so that communities can identify the impact that a 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. Buffer zone clearing could have significant impacts in urban and peri-urban and coastal areas of high conservation biodiversity value.

Recommendation: Further consideration should be given to protection of important areas of vegetation through the use of exclusion zones, for example, areas adjacent to mapped areas of threatened species and ecological communities and to E2 Zones. However, as noted above, the absence of detailed and accurate mapping of ecologically sensitive and vulnerable areas, species and communities, renders the current 10/50 Code unworkable and

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

⁴ See: <http://www.rfs.nsw.gov.au/plan-and-prepare/1050-vegetation-clearing>

unable to achieve appropriate environmental protection. Operation of the 10/50 Code should be suspended until such mapping has been completed.

Definitions

EDO NSW remains concerned about the definition of a 'tree' under the 10/50 Code and the amended Act, as this was not clarified in the finalised Code. A 'tree' is still 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 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 now allowed in riparian zones under the 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.⁵ These riparian zones are designed to protect important native vegetation and maintain water quality. The 10/50 Code allows 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 10/50 Code be consistent with current 20 m riparian buffer zones.

Clearing on slopes

EDO NSW also remains concerned about allowing 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 10/50 Code now allows clearing on slopes as steep as 18 degrees in accordance with conditions identified in a Geotechnical Engineer Assessment Report undertaken for that purpose. This rule 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.

⁵ NSW Government, 'How the PADACS program and assessment tools operate' <<http://www.environment.nsw.gov.au/vegetation/nvat.htm>>.

Recommendation: Remove provisions allowing for clearing on slopes greater than 30 degrees.

Use of herbicides

EDO NSW remains concerned that the Code has the potential to increase the use of certain herbicides, and the environmental and individual risks need further consideration. The finalised Code still does not contain an 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.

Recommendation: Include provision in the 10/50 Code for responsible herbicide use.

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

Yours sincerely,

EDO NSW



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