

18 September 2015
Our Ref: 1390

Amendment to the Priorities Action Statement
NSW Office of Environment and Heritage
PO Box A290
Sydney South NSW 1232
By email: pas.amendment@environment.nsw.gov.au

Dear Director

***Saving Our Species 'Landscape Species Strategy' – consultation draft,
and Proposed amendments to the Priorities Action Statement***

As an independent community legal centre specialising in public interest environmental law, EDO NSW welcomes the opportunity to comment on the further implementation of the Threatened Species Priorities Action Statement (**PAS**) and Saving Our Species (**SoS**) program – the State's main threatened species policy. We also thank you for your briefing in May 2015 on OEH efforts in progressing SoS.

As you know, we have commented on the introduction and amendments to the PAS between 2006 and 2015.¹ In particular our recent submissions have:

- generally supported the findings and 8 recommendations of the PAS Review (2010);
- supported increases in resourcing to the Office of Environment and Heritage (**OEH**);
- urged the adoption of an overarching goal to *recover* threatened species, rather than maintain existing populations in a limited number of locations; and
- recommended an integrated habitat or 'ecosystem functioning' approach to managing threatened species, including by identifying keystone species and regional habitats.

Perhaps most importantly, we emphasise the link between threatened species conservation and the effectiveness of the surrounding legal framework – the planning and environmental laws that affect biodiversity in NSW.²

This submission addresses 4 areas:

- 1) Current major reform of biodiversity laws;
- 2) Addressing problems with biodiversity protection under planning laws (including identifying legislative and policy channels to improve protection);
- 3) Landscape Species Strategy (objectives, indicators, targets, monitoring), and

¹ Available at: http://www.edonsw.org.au/native_plants_animals_policy.

² In particular *Environmental Planning and Assessment Act 1979 (EP&A Act)*, *Threatened Species Conservation Act 1995 (TSC Act)*, *National Parks and Wildlife Act 1974 (NPW Act)* and *Native Vegetation Act 2003 (NV Act)*.

4) Proposed PAS amendments (strategies for specific threatened species).

1) Current major reforms for a new Biodiversity Conservation Act

NSW biodiversity laws affecting biodiversity are undergoing major reform throughout 2015-16.³ EDO NSW is engaging closely with OEH, community and conservation groups on the detail of these reforms, and will continue to support public engagement as these changes unfold.

The Panel's report (recommendation 24) proposes giving effect to the PAS approach in legislation.⁴ The precise meaning of this needs further development and we welcome the opportunity to be involved in these policy discussions.

At the same time however, the SoS program notes that effective protection of biodiversity requires robust frameworks for planning and environmental laws (see OEH Draft Landscape Species Strategy (**Draft Strategy**), p 6). Legislating for the SoS approach (i.e. to prioritise strategies for investment in threatened species recovery) is not a substitute for averting biodiversity decline and its major causes (like habitat loss through land clearing). Building threatened species protection into *day-to-day decision-making* under the planning system will reinforce the aims of the SOS program while limiting the need to spend additional 'triage' conservation dollars.

2) Addressing problems with biodiversity protection under planning laws

As the Draft Strategy notes (pp 1, 3, 6), an integrated legal framework for planning and environmental laws is particularly important for 'landscape species' because of their wide dispersal across the State and different legal tenures (public and private).

To that end, we support and agree with the need for 'identifying policy and legislative channels to safeguard the habitat of landscape species from illegal land-clearing and inappropriate development' (Draft Strategy p 1) to complement site-based conservation. However the Draft Strategy does not provide detail on what this means in practice (i.e. how this identification process is occurring, or its scope and aims – presumably this will happen via the wider Biodiversity Law Review).

Unfortunately, the interaction between planning and environmental laws over the last 4 decades has been ineffective in reversing the decline of biodiversity in NSW. Below are several examples of decision points illustrating this ineffective interaction:⁵

³ The Government's reforms are in response to 43 recommendations of an Independent Biodiversity Law Review Panel's report, including a proposal for a new Biodiversity Conservation Act. See www.environment.nsw.gov.au.

⁴ Recommendation 24 – Design a legislative framework for action on threatened species and ecological communities that formalises the programmatic approach taken by Saving our Species, and which:

(a) streamlines and removes duplication in existing requirements for recovery planning, threat abatement and priorities action statements

(b) focuses on outcome monitoring and prioritisation of investment rather than prescriptive legislative provisions.

⁵ See further Australian Network of Environmental Defenders Offices (2014), *Assessment of the adequacy of threatened species & planning laws*, at http://www.edonsw.org.au/native_plants_animals_policy.

- the assessment of whether development will have a significant impact on threatened species (the '7 part test') is often not undertaken where required, and is applied inconsistently across Local Government Areas in NSW;⁶
- major private projects (State Significant Development) are still exempt from:⁷
 - preparing Species Impact Statements, and
 - consultation/'concurrence' for significant effects on threatened species;
- recovery plans are only considered in limited ways, and their effectiveness can be undermined by the approval of developments despite their impacts (see Cumberland Plain Woodland case study below);
- while there is a legal requirement to prepare a Priorities Action Statement, there is no legal requirement to consider the PAS in decision-making about local or regional plans, or individual developments and consent conditions;
- critical habitat is rarely declared for threatened species, and even where it is declared, it only introduces procedural protections and doesn't guarantee protection;⁸
- discretionary decision-making under the EP&A Act means that development proposals with major biodiversity impacts are rarely refused on those grounds;
- objective criteria, such as prohibiting land-clearing unless it 'improves or maintains environmental outcomes' (NV Act), does not apply to urban or industrial land uses (EP&A Act);
- there has been a gradual erosion in ecological standards applied to programs such as biodiversity offsets;
- current legislation fails to adequately consider cumulative impacts, particularly for the type of species being considered in the Landscape Species Strategy.

In our view, these are the type of 'policy and legislative channels' that must be identified *and amended* to meaningfully protect landscape species – and other threatened species, populations and ecological communities – from extinction.

The SoS prioritisation approach acknowledges 'There are limited resources to undertake all the management required' to protect all threatened species in NSW (Draft Strategy p 5). At the same time, ESD principles require that NSW planning laws integrate biodiversity and ecological integrity as a *fundamental consideration* in decision-making.

By building-in more fulsome protection and objective criteria into the planning framework, biodiversity conservation expands beyond a triage approach of 'What can we save from the brink?' to address broader issues of 'How can we better protect our environmental assets to begin with?' This requires better upfront strategic planning and clearer assessment and decision-making mechanisms, including in relation to cumulative impacts.

⁶ See for example *Friends of Tumblebee v ATB Morton & Cessnock City Council* (awaiting judgment) - http://www.edonsw.org.au/current_cases.

⁷ See EP&A Act ss 79A-B. This reflects exemptions in the repealed major project fast-track provisions (Part 3A).

⁸ There are only 4 critical habitat declarations out of about 1000 species listed in NSW. The Biodiversity Review Panel called for critical habitat provisions to be replaced by 'areas of special biodiversity significance' (rec. 25).

More broadly, we must better recognise the cumulative *benefits* of conservation for the social, economic and environmental wellbeing of NSW – present and future. For example, through better valuing of ecosystem services, and investing in new systems of environmental accounting. As the *State of the Environment 2011* report concluded, ‘Australians can no longer afford to see themselves as separate from the environment.’

Case study:

Cumberland Plain Woodland – a critically endangered ecological community

In *Western Sydney Conservation Alliance Inc v Penrith City Council*,⁹ EDO NSW brought judicial review proceedings on behalf of the Alliance. This case challenged Penrith City Council’s approval of four residential subdivisions on land containing the critically endangered Cumberland Plain Woodland.

The Land and Environment Court agreed that the Council had failed to consider the Cumberland Plain Recovery Plan of February 2011 as required under the EP&A Act, and the Council’s consents were suspended. However, the Council later re-approved the subdivisions with a minor alteration, notwithstanding the Woodlands’ critical status, this time taking into account the recovery plan in its decision.

Significantly, the Court found that the main decision-making considerations in NSW (s 79C of the EP&A Act) do not require a species recovery plan to be considered when evaluating the environmental impacts of a development, or the public interest. (It found that recovery plans are, more narrowly, relevant where a SIS is submitted, or in considering whether a ‘significant effect’ on threatened species or habitat is likely.)

More recently, in *MB Investments v Hawkesbury City Council*¹⁰, a Council’s *refusal* of a subdivision, because it would impact on remnant Cumberland Plain Woodland, was overturned in the Land and Environment Court.

The Penrith case was a challenge from local conservationists, while the Hawkesbury case was a challenge from the developer. However the end result in both cases was the same – approval of developments despite their impacts on the same critically endangered community. These examples are symptoms of a systemic problem with the treatment of biodiversity under the NSW planning system – including the cumulative impacts of development across a regional landscape.

⁹ [2011] NSWLEC 244. See www.edonsw.org.au/native_plants_animals_cases.

¹⁰ [2015] NSWLEC 1361. The Court found that the development met the objectives of the 2012 LEP (including protection of Cumberland Plain Woodland and encouraging conservation) despite expert concerns about the likelihood of proposed restoration of a connectivity link. Experts agreed that continued existing use as a grazing paddock would further erode the Woodland stands around the site. Experts also agreed the development did not meet the threshold of ‘significant adverse impacts’. Together these factors informed the Court’s judgment.

3) Landscape Species Strategy – objectives, indicators, targets, monitoring

EDO NSW has previously expressed concerns that the SoS program goals insufficiently address the need for species recovery and ultimate de-listing, and the need to maintain genetic diversity to ensure species can adapt and evolve into the future.

The Draft Landscape Species Strategy (p 2) notes the overarching SoS objective, key program objective (i.e. optimise investment), as well as a landscape species objective.¹¹ The performance indicators to measure the Strategy's achievement are:

- [1] *number of stakeholders/regions investing in the species' management*
- [2] *species' extent of occurrence*
- [3] *% distribution/habitat secure or managed for conservation*
- [4] *Number of important populations where threats are being controlled and (sub)populations are on track to be viable and secure for 100 years*

With regard to the draft performance indicators, our previous concerns remain. Performance indicators and individual actions in a species 'action toolbox' should be specific, measurable, attainable, realistic and timely (SMART), and should relate to the ability to recover the species.

We recommend the performance indicators be refined to relate to species outcomes:

- we suggest additional 'positive' and 'negative' performance indicators below;
- indicators could also refer back to the 'qualitative criteria' used to compare potential projects upfront (Draft Strategy p 5); and
- indicators could refer to landscape-level, state or national/international *targets*
- a further important indicator is the extent to which *key legislative mechanisms* are identified/used to maximise species' viability (as per Strategy objective).

For example, *indicator [1]* could be reoriented towards species outcomes, and be supported by further information such as hours of labour/dollar amount invested.

Indicator [2] could be supported by additional parameters that focus on both the (positive) impact of SoS projects, and countervailing (negative) biodiversity impacts that may result from other activities. For example:

- how SoS projects have contributed to species' responsiveness to specific threats (e.g. connectivity to adapt to climate change);
- improvements to species data (including where species move from the data-deficient stream back to the landscape or other stream – Draft Strategy p 4);
- negative indicators such as estimated clearing of species (permitted/illegal).

Indicator [3] doesn't appear to recognise or focus on high priority conservation areas.

Indicator [4] could be supported by including the *proportion* (not just number) of important populations where threats are being controlled. For example, as our last submission noted, a 2005 draft recovery plan identified 43 key populations of

¹¹ i.e. maximise viability, invest strategically, identify key legislative mechanisms and work in partnerships.

Green and Golden Bellfrogs (**GGBF**), but the draft amended GGBF strategy identified only 7 sites as the “minimum number” necessary for protection.

We also suggest that SoS and the Landscape Species Strategy be linked to *wider biodiversity targets*.¹² This would help contextualise the contribution of SoS projects. Relevant targets could include:

- local Catchment Action Plan targets;
- state-wide Natural Resource Commission targets for native vegetation and biodiversity;
- national Biodiversity Conservation Strategy targets; and/or
- Aichi Biodiversity Targets under the Convention on Biological Diversity.

The Draft Strategy describes 2 components to the SoS landscape species approach, and new mapping, to inform stakeholders investing in broad and targeted activities (p 3).¹³ In our view, it is equally important to identify how these components can be tied to planning and development assessment processes under the EP&A Act. For example:

- requiring that securing and restoring biodiversity is part of strategic planning processes such as Regional Growth and Infrastructure Plans;
- securing identified areas as critical habitat or ‘areas of special biodiversity importance’; and
- considering these components in reforming the ‘7-part test’ of significance (for assessing impacts of proposed development on threatened species).

Finally, on monitoring and evaluation, the Draft Strategy highlights a focus on local monitoring in recognition of the reduced cost and stricter measurability. EDO NSW recognises that this attempts to maximise monitoring with limited resources. Nonetheless, unless such monitoring is focussed on key population parameters, it will not be possible to determine whether the broader population is undergoing recovery and whether genetic diversity is being maintained – monitoring relic populations is particularly inappropriate for ‘landscape’ species. The challenge of landscape-scale monitoring will need to be addressed in the wider Biodiversity Law Review if the proposed shift to focus on ‘bioregional’ scales is to succeed.

4) Proposed amendments to the PAS

EDO NSW conducted a brief review of a small number of draft amended strategies for landscape species: the Giant burrowing frog, Eastern bentwing-bat, Swift parrot, Spotted-tailed quoll and Bell’s turtle. We provide some general observations on these proposals.

Our previously stated concern about the inadequate recognition of climate change remains. Species ability to adapt to a changing climate is fundamental to their future survival. We also reiterate our comment that experts involved in developing the ‘action toolboxes’ (Draft Strategy, p 4) should be listed to increase community confidence in the prioritisation process. This is particularly true as a number of

¹² We note that each SoS-funded project needs ‘clearly defined population targets’ (Draft Strategy p 5).

¹³ i.e. ‘identifying and securing areas’ necessary for the species ‘to survive and reproduce’; and restoring habitat or abating threats at important places (e.g. ‘site-based management to ensure long-term security’ of populations).

species have action toolbox lists that are significantly reduced from the pre-existing strategies, with no justification provided on how the reduced list of actions will lead to a better environmental outcome or ensure program objectives are achieved.

EDO NSW supports the strong focus in a number of strategies on enhanced private land conservation. It has been well established that better environmental outcomes are achieved more cost effectively by protecting existing habitat than by attempting to rehabilitate areas. However, as stated previously, unless such action occurs in the context of better planning laws that integrate biodiversity, these actions will have limited effectiveness.

Similarly, some proposed actions arguably contradict current native vegetation management policy. For example, the Swift parrot 'action toolbox' highlights the need to protect large old trees,¹⁴ but recent native vegetation changes allow paddock trees to be replaced without full consideration of their benefits.

EDO NSW also notes that any focus on voluntary conservation should be more targeted than currently appears to be the case. This is particularly relevant where landscape species are dependent on a small number of nesting or roosting sites or there are critical feeding areas.

Finally, references to engagement in the Environmental Impact Statement process have been removed for a number of species. We are concerned this will lead to reduction in standards and consistency of assessment.

Conclusion

Thank you for the opportunity to provide input into these policies. We would welcome further engagement with OEH on the integration of threatened species management and biodiversity and planning law reforms. Where relevant, we are also happy for you to pass these comments onto OEH's biodiversity law reform section.

A consolidated Biodiversity Conservation Act is an opportunity to deal with key threats to biodiversity from land-clearing and development in a more integrated and cohesive way, with appropriate regulatory checks and safeguards.

Relatedly, we would also welcome engagement on stage 3 of the PAS dealing with key threatening processes in 2015-16 (Draft Strategy, pp 2 and 7). This presents further opportunities to ensure that planning and native vegetation controls complement strategies to 'eliminate and manage' key threatening processes – such as clearing of native vegetation, loss of hollow-bearing trees and climate change.

Yours sincerely,

EDO NSW



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¹⁴ 'Loss of hollow-bearing trees' is a Key Threatening Process. One of the TSC Act's objects is 'to eliminate or manage certain processes that threaten the survival or evolutionary development of threatened species...'