Submission to the Inquiry into regional planning processes in NSW

prepared by

EDO NSW
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About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their states.

Submitted to:

The Director
Standing Committee on State Development
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Introduction

Thank you for the invitation to contribute to the NSW Legislative Council's inquiry into regional planning processes.

EDO NSW is a non-government community legal centre specialising in public interest environmental law. We give free legal advice to community members and groups across NSW on environmental and planning law. Our key functions include:

- telephone and written advice (two-thirds of calls from regional and rural areas)
- outreach (community education workshops, factsheets and guides to the law)
- environmental policy and law reform (including submissions like this one)
- public interest court actions on behalf of community members and groups
- scientific, Aboriginal and international advisory and capacity-building services.

In this submission, we take 'regional planning processes' to refer to *the way governments, planning authorities, communities and other stakeholders engage with, influence, and make decisions under planning laws and policies that affect regional (non-metropolitan) New South Wales.*

This inquiry is a good opportunity to highlight the strong interdependence between planning, environmental and natural resource management (**NRM**) laws, particularly in regional areas of the State.

Planning laws and decisions shape the past, present and future of our towns, our cities and the environments we share. While there are many issues that we would be happy to assist the Committee on, this submission focuses on five issues that are critical to regional planning:

1. **Ecologically sustainable development (ESD)**
2. **Good strategic planning**
3. **NRM goals, data and environmental accounts**
4. **Climate change readiness**
5. **Community engagement including Aboriginal communities**

These five themes are relevant to many of this Inquiry's terms of reference (**ToR**). EDO NSW strongly supports encouraging and incentivising regional development that is ecologically sustainable, and benefits regional communities in the short and long term (**ToR a**). Good strategic planning may appropriately identify environmental constraints on certain regional developments, consistent with ecologically sustainable development (**ToR b**). Establishing a clear legal framework for improved strategic regional planning will assist in responding to challenges such as land-use conflicts between farming and mining, the key role of environmental zones (see issue 2 case studies) and the increasing challenges of climate change impacts in regional NSW (**ToR d and f**). If the principles and criteria for good strategic planning are clearly set out in amended planning laws, and effectively resourced and implemented, there should be no need for stand-alone regional planning legislation. However, if the Committee recommends stand-alone legislation, it should address the 5 themes raised in this submission (**ToR c**).

This submission does not deal directly with the ongoing overhaul of land-clearing and threatened species laws. However, our recommendations on that controversial reform are here: http://www.edonsw.org.au/biodiversity_legislation_review.

In analysing how planning laws and policies affect regional planning processes, we note that planning law in NSW has multiple levels, from state to local. These include:

- the *Environmental Planning & Assessment Act 1979* (**EP&A Act**) – the main NSW planning Act, and its 2000 Regulation, which provide for plan-making, environmental impact assessment (**EIA**), development decisions and conditions, and compliance monitoring and enforcement;
- *State Environmental Planning Policies* (**SEPPs**) – these deal with state or regional issues. For example: the Infrastructure SEPP 2007, the Mining SEPP 2007, the State and Regional Development SEPP 2011, and SEPP 44 – Koala Habitat Protection;[1]
- Regional Plans (draft and forthcoming), and Strategic Regional Land Use Plans which aim to protect agriculture from mining;
- Local Environmental Plans (**LEPs**) and Development Control Plan guidance;
- Government policies such as planning directions and assessment guidelines.

Good regional planning must coordinate these different elements, as well as embed linkages with important environmental laws (such as laws that restrict pollution, prohibit broadscale land-clearing or protect threatened species[2]). Regional planning must also have strong links to NRM laws (such as laws on mining and water extraction, or laws that set up agencies like Local Land Services (**LLS**) and the Environment Protection Authority (**EPA**)).[3] This submission expands on these key themes below.

1. Ecologically sustainable development

The EP&A Act includes 10 objects. A key object of the Act, and one that we strongly support, is to encourage *ecologically sustainable development* (**ESD**). Australia has defined ESD as:

> *using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.*[4]

All governments in Australia have agreed 'that the concept of [ESD] should be used by all levels of Government in the assessment of natural resources, land use decisions and approval processes.'[5]

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[1] Full titles (examples only): State Environmental Planning Policy [**SEPP**] (Infrastructure) 2007; SEPP (State and Regional Development) 2011; SEPP (Mining, Petroleum Production and Extractive Industries) 2007; SEPP No 44—Koala Habitat Protection. See further: http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0.

[2] Namely: *Protection of the Environment Operations Act 1997* (NSW); *Native Vegetation Act 2003* (NSW) (**NV Act**); *Threatened Species Conservation Act 1995* (NSW) (**TSC Act**). Note: The NSW Government is proposing to overhaul land-clearing and biodiversity laws with a new Bill in 2016.

[3] Namely: *Mining Act 1992* (NSW); *Petroleum (Onshore) Act 1991* (NSW); *Local Land Services Act 2013* (NSW); *Protection of the Environment Administration Act 1991* (NSW).

[4] See: https://www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1#WIESD

In NSW, ESD has been incorporated into over 50 laws over the last two decades. Like most laws, the EP&A Act adopts the definition in NSW pollution law.[6] This involves five key principles:

i) *integrating short-term and long-term environmental and economic considerations* (as well as social and equitable factors) in decision-making;
ii) the *precautionary principle* – when dealing with serious or irreversible impacts on the environment (or public health) amidst scientific uncertainty;
iii) *conservation of biodiversity*[7] and ecological integrity as a *fundamental consideration* in decision-making;
iv) *intergenerational equity* – costs and benefits of decisions and development should be fairly distributed over time (we note that *intra*-generational equity between places, such as urban, regional and rural, is also important); and
v) *improved valuation* and the *polluter pays principle* – ensuring that the true costs of consumption, waste and environmental damage are paid for by those responsible for generating those costs (or benefiting from them).

Public submissions to the Planning Review (2013) reinforced the centrality of ESD:[8]

> *Just over 50 per cent of submissions [commented] that:*
> - *[ESD] should be the overarching objective of the Planning Bill…*
> - *The new planning system has a strong economic focus that outweighs social and environmental considerations.*

In addition to these public comments, our experience with planning and environmental laws in NSW suggests that clearer legal requirements, policies and guidance are needed to apply and achieve ESD – to ensure our society, environment and economy are productive, liveable and sustainable into the future. The rest of this submission provides some practical examples of how this could be done.

Recommendation 1:

The Committee should note the continued importance of ecologically sustainable development (ESD) as an overarching guiding principle for regional development. In particular, the need to more clearly integrate environmental, social, economic and equitable considerations into planning and development decision-making in regional NSW for the short- and long-term future.

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[5] *Intergovernmental Agreement on the Environment* (1992), Schedule 2 - Resource Assessment, Land Use Decisions and Approval Processes, clause 1. See: https://www.environment.gov.au/about-us/esd/publications/intergovernmental-agreement.

[6] See Protection of the Environment Administration Act 1991, section 6. At the federal level see the slightly broader definition, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 3A.

[7] *Biodiversity*, or biological diversity, includes ecosystems, animal and plant species and their genes. See *Threatened Species Conservation Act 1995* (NSW), s. 4 definitions. An *ecosystem* is a group of plants, animals and micro-organisms and their non-living environment. (*EPBC Act 1999* (Cth) s. 528.)

[8] NSW Department of Planning & Infrastructure, *White Paper Feedback Report* (2013), p 18. We understand that around 26% of submissions were from non-metropolitan NSW (ibid, p 12).

2. Good strategic planning

One of the most significant gaps in planning laws is the lack of clear, legal criteria for strategic (land use) planning in each NSW region.[9] Also, strategic planning by different agencies doesn't always seem to coordinate. For example, plans of the Planning Department or local council may not integrate with catchment NRM plans.

Lack of systematic, integrated strategic planning that is prescribed in law, results in:

- ad hoc rather than planned development;
- more intensive land use conflict on a site-by-site basis (such as between mining and farming); and
- greater cumulative environmental and social impacts – incremental effects of many projects over time (biodiversity loss, water quality, air quality, noise and amenity etc).

The following two case studies illustrate problems with the current system.

Case study 1 - Land use conflict example – mining projects

An example of poor strategic planning relates to mining projects. Planning and mining and laws (and the way they are administered) create a systemic tendency to assume that if a mineral resource exists, it should be extracted.[10] The Mining SEPP overrides LEP zoning and effectively says mining can happen anywhere.[11] Good strategic planning would instead ask whether that area or region is unsuitable due to other land uses, or too risky for other natural resources like biodiversity or water.

There has been some improvement in the last few years, such as residential exclusion zones for coal seam gas (**CSG**), the Chief Scientist's independent review of CSG (2014) and proposals for more strategic land release. But efforts have been piecemeal and complex instead of systematic and clear. For example, CSG exclusion zones do not protect high conservation value lands, and do not apply to coal mining. Also, the new Strategic Release Framework does not consider climate change as relevant to whether a resource area should be released (see part 4 below).[12]

[9] See for example, Part 3 of the EP&A Act 1979 (parts of which have been repealed). We understand the Greater Sydney Commission Act 2015 includes powers to establish regional planning authorities (*beyond* Greater Sydney), but their remit and any mandatory considerations are unclear to date.

[10] Examples of this tendency include:

- a 2013 amendment to the Mining SEPP that prioritised resource significance (now repealed);
- mining permits have priority over biodiversity conservation agreements, so that even 'offset sites' – designed to be protected 'in perpetuity' to compensate for past loss – can be mined;
- the 'Gateway process' which assesses impacts on water and agriculture via the Mining SEPP doesn't allow a Gateway Panel to refuse a certificate (mining isn't excluded from such areas);
- Strategic Regional Land Use Plans and the Gateway do not protect high conservation values.

[11] See for example, Mining SEPP 2007, clauses 7-8. National parks and a few similar areas are excluded by other laws. See *National Parks and Wildlife Act 1974* (NSW), ss. 41, 54, 58O and 64.

[12] See EDO NSW, *Submission on the Strategic Release Framework and Preliminary Regional Impact Assessment Guidelines* (Nov. 2015), at http://www.edonsw.org.au/mining_coal_seam_gas_policy.

Case study 2 - LEPs, state controls and environmental protection zones

At a local level, LEP zones are used to have some local control over land use planning. However, LEPs are overridden by many SEPPs (such as for mining or State Significant Development and Infrastructure), sites can be rezoned by request (spot rezoning), and the Planning Minister has discretion to override draft local plans.

EDO NSW is particularly concerned at the precedent set by the Northern Councils Environmental Zoning Review (2015) – see **Attachment A**: article and briefing note. The Government has adopted new, restrictive criteria for permitted Environmental Conservation (E2) and Environmental Management (E3) zoning across five northern councils.[13] We oppose these criteria applying to the northern region and elsewhere.

'E-zones' provide fundamental protection for thousands of hectares of forests, wetlands and wildlife habitats on the Far North Coast – the most biologically diverse region in NSW.[14] They do this by setting core objectives for the purpose of the land and restricting certain land uses in the zone. The importance of E-zones has been acknowledged in the Courts.[15]

We are concerned that the new restrictive criteria will undermine the objectives of E-zones and unduly narrow the application of E-zones. The recommended criteria fail to ensure adequate protection for certain high conservation values, such as any types of rainforest which are not listed under SEPP 26 (Littoral Rainforest); coastal wetlands which are not listed under SEPP14 (Coastal Wetlands); or important wildlife corridors.

To address the existing deficiencies of ad hoc and uncoordinated planning processes, regional planning processes would benefit from a clearer legal framework for evidence-based strategic planning. It would mean setting social, economic and environmental goals, protecting environmental, cultural and heritage assets, and proposing suitable areas for different land uses and compatible development. It would identify and protect high conservation value lands and the ecosystem services they provide – such as food, water quality, salinity protection, carbon storage and climate resilience. It would provide greater certainty about likely future land uses, but adapt to new evidence over time. Finally, different types of strategic planning (built environment, biodiversity protection, NRM etc) would be coordinated across scales (regional, local) and consistent in aims, content and timing.

Alongside social, economic and other goals, a healthy environment is essential to underpin the sustainability of our society and economy. We favour an overarching

[13] The new E-zone process for northern councils involves the following (see **Attachment A** for detail):
1) Primary use of the land over the last two years must be environmental conservation (E2) or environmental management (E3);
2) The land must meet the various E-zone criteria and this must be verified by additional studies (scenic values have been excluded from eligibility);
3) The proposal to apply an E-zone is included in a planning proposal through the planning Gateway process (EP&A Act, Part 3).

[14] Office of Environment & Heritage: www.environment.nsw.gov.au/biodiversity/regconsplans.htm.

[15] See for example, *Ryan v The Minister for Planning [2015] NSWLEC 88* at 150.

environmental goal to *maintain or improve environmental outcomes* – such as for water, soil, salinity, native vegetation condition, biodiversity values and carbon storage.[16] At a landscape scale, this goal could be translated into a region's strategic plan.

Recommendation 2:

Strategic planning across the regions should:

a. *be subject to clear, legislative criteria that integrates short- and long-term environmental, social, economic and equitable considerations (see rec. 1);*
b. *be coordinated and consistent across different agencies and types of plans;*
c. *be evidence-based – considering past, present and future environmental conditions, cumulative impacts and the carrying capacity of the region; and*
d. *aim to 'maintain or improve' specified environmental outcomes in the region, including for the benefit of communities and present and future generations.*

3. Natural resource management goals, data & environmental accounts

The aim to encourage ESD by integrating environmental factors in decision-making is hindered by a lack of clear environmental or NRM goals and limited data.

NRM goals, targets and resources

In 2007 the Natural Resources Commission set clear and useful state-wide NRM targets for 2010-2015 (see **Attachment B**). Unfortunately, these targets seem to have been abandoned, progress on achieving them has not been reported, and it is unclear what, if anything, has replaced them. Without clear state-wide environmental goals and targets, it is more difficult for regional and local planning bodies to establish and pursue complementary goals and targets.

The merger of former Catchment Management Authorities into Local Land Services (**LLS**) in 2014 presents new challenges for institutional adjustment and corporate memory. We welcome the opportunity to work with LLS on these challenges and opportunities. To perform their roles effectively, LLS and other agencies need skills and resourcing to collect and analyse environmental data to inform decision-making.

Environmental data, 'ecosystem services' and state-wide assessments

Reliable data on environmental assets and their condition is an important input into strategic planning processes for the regions.

A number of jurisdictions now recognise the importance of gathering data on 'ecosystem services':

[16] This test is used to regulate land-clearing (NV Act) and biodiversity certification (TSC Act Part 7AA). The Sydney Drinking Water SEPP uses a 'neutral or beneficial effect' (NORBE) test for water quality.

> *Biodiversity is the foundation upon which humans derive benefits called ecosystem services. For example, natural systems such as wetlands, free-flowing rivers, forests and grasslands provide services such as water purification, storm and flood protection, air pollution mitigation and recreational opportunities that benefit human well-being…*
> *Estimating the value of ecosystem services can reveal social costs or benefits that otherwise would remain hidden. Once identified and understood, these values can be considered and accounted for in the policy and decision-making process.*[17]

In the United Kingdom, United States, Canada and elsewhere, agencies are integrating ecosystem services into strategic planning, assessment and land management programs:

- In 2013 the UK Government issued guidance for policy and decision makers on using an ecosystems approach and valuing ecosystem services.[18]
- In 2015 the US President issued a directive to all federal agencies to develop ecosystem services frameworks in forward planning.[19]
- The Ontario Biodiversity Council has set goals and targets to implement ecosystem services approaches by 2020.[20]

Australian expert groups including the IUCN and Wentworth Group of Scientists have also recently developed relevant tools and protocols.[21]

The NSW Government should invest in a program to identify and gather data on ecosystem services, functions, values and trends. This could include a state-wide 'ecosystems assessment' as the UK has done.[22]

While the three-yearly NSW *State of the Environment* (**SOE**) report gives a high-level 'snapshot', it does not have a focus on ecosystem services, and is not designed for region-by-region planning. SOE reporting itself struggles with the limited data available across its wide remit. For example, the 2012 section on Biodiversity largely relied on the evidence from the 2009 report. There is also no requirement for Government to act on its findings or clearly integrate them in law and policy-making.

Environmental accounts

To ensure regional planning processes and decisions are informed and evidence-based, we also recommend the NSW Government takes the lead on state and regional *environmental accounts*. This does not mean simplifying everything to a 'dollar value', as this is not always practical or appropriate. Nevertheless, a number of expert reviews have recommended establishing a set of National Environmental Accounts that track the extent, quality and trend of natural resources such as native

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[17] See http://sobr.ca/report/, Indicators report – State of Biodiversity 2015 (p 138).
[18] See: https://www.gov.uk/guidance/ecosystems-services.
[19] See: https://www.whitehouse.gov/blog/2015/10/07/incorporating-natural-infrastructure-and-ecosystem-services-federal-decision-making.
[20] See http://sobr.ca/report/, Summary report – State of Biodiversity 2015 (Target 14).
[21] See for example: http://aciucn.org.au/index.php/publications/2015-valuing-nature/; and http://wentworthgroup.org/2015/06/blueprint-paper-1-using-markets-to-conserve-natural-capital/2015/.
[22] See: http://uknea.unep-wcmc.org/.

vegetation, water, soil and biodiversity.[23] The ABS and BOM are currently adapting international standards for environmental-economic accounts.[24] The level of NSW Government involvement with these initiatives is unclear.

Recommendation 3:

To better integrate environmental factors into decision making at all levels including regional planning, the NSW Government should:

a. *adopt a set of clear, ambitious, statewide environmental and natural resource management (NRM) goals and targets. These should be translated and given effect in regional plans, supported by NRM agencies;*
b. *invest in a program to identify and gather data on 'ecosystem services' (benefits to humans provided by nature), and report on and raise awareness of the importance of ecosystems and their services for NSW;*
c. *establish state and regional 'environmental accounts' to assess progress against targets (where possible based on nationally applicable criteria, but with regional application). These accounts should assess the extent, condition and trends in natural resources and environmental assets including biodiversity, native vegetation, carbon storage, soil and water quality;*

4. Climate change readiness

NSW needs to plan for a carbon constrained future.

Regional NSW is already seeing the effects of almost 1 degree warming, and further climate change is locked in by greenhouse pollution already in the atmosphere. Predicted impacts for NSW and southern Australia over the next 15 to 50 years include:

- 10-33 more extremely hot days each year (above 40 degrees), causing increased crop failure, human and animal deaths
- longer and more intense bushfire seasons
- accelerated biodiversity loss and
- increased irreversible soil erosion, affecting food security and water quality.[25]

Regional planning processes cannot ignore the implications of climate change on regional NSW. However, no part of the NSW planning or licensing framework

[23] See Wentworth Group of Concerned Scientists, *Accounting for Nature* (2008); and *Accounting for Nature – Quick Guide: Guidelines for Constructing Regional Scale Environmental Asset Condition Accounts* (2013) at www.wentworthgroup.org. See also Dr. A. Hawke, *Report of the Independent Review of the EPBC Act 1999* (2009), Chapter 19 and recommendation 67. See further National Sustainability Council, *Sustainable Australia Report 2013*, 'Sustainability Indicators for Australia'.
[24] See for example Bureau of Meteorology (BOM), *Guide to Environmental Accounting in Australia*, at http://www.bom.gov.au/environment/activities/accounts.shtml. See also Australian Bureau of Statistics, *4655.0 - Australian Environmental-Economic Accounts, 2015*, at www.abs.gov.au.
[25] See for example: http://www.climatechange.environment.nsw.gov.au/impacts-of-climate-change; http://www.csiro.au/en/News/News-releases/2015/New-climate-change-projections-for-Australia.

performs this strategic climate risk assessment,[26] either in the context of avoiding 2 degrees' warming, or a national or state carbon pollution budget.

Mitigation (reducing emissions)

The absence of a strategic framework to consider and reduce NSW greenhouse emissions from the energy sector and elsewhere is a critical policy gap that must be filled.

In December 2015, almost 190 nations agreed on the need to limit global warming to well below 2 degrees Celsius, and try to limit warming to 1.5 degrees.[27] This includes reaching peak emissions as soon as possible, and net zero emissions in the second half of this century. The NSW Government is now one of five Australian jurisdictions in The Climate Group's States and Regions Alliance.[28] These agreements provide impetus for stronger action.

Prior to the Paris Agreement, the federal Climate Change Authority (**CCA**) recommended a national carbon budget from 2013 to 2050.[29] We are not aware of any corresponding NSW carbon budget. Yet if state emissions were to continue at 2011-12 levels, by 2050 NSW would use more than half of the national budget, with just one-third of the national population.[30]

The lifecycle of energy projects means that existing (and any new) coal and gas projects, for domestic or export use, could operate up to and beyond 2050. As the Government notes: 'Three-quarters of NSW emissions come from the extraction, processing and burning of fossil fuels (primarily coal)'.[31] This means decisions we make now under state and regional planning processes will have long-term effects.

Adaptation (building resilience)

In addition to these important *mitigation* challenges, regional planning must also address *adaptation* challenges. This includes for example, planning for water scarcity, extreme weather events, bushfire planning, and in relation to biodiversity, planning for climate refugia across landscapes to help build resilience. The Office of Environment and Heritage (**OEH**) is doing important work on climate adaptation.

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[26] While Environmental Impact Statements are required to predict emissions from individual project proposals, we know of no policy stating how planning authorities take this into account, individually or cumulatively. See for example, *Integrated Mining Policy* (October 2015), Indicative SEARs (Secretary's Environmental Assessment Requirements), p 18. We also note the Department of Planning's draft Economic Assessment of Mining Guidelines (2015) excluded scope 3 emissions as secondary impacts, and limited cost-benefit analysis for mines to 30 years.

[27] Australia has committed to a 26-28% reduction on 2005 emissions by 2030, to be reviewed in 2017. These individual nationally determined contributions will make a difference, but will need to strengthen over time to avoid a significant gap in emissions reduction to avoid dangerous warming of 2 degrees.

[28] See: http://www.theclimategroup.org/what-we-do/programs/states-and-regions/.

[29] 10.1 billion tonnes CO2-equivalent between 2013 and 2050. See: *Reducing Australia's Greenhouse Gas Emissions: Targets and Progress Review—Final Report* (2013). The Climate Institute has proposed a smaller budget to improve the chance of avoiding 2 degrees: www.climateinstitute.org.au.

[30] NSW emissions in 2011-12 were 155 million tons CO_2-e. NSW had 32% of the Australian population in 2015.

[31] See: http://www.climatechange.environment.nsw.gov.au/About-climate-change-in-NSW/NSW-emissions.

However, local councils and other authorities must be well-supported to help manage these risks.

Recommendation 4:

a. NSW needs a whole-of-government greenhouse mitigation strategy and targets. This must link closely with strategic planning and development laws.

b. Any future regional planning framework must consider climate change risks and impacts (both mitigation and adaptation) and the need to transition to clean energy. This is consistent with domestic and international agreements.

c. In particular, regional planning processes should require (by law):

- *the incorporation of climate change considerations into all strategic planning;*
- *a comprehensive assessment of the climate change implications of all significant development, and the ability to refuse projects on climate grounds;*
- *best practice criteria or sectoral development standards (mitigation and adaption) that all development proposals must comply with in order to proceed.*

5. Community engagement, including Aboriginal communities

Community engagement and public participation is widely recognised as an integral part of environmental decision-making. It should be a core operating principle of any planning process. Genuine public consultation can avoid bad decisions, and improve other decisions through appropriate local conditions. Open, early engagement with local communities improves decision-making processes, minimises conflict during the assessment process and improves local community acceptance of proposals.

To improve regional planning processes, we need to understand residents' diverse perspectives and aspirations.[32] We also need to equip regional residents with evidence to make informed decisions. This includes meaningful dialogue on growing challenges like waste and consumption; climate change; and loss of biodiversity and ecosystems due to key threatening processes (such as habitat loss from land clearing).[33]

Specific groups such as Aboriginal people (particularly Traditional Owners) should be asked about their preferred ways for meaningful input into planning and NRM decisions. A large proportion of Aboriginal people live in regional NSW, with diverse interests in land use, ownership, access, NRM and culture and heritage protection.

[32] For example, a three-yearly survey by OEH, *Who cares about the environment in 2012?* found that: *People who live in rural areas outside any town:*

- *undertake the highest average number of 'everyday' environmental behaviours;*
- *have the highest participation in restoration projects; and*
- *are more likely to say that State Government environmental support and funding should occur at the local level.*

[33] Key threatening processes are listed under the *Threatened Species Conservation Act 1995* (NSW).

Access to justice

As noted above, good regional strategic planning can effectively reduce land-use conflicts. However, there still needs to be checks and balances built into planning processes. The NSW planning system provides some opportunities for local people to have their say, but these rights are not always equitable. In the 2013 Planning Review, attempts were floated to better engage the community in upfront strategic planning. However, this was not matched with effective engagement strategies or resourcing; and many in the community were sceptical of losing rights to engage on neighbourhood development while developers could negotiate 'flexible' approvals and appeal rights.

Once planning decisions are made there are two types of important legal rights for communities. First, merits appeal rights for third parties can deliver better environmental outcomes while increasing the transparency and accountability of decision-making (including checks and balances to avoid vexatious litigants). For this reason, ICAC recommended third party merit appeal rights be expanded in its submissions to the Planning Review.[34]

Others have sought to curtail the limited rights of community objectors to challenge high-impact development approvals in court (a right that is increasingly being removed by PAC hearings[35]). However, development proponents actually have much broader rights to challenge planning decisions, including for spot rezoning, development refusals or conditions. As such, developers bring around 99% of merit appeals against local development decisions, and third parties only around 1%.[36]

Second, 'open standing' to enforce the law and seek judicial review of legal errors is integral to the effective, transparent operation of planning laws. This holds decision-makers to account and ensures decisions are properly made. Open standing has been available in the NSW Land and Environment Court for over 30 years under the EP&A Act. This has not led to the 'floodgates' being opened to excessive litigation.

Regional planning processes (and decisions about resulting development) must be participatory, transparent, open and accountable.

Recommendation 5:

Regional communities should be given more engaging, innovative and earlier opportunities to influence the planning process for the future of their towns, cities and environments. This should harness new technology and go beyond orthodox approaches of 'consultation by written submission'. Specific groups, including Aboriginal peoples, should be asked about their preferred ways to engage and be able to have meaningful input in those ways. Accountability and review mechanisms should apply to regional planning processes.

[34] See ICAC, *Anti-corruption safeguards in the NSW planning system* (2012) recommendation 16.
[35] Under the EP&A Act (s. 98(5)), the Planning Minister effectively has discretion to waive community objectors' merit appeal rights by ordering a 'public hearing' by the Planning Assessment Commission (PAC).
[36] For example, Department of Planning *Local Development Performance Monitoring: 2012-13* (2014).

Attachment A: 'New approach to North Coast environmental zones'

EDO blog article by EDO NSW Outreach Solicitor Nina Lucas

23 October 2015

The NSW Government has announced key changes to the way that councils can set land aside for environmental conservation and management in the Far North Coast area of NSW. The changes weaken environmental protections and may have State-wide implications.

The NSW Minister for Planning has announced key changes to the way that councils can set land aside for environmental conservation and management under Local Environmental Plans (LEPs) in the Ballina, Byron, Kyogle, Lismore and Tweed Local Government Areas (LGAs). These changes are significant for the Far North Coast environment, and carry the potential for State-wide environmental implications.

The changes, which are set out in the *Northern Councils E Zone Review Final Recommendations Report*, water down these five councils' ability to zone land for environmental conservation and management. The changes also offer weaker environmental protections than those proposed in the interim report released by the Department of Planning and Environment for public comment in June 2014.

Why have these changes been made?

This announcement is the latest development in a three-year review of the way that environmental zones (E zones), which include E2 (environmental conservation), E3 (environmental management) and E4 (environmental living), as well as environmental overlays in LEPs, are applied by councils on the Far North Coast. The review arose following perceived conflicts between agricultural and environmental uses of land in the region, and from apparent concerns that Far North Coast councils were introducing E zones on land previously zoned for rural use without evidence of the environmental significance of the land.

The Far North Coast is one of the most biologically diverse regions in NSW and agriculture is a major part of the regional economy. See our previous article for a history of the review, and read more about the background to these recommendations in our court case challenging amendments to Lismore LEP.

Where do the changes apply?

While the review only applied to the Far North Coast, any other council in the State reviewing the application of E zones in its own LGA can apply the recommendations contained in the report. The Department has also indicated that a similar approach to the application of E zones is being considered for other council areas across NSW.

Where can E zones be applied under the changes?

Councils are now only be able to apply E zones to land that is deemed to be of very high conservation value, such as certain recognised littoral rainforest, certain coastal

wetlands, key threatened species habitat, and rare, endangered and vulnerable forest ecosystems. Scenic values can no longer be used as an attribute for the application of an E2 or E3 zone or mapped planning controls. In addition to this, the 'primary use' of the land needs to have been either environmental conservation (E2) or environmental management (E3) for the preceding two years before it can be zoned E2 or E3.

Extensive agriculture will now be permitted with consent in the E2 zone and permitted without consent in E3 zones in the relevant LGAs, and the E zones will not include buffers to the vegetation attributes that meet the E zone criteria.

Biodiversity field inspections and ground surveys are required in order to verify whether the land meets the criteria in order to be zoned as E2 or E3. Even if land is verified as having met the criteria for an E zone, it is not mandatory for the council to apply an E2 or E3 zone to it. If the council believes the intended primary use of the land does not warrant an E zone, then other mapped planning controls can be applied. In most cases, privately-owned land will not have an E2 or E3 zone applied to it unless the landowner agrees or requests it.

The Department is considering a revision of the Standard Instrument LEP to remove 'aesthetic values' from the zone objectives of the E2 and E3 zones. The possibility of an amendment to NSW planning legislation to remove or extend the 12 month time limit which extinguishes existing use rights for the land use 'extensive agriculture' is also being investigated.

These changes are a considerable erosion of the fundamental objective of E2 and E3 zones, being to protect, manage and restore areas with high or special ecological, scientific, cultural or aesthetic values. This is of particular concern given that the reforms apply to one of the most biologically diverse regions in NSW. These reforms are also worrying in the context of the NSW Government's biodiversity legislation review which from all indications to date is likely to result in further weakened protections for native flora and fauna.

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For further information see: EDO NSW Briefing Note – Northern Councils E-Zone Review Final Recommendations Report

December 2015 - ***Download PDF***

This briefing note outlines the NSW Government's changes to the way that councils can set land aside for environmental conservation and management in the Far North Coast of NSW, and the wider implications for the rest of the State.

Available at http://www.edonsw.org.au/planning_development_heritage_policy under 'Briefing Notes'.

Attachment B: Natural Resource Commission statewide NRM targets (2010-15)

NSW Natural Resources Monitoring, Evaluation and Reporting Strategy 2010–2015, Appendix 1:[37]

By 2015 there is an increase in native vegetation extent and an improvement in native vegetation condition.

By 2015 there is an increase in the number of sustainable populations of a range of native fauna species.

By 2015 there is an increase in the recovery of threatened species, populations and ecological communities.

By 2015 there is a reduction in the impact of invasive species.

By 2015 there is an improvement in the condition of riverine ecosystems.

By 2015 there is an improvement in the ability of groundwater systems to support groundwater dependent ecosystems and designated beneficial uses.

By 2015 there is no decline in the condition of marine waters and ecosystems.

By 2015 there is an improvement in the condition of important wetlands, and the extent of those wetlands is maintained.

By 2015 there is an improvement in the condition of estuaries and coastal lake ecosystems.

By 2015 there is an improvement in soil condition.

By 2015 there is an increase in the area of land that is managed within its capability.

Natural resource decisions contribute to improving or maintaining economic sustainability and social wellbeing.

There is an increase in the capacity of natural resources managers to contribute to regionally relevant natural resource management.

[37] NSW Natural Resources Commission (2007), *State-wide Targets for Natural Resource Management Fact Sheet*.