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Director Environment and Building Policy
NSW Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

Submitted online: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Coastal-Reforms>

Dear Director,

Draft Coastal Management SEPP

EDO NSW welcomes the opportunity to comment on the draft *State Environmental Planning Policy (Coastal Management) 2016 (draft SEPP)*.

EDO NSW has extensive experience advising on all aspects of coastal and planning law and policy, particularly in relation to the *Coastal Protection Act 1979 (CP Act)*, SEPPs 14, 26 and 71 and the *Environmental Planning and Assessment Act 1979 (EPA Act)*. We also engage on an on-going basis with coastal, marine, biodiversity and planning reform processes in NSW, writing submissions in response to proposed legislative and policy amendments. In response to frequent requests for legal advice and assistance from concerned coastal residents and communities, EDO NSW regularly runs community workshops and provides legal advice regarding local coastal development and management issues.

EDO NSW is supportive of law reform that will improve environmental outcomes within the coastal zone, and therefore supports many elements of the new *Coastal Management Act 2016*.

Our previous submission on the legislation is available on our website.ⁱ Many of our recommendations to ensure that the new Act and supporting instruments *conserve* sensitive coastal environments, *build resilience* to the impacts of climate change and ensure that all development in the coastal zone is *consistent with the principles of ecologically sustainable development (ESD)* still need to be addressed. In particular, and relevant to this submission, are our recommendations regarding the creation of 'red flag areas' to protect sensitive coastal environments, and the proper assessment of cumulative impacts.ⁱⁱ

In this context, this short submission focuses on a key element of concern in the draft SEPP – the impacts of **expanded urban development in and near sensitive coastal environments**. Our primary recommendation is that the new coastal SEPP explicitly confirm that exempt and code-complying development is not permitted in or adjacent to environmentally sensitive areas. These comments are in addition to those already expressed in our submission on the Bill.

Environmental context

The need to comprehensively assess and manage the potential cumulative impacts of coastal development will only increase with:

- existing levels of impact and degradation,ⁱⁱⁱ
- projected urban development in coastal areas,
- the impacts of climate change,^{iv} and
- relaxed land clearing laws passed late last year by the NSW parliament.^v

These four factors mean that the new regulatory architecture must ensure any future coastal development is comprehensively assessed and appropriately curbed to ensure resilience across the coastal zone. The expansion of development in the new coastal use areas will put increased pressure on adjacent sensitive environmental areas, such as coastal wetlands and littoral rainforests.

In this regard, it is important that the ecological communities that the draft SEPP is designed to protect are appropriately identified and more accurately mapped. For example, the definition of coastal wetlands should be expanded to include wet heath, degraded saltmarsh, all swamp forests, and wet meadows. Ground truthing of wetland areas should be undertaken to more accurately delineate the boundaries of wetlands, particularly to identify small isolated wetlands that were excluded from the original mapping produced in the 1980s (i.e. those less than <0.5 hectares). There should be a clear and transparent method for the development and approval of maps that will inform the SEPP.

What is proposed?

Part 2, Division 1 of the draft SEPP provides for development in coastal wetlands and littoral rainforest areas. As expressed in the consultation note “the intention is to maintain existing levels of protection of terrestrial native vegetation in the coastal wetlands and littoral rainforest area,^{vi} and carry over protections from the current SEPP 14 and SEPP 26. Clause 12 provides for development on land that is in proximity to coastal wetlands or littoral rainforest areas.

The draft SEPP removes concurrence requirements, and requires only development consent from the relevant consent authority. The current listing of specific matters requiring consideration has been removed. (These include specific consideration of ‘feasible alternatives’ and ‘impacts on migratory species’ etc.^{vii}) Instead, the consent authority is required to be satisfied that sufficient measures have or will be taken to protect the biophysical, hydrological and ecological integrity of the coastal wetland or littoral rainforest (clause 11(4)), or in relation to areas of proximity, that the development will not significantly impact on the coastal wetland or littoral rainforest, or the quantity and quality of surface and ground water flows (clause 12(1)).

Given the removal of specific considerations, we would recommend including a definition and further guidance on what is meant by ‘biophysical, hydrological and ecological integrity’ to remove any ambiguity regarding the meaning of these terms, and to ensure that relevant standards are met.

Key concern – Impacts of expanded residential development on sensitive environmental areas

We welcome the requirement that a consent authority must be satisfied that measures are or will be in place to protect a range of environmental factors, however, such efforts may be undermined due to the continued exemption for residential development in proximity zones (clause 12 (2)(a)). That is, development on land zones R1, R2, R3, R4 or RU5.

We do not support the continued exemption and recommend that clause 12(2) be deleted from the draft SEPP.

As noted in our previous submission, the proposed SEPP must be considered within the context of proposed amendments to the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Exempt and Complying Development SEPP)* and more recently, the proposed *Medium Density Housing Code – Statement of Intended Effect* and *Draft Medium Density Design Guide*.

These related reforms are likely to result in a significant increase in exempt and code-complying development occurring in coastal use zones adjacent to environmentally sensitive areas. Specifically, in 2016 the NSW Government proposed to expand the General Housing Code to include 3 forms of medium density housing, which could mean that:

- up to 10 dwellings per 600m² lot could be constructed just outside of the 100m perimeter of a littoral rainforest without any need to obtain development consent.
- up to 10 dwellings per 600m² lot could be constructed just outside the 100m perimeter of a coastal wetland without any need to obtain development consent.

We note that mandatory clause 3.3 of the *Standard Instrument – Principal Local Environment Plan* currently prohibits exempt and complying development within 100m of a littoral rainforest or coastal wetland, with reference to SEPP 14 and SEPP 26;^{viii} and this is being carried over in the *Amendment of Standard Instrument prescribed by Standard Instrument (Local Environmental Plans) Order 2006* that is also currently on public exhibition. Furthermore, we note the *Exempt and Complying Development SEPP* currently excludes complying development from environmentally sensitive land.^{ix} However, EDO NSW remains particularly concerned about the impacts of sites adjacent to littoral rainforests or coastal wetlands being subdivided into multiple, 600m² lots with up to 10 code-assessed dwellings on each lot. As noted in our submission responding to the Government's proposal,^x we do not think a 100m buffer is sufficient to protect these sensitive coastal environments from the possible impacts of residential development, in particular development that has not been assessed or approved by local council (or subject to the proposed assessment of impacts on 'biophysical, hydrological and ecological integrity').

Complying development is not appropriate in or near to environmentally sensitive areas. In such areas, specific impacts need to be properly assessed. We welcome the reference in the *Medium Density Housing Code – Statement of Intended Effect*

and Draft Medium Density Design Guide (p16) that complying development cannot occur in environmentally sensitive areas. This must be made explicit in the draft coastal SEPP. In addition, we recommend increasing the 100m buffer zones that apply to certain sensitive areas, in accordance with advice provided by appropriately qualified, independent experts.^{xi}

Complying development should by definition be *low-impact* in order to justify exemption from assessment and determination by local councils. The cumulative impacts of multiple code-assessed dwellings across large areas near sensitive environments remain unknown. The Government must clarify how it proposes to ensure that cumulative impacts of multiple code-based approvals and increased density are identified, managed and continually monitored (including to avoid cumulative land-clearing and biodiversity impacts). This is particularly important where cumulative impacts of multiple complying developments may impact on neighbouring zones that are environmentally sensitive such as coastal wetlands and littoral rainforests.^{xii}

Not only should development in a proximity area be fully assessed (ie, not code assessed), but the consent authority should – in addition to considering impacts pursuant to clause 12(1) - be satisfied that measures will be put in place to address impacts and protect the adjacent area. This is consistent with the objects of the *Coastal Management Act 2016*, and with the requirements for development within the coastal wetlands or littoral rainforest areas (clause 11(4)).

Similarly, code-assessable clearing under the new biodiversity laws must not occur on or near sensitive coastal areas, or in the coastal zone more broadly.^{xiii} The scale of vegetation clearing proposed to be permitted under new self-assessable codes could have significant and unacceptable impacts on rural coastal areas. EDO NSW will be providing further input to this effect on the proposed biodiversity SEPP when it is drafted.^{xiv}

Drafting a new SEPP presents an opportunity to clarify and confirm these protections and ensure that multiple developments in and near sensitive coastal areas are not exempt, complying or self-assessed. Instead, it is vital that the impacts of individual and multiple developments are comprehensively and holistically considered. **We therefore recommend that the draft SEPP explicitly confirm that exempt and code-complying development is not permitted in or near environmentally sensitive areas, including areas of proximity or adjacent to a coastal wetland or littoral rainforest area; and full impact assessment requirements apply to residential development on land in proximity to coastal wetlands or littoral rainforest.**

Please contact me if you require further information on (02) 9262 6989.

Yours sincerely,
EDO NSW

Rachel Walmsley
Policy & Law Reform Director

References

- ⁱ Submission responding to the NSW Coastal Management Reforms, February 2016, available at: http://www.edonsw.org.au/coastal_marine_fisheries_management_policy
- ⁱⁱ As proposed in our submission “7 key actions” – see actions, 2,3 and 5.
- ⁱⁱⁱ According to the NSW Government’s own data: in coastal NSW, 60% of wetlands have been lost or degraded over the past 200 years (See: <http://www.environment.nsw.gov.au/wetlands/ThreatsToWetlands.htm>); Urban development and sand mining have considerably reduced the naturally fragmented distribution of littoral rainforests along the coast, and 114 species found in the ‘littoral rainforest class’ are listed as vulnerable, endangered, or critically endangered, or as an endangered ecological population or community (See : <http://www.environment.nsw.gov.au/threatenedspeciesapp/VegClass.aspx?vegClassName=Littoral%20Rainforests>); Coastal lakes are the most sensitive of all estuaries to human intervention, with only 16 out of 90 coastal lakes in NSW are in natural or near natural condition, with the extent of impacts directly related to the extent of development and rural uses in their catchments. Continuing population growth and urban development are expected to intensify pressures on estuaries and coastal lakes (NSW Healthy Rivers Commission, *NSW Independent Inquiry into Coastal Lakes*, 2002, p. 17, 72-74); and land clearing is most significant threat to native vegetation in NSW – with coastal development is one of the two main causes of native vegetation clearing in this State (NSW Government, *NSW State of the Environment*, 2012, pp. 224, 230).
- ^{iv} In addition to urban and peri-urban development, climate change poses a significant threat to coastal environments, in particular sensitive ecosystems such as littoral rainforests. The projected impacts of sea level rise are also well documented, with the most recent NSW State of the Environment Report noting that ‘rising sea levels are likely to have a significant effect on human settlements in NSW.’ (See for example: Australian Government, *Environment Protection and Biodiversity Conservation Act 1999*, Littoral Rainforest and Coastal Vine Thickets of Eastern Australia – a nationally threatened ecological community (Policy Statement 3.9), p. 14. Available online at : <http://www.environment.gov.au/system/files/resources/19747170-3fd3-4930-9ca5-6ca89508b571/files/littoral-rainforest.pdf>; Lipman, Zada and Stokes, Robert, That sinking feeling : A legal assessment of the coastal planning system in New South Wales (2011) 28 *EPLJ* 182 ; and NSW Government, *NSW State of the Environment*, 2012, p. 199).
- ^v See: *Biodiversity Conservation Act 2016* and the *Local Land Services Amendment Act 2016*. Regulations and SEPPs made under the new Biodiversity Conservation Act will directly affect coastal vegetation and biodiversity.
- ^{vi} Clause 11910(a).
- ^{vii} See *State Environmental Planning Policy No 14 – Coastal Wetlands*, clause 7 (2).
- ^{viii} *Standard Instrument – Principal Local Environment Plan*, clause 3.3(2)(c) and (f).
- ^{ix} *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, clause 1.19(1).
- ^x Available at: http://www.edonsw.org.au/planning_development_heritage_policy
- ^{xi} https://d3n8a8pro7vnm.cloudfront.net/edonsw/pages/3480/attachments/original/1481851862/Medium_Density_Complying_Development_Code_EDO_NSW_Submission_Dec_2016.pdf?1481851862
- ^{xii} See: *Housing, housing everywhere but not a DA in sight: the possible consequences of expanding complying development on sensitive coastal environments* By EDO NSW Policy and Law Reform Solicitor Dr Emma Carmody, 26 May 2016, available at: http://www.edonsw.org.au/the_possible_consequences_of_expanding_complying_development_on_sensitive_coastal_environments.
- ^{xiii} For further detail see: *EDO NSW Submission on the draft Local Land Services Amendment Bill 2016* available at: http://www.edonsw.org.au/nsw_biodiversity_reform_package_2016
- ^{xiv} Our submissions outlining significant concerns with the new NSW biodiversity laws are available at: http://www.edonsw.org.au/biodiversity_legislation_review