



**Submission on the Review of the Koala SEPP
(State Environmental Planning Policy 44 –
Koala Habitat Protection)**

prepared by

**EDO NSW
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Introduction

Thank you for the invitation to comment on the Review of the Koala SEPP and the Explanation of Intended Effect (**Explanation**) of the proposed amendments. We strongly agree that the SEPP is in need of an update and welcome the efforts of the Department of Planning and the Office of Environment & Heritage to progress this.

NSW koala populations have fallen dramatically since 1990, and will continue to do so without change. A recent study that looked back three koala generations (15-21 years), and forward three generations, estimated a loss of 26% of the NSW koala population over this period.¹ Decline is even more severe in some local populations, such as in the Pilliga.

Reversing this decline is an important aim of the Koala SEPP, but much more must be done to achieve to achieving viable koala populations in the long term – across planning, forestry and land management systems. We are pleased to assist the Government and community to meet this objective.

Overview of this submission

Part A of this submission lists seven areas, not addressed in the Explanation, that we recommend the Koala SEPP review should address:

- i) Relationship between Koala SEPP and future NSW koala strategy;
- ii) Further information and analysis of the SEPP's effectiveness;
- iii) Expanding the scope of development covered by the SEPP;
- iv) Cumulative impacts and the '1 hectare limit' on assessable projects;
- v) Koala SEPP must be climate change ready;
- vi) Monitoring, auditing and reporting; and
- vii) Statutory review periods.

Part B of our submission then considers existing Koala SEPP clauses and proposed amendments in the Explanation (Aims, Definitions, SEPP Application, Development Assessment, Guidelines, Planning Directions and Local Environmental Studies).

Finally, we **attach** our 2010 proposals for changes to the Koala SEPP, summarised briefly below.

Previous EDO NSW recommendations and Government's proposed updates

Six years ago, EDO NSW wrote to the Government on behalf of Friends of the Koala noting, 'SEPP 44 is in urgent need of reform.'² Our key recommendations then were:

¹ Adams-Hosking et al (2016), cited by Prof. M. O'Kane, *Report of the Independent Review into the Decline of Koala Populations in Key Areas of NSW*, NSW Chief Scientist & Engineer, 2 Dec. 2016, p iv, at www.chiefscientist.nsw.gov.au/reports/independent-review-into-decline-of-koala-populations.

² EDO NSW, *State Environmental Planning Policy No 44 - Koala Habitat Protection*, December 2010. (at **Attachment A**).

- 1) Review Schedule 2 and the definition of 'koala habitat' in SEPP 44 to reflect the current knowledge regarding koala tree species and koala habitat;
- 2) Remove the 1 hectare trigger for requiring a site specific Koala Plan of Management [KPOM] to be developed; and
- 3) Insert detailed requirements relating to monitoring, review, reporting and compliance for individual [KPOMs] within the SEPP. Alternatively, [update the Guidelines and include them in the SEPP] or as a schedule to the SEPP.

In the absence of changes since 2010, all three recommendations remain relevant.

On reviewing the proposed updates in 2016, we particularly welcome the proposal to include 65 tree species instead of the current 10 listed as koala habitat. This important proposal addresses part of issue 1 above. We also welcome the proposal to update the definitions and the Guidelines. This may also address issues 1 and 3, but we would welcome further detail and discussion on these proposals (see Part B).

A. Additional issues that the Koala SEPP update should address

There are a number of important aspects of koala protection that the Explanation does not address, but are relevant to the planning system. In brief, we **recommend** the Government further consider the following seven matters as it progresses this review:

- i) ***Future NSW koala strategy: clarify scope and relationship with SEPP*** – During the consultation period, the Government released the Chief Scientist & Engineer's report on the decline of NSW koala populations.³ While we do not assess its recommendations here, the report provides timely background and case studies on NSW koala decline, to inform a new state-wide koala strategy.

While the SEPP review may be finalised before the state-wide strategy, their relationship and respective scope must be clear. We also **recommend** the Koala SEPP review should progress recommendation 4 of the Chief Scientist's report, that 'The Government improve outcomes for koalas through changes to the planning system.'

- ii) ***Further information and analysis*** - The Government should provide further data and evaluation on the performance of the Koala SEPP and its policy settings since 1995 (for example, scope of projects assessed), to help communities and stakeholders give feedback and suggest improvements. The Chief Scientist's recommendation 4 also proposed a rapid review of the Koala SEPP's performance.⁴

³ Prof. M. O'Kane, *Report of the Independent Review into the Decline of Koala Populations in Key Areas of NSW*, NSW Chief Scientist & Engineer (2016).

⁴ We suggest there are two options to progress such a review. The first is to complete and publish an independent review in the first half of 2017, to inform the update of the SEPP before it is finalised. However, if the Government finalises the SEPP update in the short-term, without a published review of its effectiveness, the second option would be to include amendments in the SEPP that require an

- iii) **Expanding the scope of development covered** – by limiting the SEPP to council-approved development (clause 6), many projects that affect koalas are excluded. For example:
- rural land-clearing to be approved under the *Local Land Services Act 2016*, whether in self-assessable codes, LLS-certified clearing or larger discretionary clearing approved by a new Native Vegetation Panel;⁵
 - major projects such as State Significant Development or Infrastructure;
 - complying development, which continues to expand in area and scope;
 - Part 5 development such as local infrastructure and mining exploration.
- The public expects koala habitat will be consistently assessed and protected.
- iv) **Cumulative impacts and the ‘1 hectare limit’** – excluding sites below 1 ha (clause 6) contributes to cumulative impacts, especially on urban koala populations. Removing the ‘1 ha limit’ was one of our 2010 recommendations, and we continue to recommend this.
- v) **Koala SEPP must be climate change ready** – identify and protect potential habitat and corridors that will support koalas’ resilience to more extreme heat and natural disasters, even if there is no koala population in those areas now.
- vi) **Monitoring, auditing and reporting conditions** – the SEPP should ensure data collection and monitoring are built into consent conditions and Guidelines. This would assist compliance, comparative analysis of state-wide performance, and improve the SEPP’s effectiveness and response to change.
- vii) **Statutory review periods** - the updated SEPP should require independent review and public consultation at regular intervals to assess the performance and effectiveness of the SEPP and Guidelines against their aims.

B. Comments on existing SEPP and the Explanation of Intended Effect

The comments below relate to existing clauses of the Koala SEPP and refer to the proposed amendments set out in the Explanation (pp 11-12).

Aims of the Policy (clause 3)

The Explanation states the aim of the SEPP ‘is relevant and is to be retained’ (p 11). We support the aim to conserve and manage areas of koala habitat, but we also **recommend** the SEPP’s aims be clarified, and updated to refer to climate change.

For example:

This Policy [the Koala SEPP] aims to:

- *ensure the proper conservation and management of land and vegetation that provide habitat for koalas across their full lifecycle; and*
- *ensure a permanent free-living population over their present range; and*

independent review within 12 months of the update. That review would cover the historical operation of the SEPP and the new amendments.

⁵ *Local Land Services Amendment Act 2016*, Part 5A, Div. 6. See www.landmanagement.nsw.gov.au.

- reverse the current trend of koala population decline, including by implementing Comprehensive Koala Plans of Management, NSW and federal koala recovery plans and complementary actions;⁶ and
- conserve koala habitat and potential habitat in the context of a changing climate, including by protecting land, vegetation and corridors where koalas can seek refuge from the effects of climate change and natural disasters (climate refugia).

Including climate change adaptation would align with objects in the *Biodiversity Conservation Act 2016* (section 1.3(d)).

Definitions (clause 4 and Schedule 2)

'Potential' and 'core' koala habitat distinction is problematic

The Explanation states that definitions will 'be amended to clearly articulate the meaning of koala habitat.'⁷ We agree that koala habitat should, at a minimum, 'include any areas where koalas are present', and would welcome further discussion on the detail and supporting tools, such as survey methods and predictive mapping.⁸

In 2010 EDO NSW noted problems with the definition of 'potential koala habitat', including the limited list of eucalypt species identified in Schedule 2 (see below). The 2016 Explanation does not state whether the updated SEPP will retain the distinction between 'potential' and 'core' koala habitat.

We do not support this continued distinction, as it leaves 'potential' habitat unprotected for future recovery (including corridors that may be climate refugia), and may lead to incorrect and inconsistent identification of actual habitat.

The definition of 'core' koala habitat is also problematic, because it relies on identification of 'breeding females' (difficult because a visible joey is only a small part of the breeding cycle) and data on current sightings and historical records which is dispersed and potentially inadequate.⁹ Further practical problems with these definitions are noted under 'Development Assessment' below.

Tree Species – support expanded listing

As noted we strongly support the proposal to include 65 tree species instead of the present narrow range of 10 'feed tree species' listed in Schedule 2 to the SEPP. We understand this expansion aligns with current understanding of koala habitat needs across their full lifecycle, recognised in the NSW Koala Recovery Plan 2008.

The Explanation also refers to 'preferred', 'primary' and 'secondary' habitat (p 12). The meaning and implications of these categories requires some further exploration.

⁶ Complementary actions would include the Biodiversity Conservation Program in Part 4 Division 6 of the *Biodiversity Conservation Act 2016* (to replace Saving Our Species/Priority Action Statements).

⁷ This 'will include any areas where koalas are present, regardless of tree species, and be supported by a definition that identifies habitat where koalas are present.' (p 11)

⁸ The Chief Scientist (2016, recommendation 3) calls on the Government to publish a state-wide predictive koala habitat map by December 2019.

⁹ See for example, Predavec (2016) cited in O'Kane (2016), p 9: 'the level of information on koala populations is variable across the state and there is no mechanism in place to collect consistent data.'

Application of the SEPP (clause 5 and Schedule 1)

The Explanation proposes to carry over the current list of council areas with updated names. The Government should demonstrate that this aligns with available data on koala populations (or likely populations) across NSW. If data suggest there are koala populations or potential habitat in other areas, we **recommend** consulting with those councils and communities and adding them to the SEPP (e.g. Dubbo, Wellington, Cobar).

Also, a more effective Koala SEPP should apply to a wider range of developments, beyond council-approved projects over 1 ha (see clause 6, and examples above). We provide further detail on one imminent concern below.

Rural land clearing and koala habitat – Codes must not commence before the maps

With the passage of the *Local Land Services Amendment Bill 2016*, new Native Vegetation Codes could allow rural land clearing of hundreds of hectares at a time without a development application (unless DAs are defined to include code-based clearing), and therefore without reference to the Koala SEPP. Clumps of paddock trees can also be cleared under existing ministerial orders and under future Codes.

The LLS Amendment Act includes koala habitat (to be defined by future regulations) as 'category 2-regulated' land. We also understand that Government policy (not the Act itself) will exclude koala habitat from Codes.¹⁰ This will be challenging in practice: limited oversight of code-based clearing makes it hard to know if habitat is cleared.¹¹

It is important, but not sufficient, to exclude the Native Vegetation Codes from koala habitat (including the 65 species of habitat trees proposed under the SEPP update). This cannot work unless koala habitat is fully mapped before the Codes are switched on. We are concerned that Code commencement could be as early as July 2017.

We **recommend** finalising regulatory maps and koala mapping before the new land-clearing system and Codes commence.

Finally, we **recommend** the Koala SEPP must also apply to rural land-clearing proposals that exceed Code limits, to be assessed by a new Native Vegetation Panel under the LLS Act. This is consistent with the Biodiversity Panel's recommendation that broadscale land-clearing proposals be dealt with via the planning system.¹²

¹⁰ See www.landmanagement.nsw.gov.au 'Land on which codes do not apply.'

¹¹ Some Code-based clearing requires LLS 'certification' of compliance, but other clearing only requires notification. LLS staff may not have sufficient time or resources for land surveying for koala habitat. Where LLS staff certify compliance with Codes, they cannot refuse compliant applications (so Code rules must be clear and robust).

¹² Byron et al. (2014), *A review of biodiversity legislation in NSW - Final report*, recommendation 40.

Development Assessment (clauses 7 to 9)

Further information is needed to assess the Government's proposals to reform the development assessment stage. We accept that Comprehensive Koala Plans of Management are more likely to achieve improved outcomes than site-scale Plans, provided they are properly resourced and implemented. Below, we recommend that Comprehensive Plans be mandatory within a particular timeframe.

However, it is not clear what 'criteria' the Government proposes to replace site-scale Plans (Explanation p 12). We support a 'consistent assessment process', and **recommend** this include a robust, scientific method that (at a minimum) requires qualified professionals to use comprehensive scat surveys and complementary tools.

Importantly, once koala habitat has been identified, we **recommend** the approval process must not allow important koala habitat to be offset, or cleared in exchange for money, in the way that the proposed Biodiversity Assessment Method (**BAM**) does.¹³ Rather, to achieve the aims of stemming and reversing koala population decline, assessment and decision-making frameworks must protect in-tact habitat and resident populations (not offset them), and also protect areas to support shifting populations under climate change.

Assessment should not rely on 'potential'/'core' habitat and discretion to protect

Clauses 7-9 set out three steps to assess habitat significance and project impacts. If 'simplifying the order of the steps' (Explanation p 12) means resolving the problems with 'potential' versus 'core' koala habitat, we support this.

As noted above, the current process hinges on the problematic definition and identification of 'potential' and 'core' habitat. The result of this distinction is that 'potential' habitat¹⁴ receives no protection in itself (clause 7). It is only if the area is further identified as 'core' habitat (i.e. '...land with a resident population of koalas...') that a koala plan of management (**KPOM**) is required (clause 8 and Part 3).

Clause 8 requires that the Council's decision on the development application 'must not be inconsistent' with the KPOM. It does *not* require development on core habitat to be refused, nor any inherent outcome or improvement for koalas or habitat on-site. The strength of this protection therefore relies on a robust and up-to-date KPOM. Below, we **recommend** mandatory Comprehensive KPOMs and binding Guidelines to stem habitat loss and support recovery in line with the SEPP and Recovery Plans.

Guidelines (clauses 10 and 17)

While we support updating the Koala SEPP Guidelines, further information is needed to assess the Government's proposed reforms – including for new Koala Plans of Management, definitions, assessment and decision-making criteria. Updated

¹³ The BAM will underpin environmental impact assessment under the *Biodiversity Conservation Act 2016*. See EDO NSW, *Technical submission on the BAM and mapping method*; and *Submission on the Biodiversity Conservation Bill 2016*, at

www.edonsw.org.au/nsw_biodiversity_reform_package_2016.

¹⁴ i.e. where the 10 listed eucalypt species make up at least 15% of tree cover on the site (clause 4).

Guidelines need to give clear direction on what is required of developers, surveyors and decision makers (less use of 'should', more use of 'must').

Instead of continuing to be a 'head of consideration' (clauses 10 and 17; Explanation p 12), we **recommend** the SEPP require that planning authorities, developers and surveyors *must comply with* the Guidelines. Binding, enforceable Guidelines would promote compliance, public confidence and improve the SEPP's effectiveness.

We also **recommend** a series of governance protections to improve the Guidelines:

- the SEPP should set out criteria for making the Guidelines, such as public comment periods, and being consistent with relevant Koala Recovery Plan(s);
- the NSW Environment Minister should be responsible for making the Guidelines, or at a minimum, have a concurrence (or joint approval) role;
- embed data collection, monitoring and auditing requirements (as per Part A);
- include the Guidelines as a Schedule to the SEPP; and
- include the Guidelines in mandatory, regular reviews of the SEPP.

As proposed, the updated Koala SEPP Guidelines will 'set out the steps required to prepare' Comprehensive Koala Plans of Management (**CKPOMs**), and establish requirements for site-scale assessment and decisions (Explanation p 12). We address these in turn.

Mandate Comprehensive Koala Plans of Management linked to recovery planning

We **recommend** the SEPP be amended to require that draft CKPOMs be prepared and exhibited within a particular timeframe after the amendments commence (e.g. 12 months).¹⁵ This would include making new Plans and updating existing CKPOMs to reflect additional tree species. Plan preparation and implementation would need additional state funding, mapping and technical support.

We also support the Chief Scientist's call for a rapid review of the effectiveness of CKPOMs (2016, part of recommendation 4). This should also examine barriers to their finalisation and implementation. The updated Guidelines could draw on the lessons learned from this rapid review to ensure CKPOMs are strong, effective and adaptive to changing population status and conditions.

Finally we **recommend** that the CEO of the Office of Environment and Heritage, at a minimum, have a concurrence or joint approval role for CKPOMs, not only be consulted (see clause 12; Explanation, p 8).

Development Application requirements and considerations for consent authorities

The Explanation proposes to replace site-level KPOMs with consistent assessment criteria. As noted, further information is needed to assess the proposed reforms in this area. We would welcome further discussion with the Department on draft provisions, and the assessment process where CKPOMs have not been developed.

¹⁵ For example, s 79AD(2) of the *Environmental Planning and Assessment Act 1979* requires the Greater Sydney Commission to exhibit draft district plans within 12 months of districts being declared.

As noted above ('Development Assessment'), we **recommend** mandating a leading practice, scientific survey method, and continuing a requirement that appropriately qualified professionals carry out site surveys. The method must be robust enough to consider the cumulative impact of localised, variable threats and state-wide threats. As noted in Part A (iii), we also **recommend** expanding the SEPP to avoid impacts whether or not local councils are the consent authority.

Local Planning Direction (to replace clauses 3, 15, 16)

The Explanation proposes to update and transfer the 'plan-making' parts of the SEPP to a Local Planning Direction. Its wording has not yet been established.

Part 4 of the SEPP (cll. 15-17) gives inadequate direction and excessive discretion, and does not establish clear roles or relationships with CKPOMs (Part 3). At present:

- clause 15 states listed councils 'should' survey for potential and core habitat;
- councils 'should' apply environment protection zones (e-zones) *or* other 'special provisions' to core habitat (not potential koala habitat); and
- councils 'should' *consider* preparing a non-binding development control plan;
- clause 16 states 'the Director will consider giving a direction' to require an environmental study where a council proposes to zone (or rezone) core koala habitat or potential koala habitat as a non-environmental zone.

We **recommend** strengthening new Local Planning Directions, to *require* councils to:

- identify koala habitat by reliable survey and mapping methods within a set timeframe;
- protect that habitat by way of linked zoning and CKPOMs; and
- prepare a local environmental study before zoning or rezoning koala habitat as a non-environmental zone, or otherwise satisfy the Environment Minister that the zoning proposal is consistent with and 'does not undermine the achievement of' koala recovery.¹⁶

Restrictions on Environmental Zoning

Finally, the Government needs to clarify how the proposed Local Planning Direction would interact with Directions issued in March 2016 which impose new, restrictive criteria for applying E2 and E3 zones and environmental overlays in Far North Coast LEPs (Direction 2.5).¹⁷ EDO NSW and others have expressed concern at these restrictive criteria.

¹⁶ Local Planning Directions on Regional Planning (5.1)/Metropolitan Planning (7.1) require planning authorities to demonstrate consistency and ensure that LEPs 'do not undermine' overarching plans.

¹⁷ Available at: <http://www.planning.nsw.gov.au/Plans-for-your-area/Local-Planning-and-Zoning/Policy-Directions-for-Plan-Making>.

Protection zones for koala habitat were one of the main concerns raised in submissions to the Northern Councils E-Zone Review.¹⁸ The Government's response was that 'Koala habitat which is consistent with the final criteria could be zoned for environmental purposes.'¹⁹ This implies that koala habitat that does *not* meet the restrictive criteria (2 years' past primary land use etc) won't be protected by e-zones.

Local Environmental Studies (clauses 3 and 16)

We do not support removing local environmental study requirements (Explanation, p 12). As noted above, we **recommend** a requirement for local environmental studies – unless it can be demonstrated that existing studies and strategic planning is up-to-date and fine-grained enough to establish the koala habitat is of low significance; and that the zoning proposal is consistent with (does not undermine) koala recovery.

Conclusion

Thank you for considering this submission. We hope its recommendations assist the NSW Government to progress important amendments to the Koala SEPP, and to develop a state-wide koala protection strategy that ensures healthy koala populations recover and flourish in NSW for the foreseeable future.

We look forward to further engagement with the Department on these matters, and would be happy to discuss our recommendations in further detail.

Attachment A – EDO NSW on behalf of Friends of the Koala, December 2010



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¹⁸ See NSW Government, *Northern Councils E-Zone Review Submission Report* (2014), 'Table 1 - Main concerns with E zone criteria', p 3. For example, submissions proposed that 'Koala habitat should be included as a criterion for the E2 zone.'

¹⁹ See NSW Government, *Northern Councils E-Zone Review Submission Report* (2014), 'Table 1 - Main concerns with E zone criteria', p 3. Koala habitat was not addressed in the final E-zone report.