



# environmental defender's office new south wales

## State Environmental Planning Policy No 44 – Koala Habitat Protection

December 2010

### The EDO Mission Statement

*To empower the community to protect the environment through law, recognising:*

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- ◆ *the importance of indigenous involvement in protection of the environment.*

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## Executive Summary

The Environmental Defender's Office of NSW (EDO) is a community legal centre specialising in public interest environmental law.

We act for Friends of the Koala (FOK). FOK is a non-profit community group run by volunteers dedicated to conserving koalas in the Northern Rivers of New South Wales. FOK plays an active role in promoting habitat restoration in the Northern Rivers Region including research, including mapping current koala populations and their distribution.<sup>1</sup>

We submit that *State Environment Planning Policy No 44 – Koala Habitat Protection* (SEPP 44) is in urgent need of reform.

Koalas are identified as a 'vulnerable species' under the NSW *Threatened Species Conservation Act 1995* (NSW)<sup>2</sup>. Over the last ten years there have been significant declines in Koala populations in NSW.<sup>3</sup> The Koala has a poor recovery potential (low breeding rate) and is subject to many on-going threats. Habitat loss, fragmentation and degradation are generally recognized as the key threats to the survival of the Koala.<sup>4</sup> Other threats include increased disturbance by humans; injury or death from traffic; injury or death from dogs and cats; increased competition for food and territory because of overcrowding; and increased stress on animals, making them more susceptible to disease.

Under the *Environmental Planning and Assessment Act 1979* (NSW) State Environment Planning Policy No 44 – Koala Habitat Protection (SEPP 44) is the primary vehicle for the protection of Koala habitat in NSW. SEPP 44 requires a Koala Plan of Management to be prepared in relation to certain developments, if an assessment identifies 'core' Koala habitat on a site. SEPP 44 is of particular relevance on the North Coast of NSW, which is home to one of the main Koala populations in NSW, but where the majority of Koala habitat is located on private lands, rather than within National Parks, and are therefore at higher risk of harm from development.<sup>5</sup>

SEPP 44 states that:

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<sup>1</sup> See for example research paper: Seznec G. (2009) 'Distribution of disease symptoms in Koalas (*Phascolarctos Cinereus*) presented into case in the Far North Coast of NSW' Unpublished Third Year Undergraduate Report, School of Environmental Science and Management, Southern Cross University, available from the FOK website at [http://www.friendsofthekoala.org/fok/dl/DRAFT\\_IP\\_Seznec.pdf](http://www.friendsofthekoala.org/fok/dl/DRAFT_IP_Seznec.pdf).

<sup>2</sup> A 'vulnerable' species is a species which is likely to become endangered unless the circumstances and factors threatening its survival or evolutionary development cease to operate.

<sup>3</sup> See report prepared by Parsons Brinckerhoff for the Department of the Environment, Water, Heritage and the Arts (2008) *Review of progress in implementing the 1998 National Koala Conservation Strategy*, as available to download from <http://www.environment.gov.au/biodiversity/publications/koala-strategy/review.html>.

<sup>4</sup> See for example Natural Resource Management Ministerial Council 2009 'National Koala Conservation and Management Strategy 2009-2014 – Consultation Draft 6 June 2009', as available to download from <http://www.environment.gov.au/biodiversity/publications/koala-strategy/pubs/koala-strategy.pdf> (accessed December 2010) and the Department of Environment, Climate Change and Water, 'Koala Profile' as published on the 'Threatened Species' website, available at <http://www.threatenedspecies.environment.nsw.gov.au/tsprofile/profile.aspx?id=10616> (accessed December 2010).

<sup>5</sup> See Seznec G 2009, as noted above.

*This Policy Aims to encourage the proper conservation and management of areas of natural vegetation that provide habitat for koalas to ensure a permanent free-living population over their presence and reverse the current trend of koala population decline.<sup>6</sup>*

After years of being actively involved in the application of SEPP 44, FOK has concluded that SEPP 44, contrary to its aim of protecting Koala habitat, is in fact an enabling instrument in that it enables development in areas of potential and core koala habitat, more often than not, to the detriment of the survival of the koala. The EDO Northern Rivers has provided assistance to FOK over the past few years regarding the application of SEPP 44 in a number of Local Government Areas in relation to many different development applications.

It is the view of both FOK and the EDO that SEPP 44 is outdated and is largely failing in its primary aim to protect koala habitat to ensure the long term survival of the koala. It is our shared view that a better and more effective system of koala habitat protection ought to be introduced as a matter of urgency.

The EDO is therefore instructed by FOK to prepare this submission on its behalf, regarding key reforms to SEPP 44. We therefore propose three key reforms to SEPP 44 to help better protect the habitat of the vulnerable Koala in NSW. These reforms are crucial first steps that can be implemented in the short-term pending a comprehensive review of the SEPP.

**The three key recommendations for reform of SEPP 44 are:**

- **Revise Schedule 2 and the definition of ‘koala habitat’ in SEPP 44 to reflect the current knowledge regarding koala tree species and koala habitat;**
- **Remove the 1 hectare trigger for requiring a site specific Koala Plan of Management to be developed; and**
- **Insert detailed requirements relating to monitoring, review, reporting and compliance for individual Koala Plans of Management within the SEPP. Alternatively, this could be done by updating the Guidelines for the policy and inserting the Guidelines within the SEPP or including them as a schedule to the SEPP.**

We note some of the recommendations for reform were also recommended by the then Department of Environment and Climate Change NSW, in the Recovery Plan for the Koala approved and released in 2008. They are discussed in detail below. The **Appendix** includes five case studies to illustrate the variable application of the SEPP on the North Coast.

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<sup>6</sup> State Environmental Planning Policy No 44, Clause .

## 1. Revising the definition of 'Koala habitat' and Schedule 2 of SEPP 44

- 1.1. FOK contends that the operative provisions of SEPP 44 in terms of defining core koala habitat need to be reformed and in accordance with the recommendations contained in the Department of Environment and Climate Change NSW, Recovery Plan for the Koala, November 2008 (**Recovery Plan**).
- 1.2. In defining koala habitat under SEPP 44 there is a two step test. The first step is to assess whether the land is 'potential koala habitat' and the second step is to assess whether the land is 'core koala habitat'.<sup>7</sup>
- 1.3. The definition of 'potential koala habitat' is problematic, particularly in relation to the 15% cover requirement and the outdated list of tree species listed in the SEPP.
- 1.4. In relation to the definition of 'potential koala habitat' under SEPP 44, Koala expert Dr Carrick contends:

*The adequacy of the biological basis of SEPP 44 is questionable, since the definitions are based on a somewhat arbitrary selection of "feed tree species" (Schedule 2) - which in any case is an oversimplified approach to what constitutes Koala habitat (Ellis et al. 2002, Matthews et al. 2007). As pointed out by Phillips (2004) in the context of Kings Forest, it results in the incongruous situation whereby identified "core Koala habitat" fails to meet a criterion (15% cover) to qualify as "potential Koala habitat".<sup>8</sup>*

- 1.5. The Recovery Plan also recognises the need to reform the definitions of koala habitat provided in SEPP 44. It states:

*As more information is gathered, it is clear that the definitions of koala habitat in SEPP 44 (as promulgated in 1995) are not able to identify all habitat of importance to koalas. Currently the list of food trees in Schedule 2 which are used to identify potential koala habitat comprises only 10 species. Given the considerably greater variety of food tree species used by koalas across the state, the current Schedule 2 does not list all of the koala food trees which are important for the survival of koalas throughout NSW. Consequently, habitat of importance to koalas will not always be identified and adequate protection and management of koala habitat does not always occur.<sup>9</sup>*

- 1.6. The Recovery Plan proposes that reform could include the Schedule 2 tree species lists aligning to regions managed by Catchment Management Authorities and that local, scientifically, objective studies be able to modify regional tree lists with the approval of the Minister for Planning.<sup>10</sup> FOK submits that amending

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<sup>7</sup> SEPP 44, Clause 7

<sup>8</sup> Kings Forest Koala Plan of Management Prepared by Dr Frank N Carrick AM EcoIndig Resources Pty Ltd March 2008 on behalf of Project 28 Pty Ltd p12

<sup>9</sup> Department of Environment and Climate Change NSW, Recovery Plan for the Koala, November 2008 p5

<sup>10</sup> Department of Environment and Climate Change NSW, Recovery Plan for the Koala, November 2008 p6 & p53

SEPP 44 to provide for this mechanism should be a priority and would greatly improve the effectiveness of the SEPP, consistent with the Recovery Plan.

- 1.7. The Recovery Plan also logically recommends that there be a single definition of koala habitat, instead of ‘core’ and ‘potential’ habitat.<sup>11</sup>
- 1.8. The case studies outlined in the later sections of this submission, which detail examples of failures of SEPP 44 to ensure that key Koala habitat is protected as well as some successes, provide evidence that the broader, more scientific and common sense approach recommended by the Recovery Plan should be immediately adopted rather than a narrow preliminary step that actually blocks the primary aim of SEPP 44 from being achieved.
- 1.9. We also note that the Recovery Plan has now been in force for two years. Given that the Recovery Plan is a publication of the NSW Government’s own environmental protection agency, it is inconsistent and difficult to justify why the relatively simple reforms to the definition of koala habitat and the list of tree species contained in Schedule 2 of SEPP 44 have not yet been taken up by the NSW Government.

## **2. Removal of 1 hectare requirement**

- 2.1. SEPP 44 currently only recognizes koala habitat to be protected where the habitat is more than 1 hectare in size. The requirement under SEPP 44 that an ‘area of more than 1 hectare’ be required before the provisions of SEPP 44 are enlivened should be removed from clause 6.<sup>12</sup>
- 2.2. It is FOK’s experience that this threshold requirement, which essentially precludes an area of 1 hectare (approximately 2.5 acres) or less from being subject to Part 2 of SEPP 44, is detrimental to the survival of koalas in real terms.
- 2.3. There is no scientific basis to the 1 hectare threshold, it is an arbitrary threshold that does not reflect current development trends and their impacts upon koala habitat.
- 2.4. FOK has also found that, in practice, the 1 hectare requirement is enabling the destruction of some of the most important koala habitat, namely urban koala habitat. Particularly in urban areas, 1 hectare is too small an area to ensure the maintenance of a sustainable habitat area in terms of relevant tree species and also a sufficient buffer zone to protect the habitat and the Koalas themselves from nearby urban activities, including roads and urban development.

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<sup>11</sup> Department of Environment and Climate Change NSW, Recovery Plan for the Koala, November 2008 p6 & p53

<sup>12</sup> Clause 6 (c) provides that Part 2 applies to land that: (i) has an area of more than 1 hectare; or (ii) has, together with any adjoining land in the same ownership, an area of more than 1 hectare.

- 2.5. FOK is observing and actively engaged Through its rescue and care work, FOK has first hand knowledge and evidence of the cumulative impacts caused by the removal of urban koala habitat and the displacement and often the death of koalas one by one, backyard by backyard.
- 2.6. In addition, with such a small habitat zone, there is a high risk from even minimal encroachment from adjoining urban activities. FOK submits that in some Local Government Areas the rate of urban fringe koala habitat destruction is alarming.
- 2.7. It is strongly recommended that the 1 hectare provisions in SEPP 44 be immediately expanded, as they have not proved effective and do not reflect current understandings of the minimal size requirements for Koala habitat protection.

### **3. Monitoring, reviewing, reporting and compliance – site specific Koala Plans of Management**

- 3.1. The current SEPP 44 is distinctly lacking in terms of monitoring, reviewing and compliance mechanisms for individual site specific Koala Plans of Management. In the absence of performance measuring criteria and a way of collecting and centrally collating measurement data, there will ongoing non-compliance with Plans of Management, as demonstrated by the case studies listed in the following sections.
- 3.2. In terms of individual site specific Plans of Management, SEPP 44 focuses on setting out standards and criteria that a proponent must satisfy but, as the Kings Forest Koala Management Plan (2008) precisely points out, ‘a key element missing from many development plans is an effective follow-up to assess whether ameliorative measures are really working’.<sup>13</sup>
- 3.3. Clause 11(3) Part 3 of SEPP 44 provides that ‘a plan of management is to be prepared in accordance with the guidelines’. The guidelines refer to the Directors Guidelines, in section 2 of the Department of Urban Affairs and Planning, Circular No B35, 1995 (**the Guidelines**).
- 3.4. The Guidelines set out a list of matters that *should* be considered when undertaking an individual site specific Koala Plan of Management, in which it specifically provides, *inter alia*, ‘the plan should also have provisions for continuing monitoring, review and reporting. This should include an identification of who will undertake further work and how it will be funded’.<sup>14</sup>

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<sup>13</sup> Kings Forest Koala Management Plan, page 30

<sup>14</sup> Guideline 2.2.2 (x)

3.5. However, this is not a mandatory requirement. It is also noted that the Guidelines are more than ten years old, and again do not reflect the recent advances in research and understanding about Koala habitat.

3.6. It is recommended that provisions be included within SEPP 44 to require a consistent and comprehensive approach to monitoring, reporting and compliance. In order to achieve proper implementation of ameliorative measures imposed in a Koala Plan of Management, co-operation between local authorities and the Department of Planning in undertaking monitoring and reviewing is required. This should be achieved through updating the Guidelines and integrating the Guidelines as operative provisions or as a schedule to SEPP 44.

### **Conclusion**

SEPP 44 is currently failing to achieve its aim of encouraging the proper conservation and management of koala habitat, and reversing decline in koala populations. We submit that making the three key reforms discussed above would greatly strengthen and aid effective implementation of SEPP 44, consistent with the specific aims of the Recovery Plan and broader aims of the *Threatened Species Conservation Act 1995*. These reforms should be a priority for the NSW Government.

## Appendix: Case studies

### ***Case study No. 1 – Inconsistent environmental assessment of vulnerable species' habitats under current NSW laws***

The EDO has recently assessed an Environmental Impact Statement (EIS) for a major environmentally impacting extractive industry that stated that the land did not meet the definition of potential koala habitat in SEPP 44, due to the 15% cover criterion. However, elsewhere in the EIS, in accordance with an assessment under the *Threatened Species Conservation Act 1995*, it was stated that the land is potential habitat for the koala and we are instructed by the local community that the land is in fact habitat sustaining a local population of koalas. This kind of inconsistency occurs because recent improvements in understanding and research regarding Koala habitat have been adopted into the requirements for assessment under the *Threatened Species Conservation Act 1995* but not SEPP 44.

### ***Case Study No. 2 – Evans Head (1998) Site Specific Koala Plan of Management***

This site specific Koala Plan of Management relates to a development for a caravan park type of development in core koala habitat. This Koala Plan of Management has provisions for monitoring in the briefest form. It provides 'Monitoring of Koala activity by organizations such as Friends of Koala or Richmond River Shire Council or similar at this site is required to determine the effectiveness of management strategies'. However, the monitoring program proposed in this Koala Plan of Management can be considered tokenistic at best, as it fails to specify sources of funding and it does not set out the basics of how the monitoring should take place in terms of area, period, methods etc. Ultimately, this plan was approved by the Richmond Valley Council later in 2001 with conditions. One of the conditions required monitoring of Koala activity on a 12 monthly basis, by a qualified person. This Koala Plan of Management provided for the removal of core koala habitat and provided that there would be revegetation of another 'offset area' within the development footprint with koala feed trees. As anticipated, there was no proper monitoring of the implementation of the Koala Plan of Management or compliance with what was required under the Koala Plan of Management. It was brought to the attention of FOK and the EDO a year or so ago that the success rate of the planted koala feed trees was very low and that in fact most of the trees were dead.

### ***Case Study No. 3 – Evans Head (2008) Site Specific Koala Plan of Management***

Ten years later, the proponent in this case sought an extension of development on the abovementioned site and engaged a consultant to prepare a new site specific Koala Plan of Management which was to supersede the previous 1998 plan. The consultant had undertaken inspections and completed reports as required by the Richmond Valley Council's notice of determination for the first plan on previous occasions. Regarding monitoring, the 2008 plan provided that:

*Annual monitoring (as per current situation) is to continue for a five year period, with targeted scat searches completed at the site. Reports with the results of annual surveys are to be provided to Richmond Valley Council.<sup>15</sup>*

Although the 2008 plan was much improved, there are still concerns that the provisions will not address the issues identified from the failures of the 1998 plan, including:

- The consultant didn't actually undertake 'annual' monitoring in relation to the previous Koala Plan of Management approved in August 2001. In its 2008 Plan, the consultant states that it had conducted inspections in November 2003, January 2004, March 2006 and March 2007. Monitoring was not undertaken in years 2002, 2005 and 2008; clearly the requirement for 'annual' monitoring was not complied with.
- The 2008 monitoring provision noted above does not make reference to compliance. Council is not obliged to check the proponent's compliance with any monitoring provision, whether 'reports with the results of annual surveys' are actually provided to Council is uncertain. The real problem appears to lie in having no compliance regime to ensure that each provision of a Koala Plan of Management is complied with. As noted above the required replacement feed tree planting was in fact completely unsuccessful, and there was not compliance with the Koala Plan of Management.

#### ***Case Study No. 4 Nambucca Shire Council (2008) Site Specific Koala Plan of Management***

In contrast to the above examples, a site specific Koala Plan of Management prepared for a development in the Nambucca Local Government Area sets out detailed provisions for monitoring, reporting and compliance measures. On top of its provisions for annual reporting to Council, the plan includes an implementation schedule. The implementation schedule provides a timeline for the implementation of the ameliorative measures provided in the plan. The implementation schedule can be used as a checklist for compliance assessment for periodic or annual reporting. The requirement of an implementation schedule is a useful tool for both developers and council, or for any responsible authority to assess compliance. The Nambucca Shire Council Site Specific Koala Plan of Management is therefore an example of current 'best practice' and the requirement for an implementation schedule as adopted by the Nambucca Shire Council should be included in SEPP 44 as a requirement for all site specific Koala Plan of Managements.

#### ***Case Study No. 5 Kings Forest (2009)***

The Kings Forest Koala Plan of Management (prepared in March 2008) for a major development in the Tweed Local Government Area contains provisions that are forward thinking in terms of how monitoring, reviewing and compliance can be improved in reforming SEPP 44. The Kings Forest plan provides measureable performance indicators and applies sanctions where targets are unmet.<sup>16</sup> In contrast to most other individual koala Plans of Management this is a positive step in that measureable performance

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<sup>15</sup> KPOM Evans Head 2008 Page 22.

<sup>16</sup> Kings Forest Koala Management Plan (2008) page 30

indicators allow assessors and reviewers to record failure or success more clearly. Another key point to note is that, the Director General of NSW Department of Planning is actively involved in all phases of monitoring and reviewing. For instance actions 17 and 18 of the plan provide that:<sup>17</sup>

- The (monitoring) program is conducted by a suitably, qualified environmental consultant appointed by the developer with the concurrence of the Director General of the Department of Planning.
- Annual reporting will be to the local council and the Director General of the NSW Department of Planning.
- A review will be undertaken by the developer, Council and the NSW Department of Planning.

The provisions of the Kings Forest Plan therefore also provide a positive example for ways to improve implementation of SEPP 44.

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<sup>17</sup> Kings Forest Koala Management Plan (2008) page 31,32