



**Submission on the Infrastructure SEPP Review –
State Environmental Planning Policy (Infrastructure)
*Amendment (Review) 2016***

prepared by

**EDO NSW
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Executive Summary

Thank you for the opportunity to comment on the 10-year Review of the *State Environmental Planning Policy (Infrastructure) Amendment (Review) 2016 (Infrastructure SEPP Review)*, including the Government's Explanation of Intended Effect (the **Explanation**) and the exposure draft of amendments which provides the legal details (**Draft Infrastructure SEPP**). We note that a new, separate SEPP for educational facilities is on exhibition at the same time.

EDO NSW recognises the need to deliver well-planned civic infrastructure and government services in a timely way – including transport, health services, emergency services, energy and water utilities. At the same time, there is a need to ensure these services and infrastructure are well-planned, credibly assessed, adequately consulted on, and have minimal adverse impacts on the environment.

EDO NSW last made a submission reviewing the Infrastructure SEPP in 2010.¹ Our main recommendation was that public infrastructure development should be subject to *one regime that codifies best practice community consultation and environmental assessment procedures*. However since then, guidance for public authorities, transparency for communities and oversight by regulators remain limited. We note that there is very little aggregated information on the SEPP's 10-year operation.

The 2017 review of the Infrastructure SEPP is premised on the need to deliver, upgrade and maintain infrastructure and public services to growing communities. The draft SEPP significantly expands the types of utilities, services and infrastructure projects that can:

- use the fast-track pathways of 'exempt' and 'complying development' via the SEPP (i.e. such activities may no longer require public exhibition or scrutiny); or
- be assessed and approved by a local council or government agency under Part 5 of the Planning Act, in an expanded range of zones (i.e. often without public consultation, and usually involving self-assessment and approval by the authority proposing the project).²

At the same time, we note that delivering infrastructure increasingly involves competing public uses and interests. The Infrastructure SEPP's effectiveness should therefore be assessed on its ability to navigate these conflicts in a way that is economically responsible, socially acceptable and ecologically sustainable.

¹ EDO NSW, *Submission on the review of the State Environmental Planning Policy (Infrastructure) 2007*, April 2010, available at http://www.edonsw.org.au/planning_development_heritage_policy - [Download PDF](#).

² The Explanation (p 6) states that the SEPP review focuses on 'improving delivery of social infrastructure' such as 'health service facilities, correctional centres, emergency and police services, public administrative buildings, and council services on operational lands.'

This submission is divided into 3 parts:

- **General comments and key issues: transparency, assessment and oversight**
- **Comments on Key Amendments in the *Explanation of Intended Effect***
- **Comments on Other amendments in the *Explanation of Intended Effect*.**
These include:
 - *positive changes* (such as clarifying the scope of exempt development, new heritage safeguards and additional consultation requirements);
 - *concerning changes* (such as reduced consultation requirements, and exempt development in national parks and the marine environment); and
 - *proposals requiring further detail* (parks, reserves and public buildings).

In summary, in our view any expansion of faster approvals for infrastructure calls for:

- **improved transparency, notification and consultation based on the scale of change;**
- **harm minimisation guidelines, to ensure the SEPP is properly applied;**
- **exemplary environmental compliance within Part 5 agencies; and**
- **strong oversight and enforcement by regulators including the Department of Planning and Environment, and the resourcing to do so.**

General comments and key issues

Previous EDO NSW submission

In 2010 we identified two problems with the SEPP's complexity and application:

- first, public authorities relying on the SEPP where it in fact does not apply; and
- second, public authorities failing to conduct a Part 5 assessment or obtain approvals under other legislation where development consent is not required under the SEPP.

Our main recommendation in 2010 was **that public infrastructure development should be subject to one regime that codifies best practice community consultation and environmental assessment procedures.**

We also made several other recommendations including:

- to ensure public authorities understand how the SEPP operates and interacts with the wider planning system;
- regular audits to ensure the SEPP is correctly applied;
- the need for guidelines on 'minimal environmental impact' (to meet the threshold for exempt development); and
- supporting a clarification that exempt development may still need other approvals (clause 20).

The Explanation does not revisit the outcomes of the previous SEPP review. Nevertheless, **we reiterate these recommendations** to improve the guidance on, understanding of and compliance with the Infrastructure SEPP.

The Infrastructure SEPP is significant in scope but obscure to the public

Like Part 5 of the *Environmental Planning and Assessment Act 1979* (**Planning Act**), the Infrastructure SEPP is legally powerful but obscure to the public. The SEPP permits a range of infrastructure development to occur without requiring the proponent (often a council, state agency or utility provider) to obtain development consent under Part 4 of the Planning Act.³ However, the determining authority (often the proponent themselves) must still assess the impacts of the proposal under Part 5 of the Act, or otherwise meet standards for 'exempt' and 'complying' development.

Part 5 environmental assessment

Part 5 of the Planning Act is a 'safety net' for assessing activities that don't require consent. It requires public authorities proposing (or determining) an activity to examine and take into account, to the 'fullest extent possible', all matters affecting or likely to affect the environment as a result of that activity.⁴ This usually involves the agency (or other proponent, such as a utility company) conducting a small-scale Review of Environmental Factors (**REF**). If an activity is likely to significantly affect the environment, critical habitat, threatened species, populations or ecological communities, or their habitats, Part 5 requires a full Environmental Impact Statement (**EIS**).⁵ As well as these assessments, proponents must comply with the SEPP itself.

Public concerns – SEPP must navigate tensions in a fair and sustainable way

Community members who call our free legal advice line are often perplexed at the limited availability of information or consultation opportunities about Part 5 infrastructure development – whether or not they know what Part 5 is when they call. This observation and experience is important because the Infrastructure SEPP gives effect to a large range of development under Part 5 that the public may encounter.

Competing public uses can be at stake when planning for infrastructure, particularly in increasingly-crowded urban environments. For example, expanding a hospital under the SEPP may conflict with the ecological and social value of retaining dwindling public bushland. Modernising a police station under the SEPP may conflict with the local heritage significance of an 80-year-old building (whether or not that building is listed).

EDO NSW supports the well-planned and timely delivery of essential services. While there are undoubtedly social benefits of delivering essential services under the Infrastructure SEPP, agencies or policy-makers should not simply assume 'the ends justify the means' when deciding what assessment, notice or public consultation is required. Above all, delivering and maintaining public or private infrastructure and

³ Environmental Planning and Assessment Act 1979 (NSW) (**Planning Act**), s. 76.

⁴ Planning Act, s. 111.

⁵ Planning Act, s. 112.

services requires transparency, sensitivity and accountability to the community being affected, and ultimately served.

Delivering infrastructure and meeting expectations for input and transparency

EDO NSW recognises the need to deliver well-planned civic infrastructure, government services and maintenance in a timely way – including transport, health services, emergency services, and public and private energy and water utilities. At the same time, there is a need to ensure these services and infrastructure are well-planned, credibly assessed, adequately consulted on, and have minimal adverse impacts on the environment and local areas.

Communities expect appropriate notice, consultation and transparency for activities such as demolition of significant buildings, protection of streetscapes and clearing of local vegetation. When there is no notice, no chance to have input, and little if any documentation available, on-site or online – then community members are more likely to be concerned or alarmed at works that are commencing. They understandably feel that due processes have not been followed.

Despite this common frustration, transparency requirements under the Infrastructure SEPP and Part 5 of the Planning Act continue to be limited, and confusing to navigate. This means that satisfying the SEPP and the Planning Act does not always coincide with satisfying the community. Yet this can be improved.

The SEPP review is an opportunity to understand and respond to community expectations and experiences of infrastructure delivery and public participation (recognising these may vary). However, we expect the obscurity of the SEPP itself will limit comments made via this review. We recommend the Department therefore seek more targeted feedback from community members and groups, in terms that will make sense to them.

Key issues: transparency, robust assessment, compliance and oversight

Accordingly, there are four significant issues that we recommend the Infrastructure SEPP Review should address:

- **clear, consistent and proportionate public notification and consultation requirements, drawn together in one place**
 - i.e. minimum notice and exhibition requirements for different scales of infrastructure;
- **issue ‘minimal environmental impact’ guidelines**
 - i.e. to assist correct application, assessment, and avoidance of harm;
- **additional public consultation, independent assessment or peer review**
 - if an activity will affect heritage, environmentally sensitive areas, endangered species etc (i.e. accounting for cumulative impacts and public confidence, even if no ‘significant effect’ is identified by itself); and
- **build-in compliance safeguards, regulatory oversight and performance reporting by authorities relying on the Infrastructure SEPP.**

- i.e. require all environmental impact assessments (including REFs) and submissions to be published online, prior to approval where possible;
- publish statistics on approvals, environmental impact assessments (REFs and EISs), inter-agency concurrences, and complaints received;
- publish results of departmental audits, investigations and prosecutions.

Comments on Key Amendments in *Explanation of Intended Effect*

Part C of the Explanation describes proposed expansions to *exempt* development, *complying* development and development *permitted without consent* (after Part 5 assessment) for key ‘social infrastructure’: such as public and private health facilities, police stations, council operational lands and commuter hubs (rail and bus stations).

Our **general comment and recommendation** for all categories under Part C is that: the Infrastructure SEPP needs to trigger additional transparency, independent oversight and notification and consultation opportunities where valued and sensitive areas may be affected.⁶

Exempt and complying development – Minimal environmental impact

Importantly, protecting sensitive areas relies in part on proper and objective decisions as to whether the activity is of ‘minimal environmental impact’ (often by the agency carrying out the development) and therefore qualifies as exempt development.⁷ However, as we noted in 2010, there is limited guidance or checks and balances (transparent assessment, audits etc) to ensure this prerequisite is adequately and objectively met.

We **recommend** developing guidance on how to assess whether an activity is of ‘minimal environmental impact’, including what pathways may be available if impact is not minimal. We also **recommend** the SEPP Review include a clear process for Part 5 authorities to demonstrate to the public, before infrastructure development commences, how the authority has determined the activity will be of ‘minimal environmental impact’. This should include publishing any supporting studies, and providing a process for the community to provide comment, feedback, complain or report non-compliance during construction or operation of infrastructure under Part 5.

⁶ This would include, for example:

- rare, endangered or locally significant vegetation or habitat;
- sites of heritage significance;
- places significant to Aboriginal people, culture and heritage;
- sensitive coastal or riparian areas; and
- public reserves and protected areas.

⁷ ‘Minimal environmental impact’ is a prerequisite for carrying out ‘exempt development’ under s. 76(2) of the Planning Act.

Development without consent (Part 5) – expansions for ‘social infrastructure’

The proposed Infrastructure SEPP amendments would significantly expand ‘development permitted without consent’ (Part 5 self-assessed development) to activities such as:

- alteration, demolition and additions to health service facilities, carparks and helipads (EIE p 8);
- similar activities for existing police and emergency services facilities, including in an expanded range of zones (EIE p 8);⁸
- a range of purposes on Council operational land and Crown (public) reserves; and,
- a range of miscellaneous development types under ‘Other proposals’ (Part D).

While we do not object to proposals to expand Part 5 ‘self-assessed’ development for essential services *per se*, we do recommend that the Government ensure the following safeguards:

- consultation requirements are clear, consistent and proportionate to the scope and impact of change and the sensitivity of the environment affected – by consolidating and standardising minimum requirements either in the Infrastructure SEPP or the Planning Act; and,
- more systematic oversight to ensure environmental assessment (REFs/EISs) are adequate and objective (including measures to avoid and mitigate environmental impacts such as tree-clearing, erosion and pollution).

Planning Bill and ISEPP Review should require clear, consistent consultation

A significant new proposal under the Environmental Planning and Assessment (Amendment) Bill 2017 (**Planning Bill**) is that each ‘planning authority’⁹ – including Part 5 determining authorities – must prepare and exhibit a Community Participation Plan.¹⁰ The Planning Bill also sets out minimum exhibition periods for certain draft planning instruments and development applications.¹¹

While we strongly support these proposals, neither the Bill nor the Infrastructure SEPP Review propose minimum exhibition timeframes for Part 5 activities. Instead, exhibition will continue to be left to disparate SEPP requirements, authorities’ discretion, agency or council policies and future Community Participation Plans. As requirements in Community Participation Plans may not be mandatory, there is no guarantee what exhibition periods will apply, and no consistent baseline of

⁸ The EIE (p 9) notes that police station development can only be carried out without consent (Part 5 assessment) if it will not ‘result in any significant adverse effect on the amenity of the locality, including impacts on traffic, parking and noise.’

⁹ Planning authorities include: The Minister, the Planning Secretary, the Greater Sydney Commission, the Independent Planning Commission, Sydney district regional planning panel, a council, a local planning panel, a determining authority under Part 5, a public authority prescribed by the Regulations. See Draft Bill, pp. 15 and 16.

¹⁰ The CP Plan will set out how and when the (Part 5) authority will undertake community participation on preparing environmental planning instruments, assessing development proposals, conducting environmental impact assessment and so on. In preparing a CP plan, the determining authority must *consider* community participation principles in the Bill.

¹¹ Planning Bill 2017, Schedule 1 to Part 2.

transparency across different authorities. Unlike the consolidated Planning Bill, Part 5 exhibition requirements will still be scattered within and across policies.

For that reason, as noted we recommend the Infrastructure SEPP (or Planning Bill) adopt clear, consistent, consolidated minimum requirements for public consultation and notification periods for Part 5 activities – based on scope, scale and sensitivity. In particular, standard notification should include a ‘scope of works’, access to the REF (including but not limited to online access), and complaint-handling information.

Comments on *Explanation of Intended Effect: Other Amendments*

Part D of the Explanation sets out the Government’s proposed operational improvements and housekeeping amendments. We comment briefly on these with regard to positive changes, concerning changes and amendments that need further explanation.

Positive changes and further suggestions

Clarity throughout the Infrastructure SEPP

We generally welcome amendments to update, simplify and clarify provisions of the SEPP in ways that assist with interpretation ‘without altering the policy intent or operation of those provisions.’ (Explanation p 11)

Part 2: General, Division 1: Consultation

We welcome requirements to provide a ‘scope of the works’ as part of notification to councils and other public authorities to assist them in understanding likely impacts.¹²

We recommend that a ‘scope of works’ be *systematically required* to accompany *any* notification under the Infrastructure SEPP (such as notice to adjoining neighbours in relation to health service facilities without consent under Division 10, e.g. tree clearing; and notice regarding roads and traffic development under Division 17).

We recommend additional requirements that the notice and scope of works also be published online, as soon as practicable by the local council (for example, on the local council’s website) with ‘alert notifications’ available to interested community members when a notice is added to the website. At a minimum, interested residents could then contact their local council to have their say.

In relation to Part 5 infrastructure activities likely to have local heritage impacts, we recommend that in addition to notifying local councils, public authorities be required to notify and take account of comments from local heritage groups (i.e. those known to the local council, or with contacts listed on a specified heritage body’s website).

¹² See Infrastructure SEPP Amendment (Review) 2016, p 3, Schedule 1: consultation and notification.

Exempt and complying development generally¹³

We welcome proposed amendments to clarify the limits of exempt development under the Infrastructure SEPP (Part 2 Division 4) particularly regarding heritage and asbestos.¹⁴ Once again the effectiveness of these exempt development provisions relies on the robust and objective interpretation of (no more than) ‘minimal impact’ on heritage. What information does the Department have on its application to date? Statutory or other guidance should be provided to ensure this is properly adhered to.

We also welcome the clarifying note (to Division 5) that complying development under the Infrastructure SEPP must also satisfy general complying development requirements under cl. 1.17A of the *SEPP (Exempt and Complying Development) Codes 2008*.¹⁵ Nevertheless, we recommend further consideration as to whether a note on cl. 1.17A is sufficient.

For example, cl. 1.17A states that complying development does not apply where an item is listed on a heritage list (local or state). If other specific heritage requirements are removed as a result (e.g. correctional centres, cl. 26B), *those* revised clauses must be clear that the general requirements in the Codes SEPP still apply. Similarly, several draft clauses specifically require compliance with cl. 20 of the Infrastructure SEPP (*General requirements for exempt development*) but for completeness, should arguably also refer to cl.1.17A of the Codes SEPP.

Conditions on complying development certificates on Aboriginal and other heritage

We welcome additional items under clause 20C specifying ‘stop work’ requirements if (8A) ‘any object having interest due to its age or association with the past’ is found; as well as (8B) if any Aboriginal object, evidence of habitation, or remains, is found.¹⁶

We recommend that the reference in (8A) be broadened beyond ‘objects’ to refer to ‘buildings’ (or parts of buildings) that are of such interest. The intent is to capture and assess potentially significant heritage buildings (as well as objects) not yet listed in an LEP or the State Heritage Register.¹⁷

We support the proposed note to (8B) stating that an Aboriginal Heritage Impact Permit may be required. We recommend this note also refer to s. 89A of the *National Parks and Wildlife Act 1974* (NSW) (failing to report an Aboriginal object is an offence).

Additional notice to councils and residents regarding roads and traffic development

Division 17 of the Draft Infrastructure SEPP proposes to expand development without consent (Part 5-assessed) to include bus and maintenance depots etc

¹³ Infrastructure SEPP Amendment (Review) 2016, p 4, Schedule 2.

¹⁴ See Infrastructure SEPP Amendment (Review) 2016, p 4. The amendments state that exempt development must not involve demolition of a heritage building or work (local or State-listed). Any other demolition, and any removal of asbestos, must comply with the relevant Australian Standard and guides.

¹⁵ Infrastructure SEPP Amendment (Review) 2016, p 4. See also *Explanation of Intended Effect*, p 12.

¹⁶ See Infrastructure SEPP Amendment (Review) 2016, p 5, amendment to cl. 20C.

¹⁷ Clause 1.17A of the Exempt and Complying Codes SEPP states that complying development does not apply where an item is *listed* on a heritage list (local or state). This does not capture the above.

(Explanation p 16). While we do not comment on this expansion itself, we welcome additional notification and consultation requirements for councils and local residents regarding these types of infrastructure proposals. However, this is on the basis that (as noted elsewhere) standard notification should include a 'scope of works', access to the REF study, and complaint-handling information.

Additional noise attenuation requirements for developments along road corridors

We also welcome the proposal for additional noise attenuation obligations on developers, by lowering the current threshold of 40,000 vehicles per day to 20,000 (Explanation p 17). This is an important safeguard for sensitive users such as residents, hospitals and childcare centres.

We recommend the Department consult with the EPA as to whether the Infrastructure SEPP should also require smog ventilation for developments along road corridors, to address vehicle emissions that are harmful to residents and other sensitive users. The EPA advice and any other consultation (such as with RMS) should be published.

Concerning changes, and recommendations to address these

Removing consultation with neighbours for electricity substation maintenance works

We recommend retaining requirements to notify neighbouring residents regarding proposed electricity substation maintenance works (and notifying local councils if this is generally councils' preference). Notification should be proportionate to the degree of impact or interference, so a period less than the current 21 days may be appropriate in some circumstances. In cases of very minor maintenance, notice to neighbours could be for information only. The point is to satisfy reasonable expectations, be alert to disruptions, and ensure neighbours have input where there is a long-term amenity impact.

Port facilities etc: Extending exempt development and development without consent

We are concerned at the breadth of proposed amendments related to port, wharf or boating facilities.¹⁸ In particular, noting the level of community interest in protecting sensitive marine environments, we do not support permitting dredging of new navigation channels as 'development without consent'.

We are concerned that Part 5 development is subject to less public scrutiny and input than development which requires consent. We recommend this proposal should not proceed without specifically consulting coastal communities and environment groups on its effects in practice.

We also recommend that climate change adaptation (and the potential for 'maladaptation', via works which unintentionally exacerbate vulnerabilities) should also be a mandatory consideration for port, wharf and boating facilities in the SEPP.

¹⁸ Infrastructure SEPP Amendment (Review) 2016, p 25, Schedule 13.

Finally it is unclear what assurance measures the Department of Planning, DPI Fisheries, Roads and Maritime Services (**RMS**) or other port authorities are taking to verify and ensure that port, wharf and boating infrastructure has minimal environmental impact, particularly with regard to the adequacy and objectivity of Part 5 assessments, sensitive marine environments and threatened species referrals. It is difficult to support expansions without considering existing levels of compliance.

Temporary crushing plants near rail corridors to be development without consent

We raise concerns as to the potential for impacts on neighbours and the environment by way of noise, land and water pollution with regard to permitting 'temporary crushing plants or temporary concrete batching plants' operated by public authorities as development without consent (Part 5-assessed).

We recommend three safeguards to minimise the potential for negative impacts:

- that industrial plants be located a minimum distance from sensitive receivers (human and environmental), including homes and watercourses;
- that neighbours be notified and invited to comment on the scope, duration, impact and hours of works;
- that neighbours have access to the REF and conditions to minimise impacts and be informed of an EPA or Planning Department complaint-handling line.

If these safeguards are not included, such development should require consent.

The Department should also consider whether local communities would reasonably expect to be notified about remediation of contaminated land (Explanation p 16).

Finally, while we do not object to including 'replacement' in relation to rail maintenance as exempt development, we do note that infrastructure replacement is an opportunity to ensure continuous improvement in environmental protection and management. The lack of external or community oversight over exempt development means that other requirements and incentives are needed to improve environmental standards. We recommend the SEPP Review build-in references to ensuring continuous environmental improvement, including in relation to plant replacement.

National parks: Replacing or upgrading telco facilities to be exempt development

We do not support the proposal to allow public authorities to replace or upgrade telecommunication facilities in national parks (or on land acquired under Part 11 of the *National Parks and Wildlife Act 1974* (NSW)) as 'exempt development'.¹⁹ Given the sensitivity of these lands, such activities require greater oversight and assessment (at least by way of an REF) than exempt development would provide.

The proposal also appears to conflict with existing controls under the SEPP provision it proposes to amend, clause 116 (controls that will continue).²⁰ Clause 116(1)(d) notes that exempt development for telecommunications cannot be carried out on an

¹⁹ Draft Infrastructure SEPP, p 48, clause 116(3).

²⁰ Draft Infrastructure SEPP, Schedule 19, item [7], amendment to Infrastructure SEPP clause 116.

environmentally sensitive area under the Exempt and Complying Codes. In turn, those sensitive areas include national parks and land acquired under Part 11.²¹

We recommend that replacing or upgrading telecommunication facilities in national parks (or on land acquired under Part 11) require, at a minimum, assessment under Part 5 instead of being exempt development. Consultation requirements with the local council and the National Parks and Wildlife Service should also be considered.

Proposed changes that require further explanation

Parks & reserves: Extending exempt development and development without consent

The proposed amendments related to parks and other public reserves (under Schedule 12 of the draft Infrastructure SEPP) require further explanation as to:

- How the scope of these amendments may broaden as a result of the passage of the *Crown Lands Management Act 2016* (the Explanation refers to certain expanded provisions being consistent with the *Crown Lands Act 1989* only);
- What assurance measures the Department and public authorities are taking to verify that exempt development in parks and reserves is having 'minimal environmental impact'.

Public administration buildings and Crown buildings

Division 14 of the draft Infrastructure SEPP proposes that alterations or additions to public administration buildings, not just 'minor works', become development without consent (Part 5-assessed). We recommend the Government clarify what heritage considerations and assessments would be required under these changes (for example, in association with clauses 77-77A). In particular, alterations or additions to public buildings should be required to respect, conserve and restore heritage values.

²¹ SEPP (Exempt and Complying Development Codes) 2008, cl. 1.5, 'environmentally sensitive area'.