



## Draft Local Land Services Amendment Regulation 2017

This part of the submission comments on the proposed *Local Land Services Amendment (Land Management—Native Vegetation) Regulation 2017 (LLS Regulation)*.

For detailed analysis of the amendments made to the LLS Amendment Act in 2016, please refer to our previous submission.<sup>1</sup>

Our key concerns have not been adequately addressed and include:

- removal of the ‘maintain or improve’ test;
- repeal of the environmental outcomes assessment methodology – particularly as the new scheme details do not indicate equivalent mandatory assessment of soil, salinity and water;
- expansion of allowable activities;
- use of code-based clearing – especially for vegetation at very high risk of extinction (endangered ecological communities (**EECs**) and vulnerable ecological communities); and
- the transitional arrangements for the native vegetation scheme to commence in the absence of comprehensive and accurate maps.

The subordinate instruments and documents on exhibition present an opportunity to address some of these issues. This part of the submission addresses the proposed clauses of the LLS Regulation in turn:

- Schedule 1 – Amendment of Local Land Services Act 2013 (**LLS Act**) No 51
- Schedule 2 Amendment of Local Land Services Regulation 2014
- Division 2 Native vegetation regulatory map
- Division 3 Clearing native vegetation under land management (native vegetation) code
- Division 4 Approval for clearing native vegetation not otherwise authorised
- Division 5 Miscellaneous
- Other issues - Regional strategic land use map pilot

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<sup>1</sup> EDO NSW submissions on the biodiversity and land management legislation in 2016 are available at: [http://www.edonsw.org.au/nsw\\_biodiversity\\_reform\\_package\\_2016](http://www.edonsw.org.au/nsw_biodiversity_reform_package_2016)

## **Schedule 1 – Amendment of Local Land Services Act 2013 No 51**

This schedule contains 6 clauses that propose to amend Schedule 5A of the LLS Act. The clauses relate to private native forestry (**PNF**) provisions, incorporating the new category of sensitive regulated land, and regarding soil erosion.

We seek clarification regarding how the special provisions for PNF will be carried over from clause 47 and 48 of the current *Native Vegetation Regulation 2005*, and note the concurrent separate review of PNF (clause [1] 11A).

We **strongly support** the amendments to Schedule 5A – Part 4 of the LLS Amendment Act to recognise the new Category 2 - sensitive regulated land.

We support the proposed new clause 36 that stipulates that the part only authorises clearing that achieves the purpose of the clearing in a manner that minimises the risk of soil erosion. However as noted, we have concerns about the repeal of the mandatory soil assessment module of the EOAM and we would like to see equivalent requirements for soil assessment in the new regime.

## **Schedule 2 Amendment of Local Land Services Regulation 2014**

This schedule inserts a new **Part 14 Land management (native vegetation)** into the LLS Regulation 2014. This part of the submission makes recommendations on the key parts of the amended regulation.

### **Division 2 Native vegetation regulatory map**

#### *Transitional arrangements*

EDO NSW has repeatedly raised concerns about the regulatory risk of commencing the new native vegetation management scheme before the maps have been finalised. We therefore remain concerned about the transitional provisions proposed. The Native Vegetation Regulatory Map (**NV Regulatory Map**) was envisaged and designed as the regulatory centrepiece of the Government's native vegetation reforms. Significantly, the transitional provisions allowing the scheme to commence *without* the NV Regulatory Map were never subject to public consultation prior to the revised Bill being introduced to Parliament. It is also highly doubtful that the Government's own advisory panel would have supported this.

The reform timeline states that the reforms will commence on 25 August 2017. The *Land management and the Native Vegetation Regulatory Map fact sheet* states that there will be targeted consultation on the draft map 'over the coming months' and 'the regulatory effect of the map is likely to commence in 2018.' There is therefore a significant transitional period when land categories will be self-determined and significant code based clearing will occur. If the scheme does commence without a quality-assured NV Regulatory Map, it will be difficult to verify if clearing was legal after the fact, particularly if no LLS staff set foot on the land.

The *Regulatory provisions for the native vegetation regulatory map - Submission Guide* states:

#### **Transitional arrangements for the NVR Map**

The NVR Map will commence after the other aspects of the reform package commence, to enable further stakeholder consultation on the NVR Map. Once the LLSA Act commences the following transitional arrangements will be in place (until the final NVR Map is made):

- If landholders wish to undertake any clearing on their land they will determine whether their vegetation is on regulated or unregulated land, using the criteria set out in the LLSA Act and the draft LLSA Regulation (except for low conservation grasslands). Local Land Services (LLS) can assist landholders to apply the criteria. [emphasis added]
- For low conservation value grasslands on regulated land, the criteria that currently applies to determine whether groundcover can be cleared under section 20 of the Native Vegetation Act 2003 will continue to apply during the transitional period.
- Landholders can rely on the draft NVR Map for the purposes of determining whether land is vulnerable regulated land or sensitive regulated land.

The criteria are not clear and self-assessment of whether land is regulated is high risk. We strongly **recommend** that the scheme should not commence until maps are complete.

If rushed commencement does proceed, we strongly **recommend** that all levels of Code-based clearing require LLS certification (not only notification). This would ensure LLS staff have the opportunity to talk to and assist landholders with the new scheme; verify vegetation types, status and condition; observe the scale of land-clearing proposed (and ultimately undertaken); and observe the condition of the land and other environmental assets, including waterways, before and after clearing.

#### *New category 2 – sensitive regulated land*

We **strongly support** the new map category 2 – sensitive regulated land (clause 108). Clause 108 provides that the new category applies where the land:

- contains native vegetation grown or preserved with public funds for the funding period, or
- is subject to remedial action, or
- is subject to a private land conservation agreement under the *Biodiversity Conservation Act 2016*, or
- is subject to be set aside under a requirement made in accordance with a land management (native vegetation) code, or
- is subject to an approved conservation measure that was the basis for other land being biodiversity certified under Part 8 of the *Biodiversity Conservation Act 2016* or under any Act repealed by that Act, or
- is an offset under a property vegetation plan under the *Native Vegetation Act 2003* or is a set aside under a Ministerial order under Division 3 of Part 6 of the *Native Vegetation Regulation 2013*, or
- is in the coastal wetlands and littoral rainforests area of the coastal zone referred to in the *Coastal Management Act 2016*, or
- is identified as koala habitat (of a kind prescribed by the regulations) in a plan of management made under *State Environmental Planning Policy No 44—Koala Habitat Protection*, or
- is a declared Ramsar wetland within the meaning of the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth, or
- has (subject to the regulations) been mapped by the Environment Agency Head as land containing critically endangered species of plants under the *Biodiversity Conservation Act 2016*, or
- has been mapped by the Environment Agency Head as land containing a critically endangered ecological community under the *Biodiversity Conservation Act 2016*, or
- contains high conservation value grasslands.

Clauses 111, 112 and 113 go on to confirm that the new category includes:

- core Koala habitat (i.e. identified in a Plan of Management under SEPP 44) (clause 111). Although we note that a concurrent review is underway;<sup>2</sup>
- critically endangered plants or communities (clause 112), although the wording of this clause is unclear: “only if it is land around the location of particular plants of that species”;
- PNF plans (clause 113(a));
- land subject to funded conservation agreement, property vegetation plan (**PVP**) etc (clause 113(b), (c), (d), (e));
- vegetation related to a plantation approval (clause 113(h));
- grasslands beneath the canopy or drip line of woody vegetation (clause 113(g));
- land in the Southern Mallee Planning Group subject to western lands lease conditions (clause 113(h));
- land managed as a condition/offset of a planning approval (clause 113(i)) – we note it is unclear how OEH will obtain this information to regularly update the map category, and urge the Department of Planning to ensure this information is made available as soon as possible; and
- mapped old growth forest and rainforest (clause 113(k) and (l)).

We **strongly support** the proposed list of land that will be categorised in the new sensitive regulated land category. We also welcome the intention that the Sensitive Values Map will be available from commencement (unlike the NV Regulatory Map). The fact that the Sensitive Values map can now identify areas where code clearing is excluded is a positive improvement. We strongly support clause 124 and the note after Clause 108 stating:

**Note.** Category 2-sensitive regulated land (including land taken to be so categorised under subclause (4)) is not authorised to be cleared under a land management (native vegetation) code—see clause 124.

To ensure this new category is effective in protecting environmentally sensitive and high conservation value land, we **recommend that this category be expanded**, for example, to include travelling stock reserves (**TSRs**).<sup>3</sup>

The *Regulatory provisions for the native vegetation regulatory map - Submission Guide* (p10) notes that:

TSRs play a key role in ecological landscape connectivity and biodiversity conservation across NSW as well providing important agricultural, social, Aboriginal cultural heritage and recreational values.

The Independent Biodiversity Legislation Review Panel in its final report recommended that high-conservation value TSRs should be maintained to prevent the current network from being broken and connectivity lost.

We **strongly recommend** that TSRs be included in the new category 2 - sensitive regulated land or mapped as excluded land. Even if mapped as sensitive, the fact that TSRs could still be cleared with NV Panel approval emphasises the need for land-clearing applications to the NV Panel to be exhibited for public comment.

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<sup>2</sup> See our submission on the Koala SEPP Review (State Environmental Planning Policy 44 – Koala Habitat Protection January 2017). Available at [http://www.edonsw.org.au/native\\_plants\\_animals\\_policy](http://www.edonsw.org.au/native_plants_animals_policy).

<sup>3</sup> The consultation note after clause 113 states:

**Consultation note.** *This Regulation may be revised after public consultation to prescribe travelling stock reserves as category 2 - regulated land.*

We **strongly recommend** the LLS Regulation set out a **broader definition of koala habitat** to be mapped as sensitive land. This is because: very few areas are protected and mapped under Koala Plans of Management (**KPOMs**) (only 5 local government areas across NSW have Comprehensive KPOMs); the definition of core koala habitat is widely acknowledged as inadequate (yet the proposal to expand this from 10 tree species to over 60 species has yet to take effect under Koala SEPP 44); and the Chief Scientist has recommended the planning system address this as a priority.

In addition, we **recommend** that the **coastal zone** also be included in the new category.

We also **recommend** a **minimum riparian buffer zone** of 20 m around all watercourses be mapped as category 2 sensitive regulated land.

We also **recommend** that Code clearing is excluded from all **E-zones**.

#### *Grasslands and groundcover*

We are concerned that the draft NV Regulatory Map “will not be operational for grasslands in this [transitional] period” (*Regulatory provisions for the native vegetation regulatory map - Submission Guide p 8*), however we support the continued use of the criteria set out in the *Native Vegetation Act 2003* to be applied to groundcover during the transitional period. The Guide goes on to state: “until a determination is made of conservation value, grasslands will be mapped according to the ‘significantly modified or disturbed’ test” (discussed below).

The LLS Regulation gives the Environment Agency Head discretion to determine the conservation value of grasslands and groundcover (clauses 109 and 110). We note that a determination of low conservation value (clause 109(1)) could potentially conflict with EEC definitions.

We **recommend** that the ‘Grasslands and Other Groundcover Assessment Method’ that is to be published (clause 108(2)(e)), identifies objective scientific criteria for categorisation to assist with accurate and comprehensive mapping of grasslands and groundcover. We note that the *Land management and the Native Vegetation Regulatory Map fact sheet* indicates this method will be peer reviewed ‘with targeted consultation undertaken before it takes effect.’ This method should be publicly exhibited and consulted upon. The unclear timeframe for when it takes effect raises concerns about inappropriate clearing during the transition phase when important grasslands may remain unmapped.

#### *Determining whether native vegetation has been disturbed or modified or unlawfully cleared*

Clause 114 proposes that determining whether grassland or other non-woody vegetation has been disturbed or modified will be determined by aerial assessment (for example of cropping patterns). It is not clear how this would pick up unlawfully cropped grasslands where no official compliance action was completed.

Clause 115 (*Compliance or enforcement action required for determination that land was unlawfully cleared*) requires a conviction or a court order to prove that land was unlawfully cleared. This has the potential to overlook and retrospectively validate illegal clearing where compliance has not been completed yet. There is scope for regulations (under section 60J of the Act) to provide that warning letters and lesser compliance activities such as PINs are relevant to such determinations.

Furthermore clause 116 (*Additional grounds on which land is authorised to be re-categorised to category 1 – exempt land*) is confusing as it appears to give discretion to re-categorise land even where there has been unlawful clearing, followed by lawful clearing of subsequent

regrowth. This is not clear as regrowth vegetation did not require approval under the *Native Vegetation Act 2003*.

We **recommend** that land must not be mapped as exempt if that would represent a perverse benefit from unauthorised clearing.

#### *Re-categorisation of mapped land*

Clauses 116 to 123 deal with the process of re-categorisation. It is likely that mapping in some areas may be highly contested and so a clear, objective and accountable process for re-categorising – where ecologically valid – is essential.

We **recommend** that the circumstances identified in clause 117(2)(b) *must* involve public notification of re-categorisation.

We **support** the designation of land as category 2 regulated land while a decision is being made, but it should be made clear what happens at the end of 60 days (clauses 118 and 119). Land should remain regulated until a decision is made.

We **support** the ability of the Environment Agency Head to seek further information for a re-categorisation review request (clause 121), and that the review ‘clock is stopped’ while the necessary information is being sourced (clause 122).

We **support** deemed refusal if no decision is made after 40 days (clause 122(3)).

Local Councils and LLS should have rights to make submissions on, and to appeal against, re-categorisation requested by a landholder.

We **recommend** that third party rights regarding re-categorisation decisions are provided for in the LLS Regulation, especially where Crown lands such as TSRs are involved.

### **Division 3 Clearing native vegetation under land management (native vegetation) code**

#### *Land excluded from code clearing*

As noted above, we strongly support clause 124 that stipulates that category 2 – sensitive regulated land and other certain land (i.e., some old growth forest) is excluded from application of the code.

As noted throughout, we recommend this clause be strengthened by applying to all old growth forest and being extended to include other lands such as travelling stock reserves, the coastal zone, a broader category of koala habitat, a minimum riparian buffer zone, and all e-zones.

#### *Maximum period of clearing*

Clause 126(b) provides that codes can set maximum periods for clearing. As noted, the cumulative impacts of applying multiple codes needs to be carefully monitored. There is a risk of accumulating unexercised code authorisations over a number of years, i.e. long periods of un-activated code clearing with multiple notifications and certifications possible.

We **recommend** that the LLS Regulation set clear short term maximum periods, such as 5 years. This would generally align with development consent rights under the Planning Act (s. 95). If a landholder still wants to undertake code clearing, they can notify or apply for

certification for another 5 year period. This would assist LLS and OEHL in keeping track of the scale of code clearing in each LLS and across NSW.

#### *Areas that cannot be set aside areas*

It is vitally important that any set aside area be a new and additional area managed for conservation, and cannot be an area that is already managed under an agreement, approval condition or program. We therefore **support** clause 129 to avoid potential double counting of offset/set aside areas.

#### *Public register of set aside areas*

It is essential that there be a public register of set aside areas and clause 130 is therefore **supported**. EDO NSW believes that ideally such areas should be registered on title like PVPs were, but as this is not provided for in the legislation that was passed, it is necessary to ensure the register is accurate, comprehensive and public.

We therefore **recommend** that the clause be strengthened in two ways:

- ensure that register *must* be in electronic form *and* any other form determined appropriate (i.e., to ensure accessibility, a hard copy register would not be sufficient) in clause 130(2); and
- require that the register is made public by LLS in clause 130(5). The current drafting of this sub-clause is too vague and gives LLS discretion about how the register is made public.

### **Division 4 Approval for clearing native vegetation not otherwise authorised**

Division 4 provides further detail about the process for clearing applications to the NV Panel.

We **recommend** there be a requirement for “detailed” information in clause 131 when an applicant is seeking a variation and the applicant must demonstrate they have taken reasonable steps to secure like-for-like credits. We **support** the ability of the NV Panel to seek further information (clause 132); that the clock stops while obtaining further information (clause 133(2)); and there is a deemed refusal if no decision is made in 90 days (clause 133(3)).

We **recommend** that third party rights regarding NV Panel approval decisions are provided for in the regulation, especially where Crown lands such as TSRs are involved.

### **Division 5 Miscellaneous**

Division 5 contains one clause regarding the offence of contravening certain requirements of approvals or certificates. Clause 135(3) could be clarified – it may provide a defence to a third party contractor who clears land if they are not aware of the relevant approval or certificate – it should be made clear in supporting materials, guidelines, outreach that the landholder may still be liable.

In relation to offence provisions, there has been scant detail provided on how compliance and enforcement will be undertaken under the new scheme. We **recommend** that an **updated compliance policy** be published by OEHL to make it clear to landholders what kinds of infringements will activate regulatory clauses like this scaled up to offences that will attract more serious compliance and enforcement action.

## **Other issues**

### *Regional strategic land use map pilot*

The *Fact sheet - Land management and the Native Vegetation Regulatory Map* notes:

*the LLS will pilot development of a regional land strategic land use map to identify high, moderate and low conservation value land at a landscape scale and land that is likely to be suitable for high level agricultural development.*

EDO NSW supports landscape scale strategic planning that is comprehensive and robust. There needs to be further detail provided and public consultation on how this strategic map is developed and what the application will be. It is unclear how it will link to the regulatory map, sensitive values map, grasslands mapping etc. EDO NSW would be happy to be involved in developing this further.