



Explanation of Intended Effect for the *State Environmental Planning Policy (Vegetation) 2017*

This part of the EDO NSW submission comments on the proposed *State Environmental Planning Policy (Vegetation) (Vegetation SEPP)*. This part provides comment on:

Background to the policy

- Role of new Vegetation SEPP and DCPs in urban areas and environmental zones
- Proposed changes to LEPs and the Standard Instrument

EDO NSW comments on the Vegetation SEPP proposals

- Biodiversity offsets scheme threshold
- 'More robust' DCPs – regulated tree species and public consultation requirements
- Clearing permissions will continue under a range of existing SEPPs and Codes
- Synchronise Vegetation SEPP and other environmental SEPPs now under review

Questions posed in the Explanation of Intended Effect

Background – A policy to assess vegetation-clearing in urban and E-zones, for land uses that do not require development consent

The NSW Government is proposing to introduce a new Vegetation SEPP to support its Land Management and Biodiversity Conservation reforms.

The new SEPP would assess proposals to clear native vegetation in urban areas (various zones) and Environment zones (E2, E3, E4) (**E-zones**) state-wide. It would require clearing to be assessed using the Biodiversity Assessment Method (**BAM**) or a local council's Development Control Plan (**DCP**) depending on the size and location of clearing.

The SEPP would *not* apply in rural zones, nor where the clearing or subsequent the land use requires development consent (e.g. in a local environmental plan (**LEP**)). Those areas will be regulated via the *Local Land Services Amendment Act 2016 (LLS Act)* and *Environmental Planning and Assessment Act 1979 (Planning Act)* respectively. Assessment may also involve the *Biodiversity Conservation Act 2016 (BC Act)*.

A major purpose for the proposed SEPP is to fill a 'regulatory gap' that may otherwise exist for tree removal outside of the LLS Act (rural zones) or Planning Act approvals (activities that need development consent).

The Vegetation SEPP may also help to address impacts of incremental clearing that does not require consent, or where a landowner may try to gradually clear smaller patches that should be assessed together using the BAM. However, the details and level of compliance oversight are yet to be clarified.

Role of new Vegetation SEPP and DCPs in urban areas and environmental zones

For clearing and tree removal above certain thresholds (i.e. the Biodiversity Offset Scheme (**BOS**) threshold¹), the Government proposes that clearing will be approved or refused by the Native Vegetation Panel (**NV Panel**) under the LLS Act, following the BAM assessment.

For clearing and tree removal *below* the BOS threshold, local councils will continue to assess applications via permits in their DCPs. Clearing some trees will remain exempt from any approval (i.e. species that are not prescribed in the council's DCP).

Proposed changes to LEPs and the Standard Instrument

The Government proposes to repeal the standard LEP provisions that give effect to tree protection orders in DCPs (clauses 5.9 and 5.9AA), and remake them in the Vegetation SEPP based on the policy settings that are finalised after consultation. One proposed change is that DCPs will no longer be able to require development consent for clearing (as opposed to a permit). See standard instrument cl. 5.9(3)(a).

EDO NSW comments on the Vegetation SEPP proposals

The Government is exhibiting an Explanation of Intended Effect (**Explanation**) only. There is no draft SEPP on exhibition which makes it more difficult to comment on the details. We would welcome the opportunity to comment on draft SEPP provisions.

As a starting point, we **support** the role of the Vegetation SEPP in filling a potential regulatory gap – by ensuring consistent assessment of smaller-scale and cumulative clearing that wouldn't otherwise require development consent or BAM assessment. We also **recommend** the SEPP go further, setting more consistent and robust environmental standards for tree protection and public participation in decisions. We also **recommend** holistic conservation and planning for 'green infrastructure' below.

BOS threshold

We strongly support the Sensitive Values Land Map approach but comment on the proposed BOS thresholds in our submissions on the Regulation. A strong BOS threshold is very important to capture cumulative impacts of small-scale clearing (including incremental clearing by stealth) which can have disastrous effects on biodiversity, including in urban areas and environmental zones.

The Explanation notes that in some cases the size of clearing will be determined by the consent authority with regard to the future land use purpose (e.g. residential subdivision). As noted, we **support** the need to prevent clearing by stealth for purposes that should be

¹ The threshold may be triggered by clearing size (e.g. over 0.25ha - over 2ha, depending on minimum lot size in the LEP) or mapped sensitive areas (clearing of any size where the site is mapped on the Sensitive Biodiversity Values Land Map). The proposed BOS threshold is set out in the draft *Biodiversity Conservation Regulation 2017*, cl. 7.2. See our submission on the BAM for our concerns regarding the proposed thresholds.

assessed by the BAM. However the detail of how clearing area and purposes will be predicted in advance is unclear.

It is also important to note that the BAM assessment is only the start of a highly discretionary assessment process that we have major concerns about – including the ability to ‘discount’ offset requirements; weaken offsetting rules; pay money into a fund without verifying if offsets are available; and major deficiencies in the offset payment calculator, which fails to recognise the true value of scarce biodiversity. These concerns are detailed elsewhere in this submission (and 2016 submissions).

‘More robust’ DCPs – regulated tree species and public consultation requirements

We **welcome** the proposal for ‘more robust’ tree protections in DCPs, including enabling councils to charge application fees and place conditions on tree removal permits. However, there is limited further detail on proposals to improve DCPs.

We **recommend** that the SEPP be used to bring tree protection orders in DCPs up to a robust minimum environmental standard – including:

- the types of trees subject to permits and other protections; and
- to improve transparency and public consultation regarding local tree-clearing.

With regard to types of trees, we **recommend** the Office of the Government Architect, Local Land Services and the Office of Environment and Heritage coordinate to set baseline lists of trees to be protected under DCP permit schemes (appropriate to NSW bioregions). Alternatively, revised DCPs should apply to all tree species *except* those specified as exempt (with reasons for the exemption – for example, locally declared weeds).

Transparency and public consultation is a serious concern for the NV Panel process. It appears there is no requirement to exhibit large-scale rural clearing applications for public scrutiny and comment under the LLS Amendment Act. However, the same concern arises for clearing in urban and environmental zones under the Vegetation SEPP: the NV Panel process does not include consultation. We strongly **recommend** the LLS Regulation and Vegetation SEPP require that clearing proposals and BAM reports be publicly exhibited for consultation, and require the decision-maker to take public submissions into account when making a decision to approve or refuse clearing.

Transparency and public consultation is also a serious concern regarding tree removal undertaken via SEPPs. For example, complying development does not require consultation. Nor is consultation required for a range of Part 5 local infrastructure. Our recent submission on the Infrastructure SEPP review (2017)² provides further detail. EDO NSW receives numerous calls from people in urban and regional areas about tree removal, damage and lack of consultation. These range from high-profile major projects by state agencies, to local councils removing well-loved trees in streets or reserves without public notification.

We **recommend** that existing and proposed SEPPs require public notification of, and consultation on, proposals to remove trees and other vegetation.

Clearing permissions will continue under a range of existing SEPPs and Codes

We note the intention that clearing allowed under existing SEPPs will still continue once the Vegetation SEPP is adopted. However, current policy settings in SEPPs and LEPs make it

² EDO NSW submission: State Environmental Planning Policy (Infrastructure) Amendment (Review) 2016 –EDO NSW submission, April 2017, available at: http://www.edonsw.org.au/planning_development_heritage_policy

all too easy to remove valuable tree cover, instead of improving landscape design principles to respect and enhance green infrastructure.

For example, other SEPPs will continue to allow tree removal in and around building and subdivision footprints, trees under a certain height, etc. Examples include the Exempt and Complying Development Codes SEPP, the Infrastructure SEPP, the Growth Centres SEPP and the Priority Precincts SEPP.

We also reiterate our concern that the Government continues to expand the categories of complying development, before resolving problems with private certifier compliance and oversight. Examples include a draft Medium Density Housing Code (2016) and current consultation open on a Greenfields Development SEPP.³

Expansion of complying development is a particular concern here, because current policy settings *exclude* complying development from the BAM assessment process. The perverse effect is that complying development (and other policies like the Infrastructure SEPP) could apply to areas on the Sensitive Biodiversity Values Land Map; or to areas that would otherwise trigger the BOS threshold due to cumulative size of clearing. This must be addressed in the Vegetation SEPP or elsewhere.

We **recommend** a systematic review of tree removal permitted via existing and proposed SEPPs (see examples above), to ensure they complement, not undermine, the aims of the Vegetation SEPP – to preserve local and regional biodiversity and amenity. We **recommend** these issues be addressed holistically, whether via the Vegetation SEPP or other clear, mandatory regulatory process. The aim should be to reduce and monitor the cumulative impacts on biodiversity, streetscape amenity and urban heat island effects; and to protect and enhance urban tree canopy and green infrastructure (by which we mean urban bushland, public parks, active transport networks, private gardens etc).

We also **recommend** that BAM assessments be required for complying development that meets the BOS threshold, either due to cumulative clearing size (for example, multiple uses of any medium density housing code) or on sensitive mapped land.

Synchronise Vegetation SEPP and other environmental SEPPs now under review

Updating and consolidating existing environmental SEPPs that are already under review could greatly enhance the Vegetation SEPP (or a parallel, holistic consideration of green infrastructure). Key examples are the Urban Bushland SEPP (**SEPP 19**) in urban areas and the Koala Habitat Protection SEPP (**SEPP 44**) in environmental zones. Both SEPPs are widely acknowledged to have useful intentions but limited and outdated application.⁴ Both could be readily improved to work with the Vegetation SEPP to ensure that important remnant bushland and biodiversity is protected. This should not be limited to requiring the BAM to apply where development is proposed, but should identify and protect areas that the community values for its amenity, biodiversity, climate regulation and heritage value.

We also note that there will be a new **coastal management SEPP**. The interaction of the newly mapped coastal zones and biodiversity provisions will need to be clarified.

³ Our planning instrument submissions are available at:
http://www.edonsw.org.au/planning_development_heritage_policy.

⁴ For example, the NSW Chief Scientist & Engineer's review of the decline in key koala populations (O'Kane 2016) recommended koala habitat protection be improved via the planning system (rec. 4).

Questions posed in the Explanation of Intended Effect

The Explanation asks questions on key details about the scope and operation of the Vegetation SEPP. We respond to selected questions paraphrased in italics below.

- *Is the grant of development consent appropriate for clearing of heritage vegetation? Or would a permit be equally effective for regulating this vegetation?*

We **recommend** development consent as a more appropriate process for considering the protection or removal of heritage vegetation (than a permit). Our main reasons for this are the importance of public consultation on heritage values, and requirements (in the LEP clause 5.10 and Planning Act s. 79C) to consider all relevant impacts on the natural and built environment. Whatever the process, it is essential that community engagement and expert heritage advice inform decisions.

- *Should all clearing of native vegetation in urban areas and environmental zones require development consent if it exceeds the BOS thresholds?*

There are potential advantages in requiring all clearing above the BOS threshold to require development consent. For example, unless the LLS Regulation and the Vegetation SEPP are amended to provide for public consultation on tree removal applications, this is an important advantage in requiring development consent for all clearing above the BOS threshold. This would align with proposed amendments in the Planning Regulation which require such applications to be ‘advertised development’.⁵ It is inconsistent and non-transparent if the same level of scrutiny is not applied to clearing over the BOS threshold in the Vegetation SEPP.

Another advantage of requiring development consent is that it may avoid public confusion around the technical use of ‘consent’, when clearly some form of ‘approval’ is required (whether from a consent authority under the Planning Act; or from the NV Panel, or indeed the council, under the Vegetation SEPP and LLS Act). That is, it is more straightforward if clearing that requires BAM assessment also requires development consent, instead of BAM assessment and ‘approval’, but ‘no development consent’.

As noted, it is not sufficient to consider which body makes the decision, but also what would the decision-making process be – for the Native Veg Panel (s. 60ZG LLS Act) or Council (s. 79C EP&A Act). Both decision-making processes require consideration of:

- economic, social and environmental impacts of the proposed clearing, and
- the principles of ESD (although to its credit, the NV Panel process requires this explicitly, whereas in 79C this occurs via the ‘public interest’ test only), and
- the impacts on biodiversity values as set out in a BAM report (or BDAR).

In addition, the NV Panel process requires explicit consideration of soil erosion and various other adverse land or water impacts, but does not apply a scientific method (like the EOAM).

Section 79C requires a range of additional considerations: any environmental planning instrument (such as SEPPs and LEPs), any DCP (this would include tree protection orders), coastal zone management plans, the suitability of the site, any public submissions and the ‘public interest’.

⁵ Draft Environmental Planning and Assessment Amendment (Biodiversity Conservation) Regulation 2017, Schedule 1, item [1] *Clause 5 Advertised development*.

- *Should the NV Panel delegate urban and e-zone clearing decisions to Councils?⁶ What involvement do you think councils should have in assessing clearing applications above the BOS threshold? (e.g. notified, review, delegation)*

EDO NSW acknowledges that there is a wide range of expertise, operating procedures and cultural differences between different councils across the state. For example, some local councils have expressed concerns to us about the biodiversity reforms reducing and limiting their ability to control development on valuable vegetation; while other community members have expressed concerns about delegating widely discretionary decisions to councils.

Our primary concern is less about which body makes the decision, and more about the level of transparency, public participation, objective criteria and advice involved. Accordingly we **recommend** the Vegetation SEPP ensure:

- opportunities are available for public participation in decision-making and scrutiny of decisions;
 - decision-makers have, or are required to rely on, ecological/arborist expertise;
 - decision-makers are required to consider objective criteria, including the cumulative impacts of small-scale tree-removal on amenity, biodiversity and climate change readiness; and
 - information before the decision-maker is objective, accurate and complete.
- *Should the Vegetation SEPP set out mandatory exemptions to allow certain clearing?*

This proposal raises concerns given the recent misuse of the 10/50 Bushfire Code. We **do not support** this proposal. As noted in the Frequently Asked Questions on the Vegetation SEPP, mandatory clearing exemptions conflict with the objectives of environmental land use zones; they would also threaten bushland and coastal vegetation (e.g. mangroves) in urban areas.

It is not clear from this question whether the Government intends councils to decide whether to permit 'allowable activities' (formerly Routine Agricultural Management Activities) in environmental zones.⁷ We **do not support** wide council discretion on this matter. If this approach is being considered, any such decision must be based on a detailed scientific assessment of local vegetation values and potential impacts.

⁶ The Government does not intend that the Panel would delegate *rural* clearing (Explanation p 11).

⁷ See Explanation, p 18. See also Standard Instrument LEP, sub-clause 5.9(8)(ii) and optional sub-clause (9). Currently, if councils include sub-clause (9) in their LEP, RAMAs are *not* exempt clearing in R5 or E-zones.