



**Submission on *Primary Production and Rural Development - Explanation of Intended Effect*
(proposed State Environmental Planning Policy)**

prepared by

**EDO NSW
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Introduction

EDO NSW welcomes the opportunity to comment on the Explanation of Intended Effect for a new State Environmental Planning Policy on Primary Production and Rural Development (**proposed SEPP**), dated October 2017.

SEPPs are powerful legal instruments given effect under the *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**). They affect how land is developed and how natural resources are used, managed and conserved across NSW.

We note that the Department of Planning and Environment's proposal would revise and consolidate five rural and agricultural SEPPs¹ into one Primary Production and Rural Development SEPP. Other updated provisions would be given effect via:

- Ministerial Directions for plan-making (Direction 1.5 Rural Lands);²
- the Standard Instrument Local Environmental Plan (**SILEP**) and
- the *Environmental Planning and Assessment Regulation 2000* (**Planning Regulation**), including high-impact 'designated development' categories.

EDO NSW sees the in-principle benefits in reviewing and consolidating SEPPs so that planning controls are up-to-date, accessible and effective. In doing so it is also important that environmental protections and community engagement are maintained and improved, consistent with the aims of planning and environmental legislation.³

This submission is divided into three parts.

Part 1 considers some important issues upfront that are not dealt with, or fully dealt with, in the Explanation of Intended Effect (**Explanation**). In particular:

- two guiding principles – on maintaining environmental protections and community engagement, and transparency in SEPP reviews and outcomes;
- an important query on how the reforms will affect land use on Environmental zones (**E-zones**); and
- the need for closer regulation and best practice guidance for intensive plant agriculture (such as berry farming).

Part 2 comments on the proposed new Primary Production and Rural Development SEPP (**proposed SEPP**).

Part 3 comments on proposed amendments to other planning instruments and regulations noted above. It also makes brief comments on the draft guidelines for intensive livestock agriculture development (October 2017).

¹ SEPP (Rural Lands) 2008; SEPP 30 (Intensive Agriculture); SEPP 52 (Farm Dams and Other Works in Land and Water Management Plan Areas); SEPP 62 (Sustainable Aquaculture). The Sydney Regional Environmental Plan [SREP] 8 (Central Coast Plateau Areas) is also reviewed and amended.

² Also known as 'section 117 directions', under s. 117 of the Planning Act.

³ See for example the objects of the NSW *Environmental Planning and Assessment Act 1979* (Planning Act); *Protection of the Environment Administration Act 1991* (including principles of ecologically sustainable development); *Protection of the Environment Operations Act 1997*; *Biodiversity Conservation Act 2016*; and the *Local Land Services Act 2013*.

Part 1 - Additional considerations for the agricultural SEPP review

Guiding principles to maintain environmental protection, community engagement and transparency

Consistent with the aims of NSW planning and environmental laws, we strongly **recommend** that as a guiding principle, SEPP consolidation and amendment must not reduce the level of environmental protection or community participation in planning, development assessment and natural resource management.⁴ Rather, SEPP reviews should seek to maintain and improve environmental protection and community participation consistent with the aims of the Planning Act and related laws.

For transparency and effective public participation we also **recommend** that a draft SEPP be exhibited for comment – together with proposed Ministerial directions and standard instrument provisions – before being finalised and made by the Government. Explanatory documents are not a substitute for the actual text of legislative instruments.⁵ A draft SEPP would also demonstrate how feedback on the explanatory documents is taken into account – a principle endorsed by the Government in its 2017 Planning Act amendments.⁶

Environmental zones must be protected, and any changes must be clear and consultative

While the Explanation for the reforms discusses agriculture and rural lands generally, there is no specific consideration of how agriculture is managed on Environmentally-zoned land (**E-zones**), as distinct from Rural (**RU**) zones. However, many of the proposed changes will affect E-zones, either because Ministerial Direction 1.5 (Rural Lands) also applies to E-zones,⁷ or because some LEPs permit certain types of agricultural development in local E-zones.

Planning controls that protect E-zones are important to maintaining and improving natural resources including water, soil, stored carbon and biodiversity. All of these are valuable intrinsically but also vital to environmentally sustainable agriculture and other human uses, present and future. These values are reflected in the objectives of E-zones under LEPs.

EDO NSW has previously expressed concerns about the Government's Northern Councils E-Zone review.⁸ While the Explanation does not refer to that review, or

⁴ While we agree that policies should be given effect in the most effective form, from the viewpoint of transparency and accessibility, there is no reason to suggest that planning directions under s. 117 are any more familiar or well understood by the wider community than SEPPs are (or that the community knows how to find them).

⁵ SEPPs and s. 117 directions receive less parliamentary scrutiny than Planning Act amendments, but can have pervasive and powerful effects on local planning, development and environmental outcomes.

⁶ See the community participation principles in the *Environmental Planning and Assessment Amendment Act 2017*.

⁷ See Explanation of Intended Effect, p 29 (the only reference to E-zones in the Explanation).

⁸ In 2015 the NSW Government adopted new restrictive criteria for permitted Environmental Conservation (E2) and Environmental Management (E3) zoning across five northern councils. EDO NSW expressed concerns that the new criteria will undermine the objectives of E-zones and unduly narrow the application of E-zones even where high conservation values exist. For

expanding that approach, there may be implications that are not discussed in the current consultation, for example if the Government were to encourage or require agricultural development to be permitted (with or without consent) in certain E-zones.

We strongly **recommend** the Planning Department provide specific analysis, guidance material and consultation on how the proposed SEPP and reform package will affect E-zones, to enable full public consideration of the potential consequences, both for the strategic level (e.g. Ministerial directions) and development assessment.

Dealing more effectively with intensive plant agriculture

The Explanation provides little if any discussion or guidance around the appropriate management and regulation of intensive plant agriculture, such as berry farming. We are concerned that this exhibition was a missed opportunity to seek public feedback on the benefits, concerns and impacts of current and emerging practices.

As the FAQs for the reforms suggest, as the industry grows, plant agriculture has been a frequent source of local complaints in northern and mid-north coast NSW.⁹ It is likely that these concerns partly stem from the permissibility (in some LEPs) for landholders to begin berry farming in some areas without any mandatory environmental assessment, council development consent or community consultation.

As the FAQs note, this results in a diverse range of complaints (and potential environmental risks) – ranging from amenity through to concerns about water use, bore contamination, chemical spray drift, noise and land-clearing. Land-clearing is a particular risk when coupled with new land management codes under the LLS Act. These codes can allow hundreds of hectares of rural land-clearing where agricultural uses do not require planning consent. Larger-scale clearing may require LLS certification or native vegetation panel approval, but don't require public consultation.¹⁰

We **recommend** further specific consultation with communities, industry and local councils about the permissibility of intensive plant agriculture in relevant LEPs, the potential need for additional regulation in the new SEPP, and best practice guidance. Just as the Explanation proposes a consistent approach to livestock agriculture, consistent LEP requirements for development consent and local consultation should be considered for intensive plant agriculture.

further information see *EDO NSW Briefing Note – Northern Councils E-Zone Review Final Recommendations Report* (Dec. 2015) at www.edonsw.org.au ([Download PDF](#)).

⁹ See Department of Planning, 'SEPP Review Program - Primary Production and Rural Development planning reform package FAQs', 'Why are there no reforms proposed for intensive plant agriculture development?'

¹⁰ Where development consent is required and the Biodiversity Conservation Act applies, the regulations (clause 7.2) still permit clearing of up to 1 or 2 hectares of native vegetation without requiring a Biodiversity Development Assessment Report to inform council decisions.

Part 2 - Comments on proposed Primary Production and Rural Development SEPP – Explanation of Intended Effect

SEPP aims

We welcome and **support** the inclusion of ‘environmentally sustainable’ in the proposed aim to facilitate the orderly, environmentally sustainable and economic use and development of land for primary production and development. We **recommend** this ‘environmentally sustainable’ reference be mirrored in updates to the Ministerial direction 1.5 for Rural Lands (updating the reference to ‘orderly and economic use’).

We also **recommend** that the broader aims of the SEPP to encourage agriculture are not, in practice, given priority over the aims of environmental protection – particularly where the proposed SEPP affects Environmental zones and other environmental assets. The Planning Act encourages ‘ecologically sustainable development’ (**ESD**). ESD requires the effective *integration* of environmental, social and economic considerations in decision-making, including via the precautionary principle, biodiversity conservation, intergenerational equity considerations, and improved valuation of environmental assets, costs and services.

As noted, it is difficult to fully determine how these and other aims will be given effect in practice without reviewing the details of a draft SEPP.

Sustainable Aquaculture

We are concerned at a potential time gap between the reforms to marine aquaculture and the completion of the NSW Marine Waters Sustainable Aquaculture Strategy (Explanation, p 10) – in particular for the proposed Schedule to the SEPP that will specify sensitive exclusion areas. We **recommend** a transparent interim process to ensure sensitive areas are protected from impacts of marine aquaculture proposals before the Strategy is made.

We also **recommend** the proposed SEPP expand the conservation exclusion zones for *land-based* aquaculture to avoid impacts on areas of high biodiversity significance.

We do not support the suggestion that marine aquaculture activities by public authorities may be classified as State significant infrastructure (**SSI**) (Explanation p 10). Like the former Part 3A major projects process, SSI enables standard assessment pathways, other legislative approvals and community rights to be set aside with limited scrutiny.

The Explanation (pp 11, 18) also refers to requiring consent authorities’ *consideration* of oyster industry development strategies. Where industry strategies adopt particular management standards, such as cumulative impact assessment, we recommend clarifying whether those standards and assessments are a minimum baseline to be complied with. Industry strategies may complement, but are not a substitute for, robust environmental impact assessment, consultation and clear consent conditions.

State Significant Agricultural Land (Explanation p 11)

We generally **support** retaining and transferring the concept of State Significant Agricultural Land from the existing Rural Lands SEPP to the proposed new SEPP.

Noting that the existing schedule has not been used to date, we also **recommend** considering how this concept could integrate Critical Industry Clusters and Biophysical Strategic Agricultural Land, identified where Strategic Regional Land Use Plans were developed in recent years. These identified lands could be listed initially in the schedule to the proposed SEPP. However it is difficult to comment further without more detail on the implications of listing. In particular we would **recommend** integrating biodiversity protections and mapping, as originally envisaged in the Strategic Regional Land Use Plan process.

Land uses exempt from consent (Explanation p 11)

Comment: Improve protection & definition of 'environmentally sensitive areas'

In several cases the proposed SEPP relies on the definition of 'environmentally sensitive areas' under the Exempt & Complying Development Codes SEPP 2008 (see Explanation, p 17). For example, it proposes that smaller-scale artificial waterbodies, and intensive livestock agriculture below set numbers of stock, would not require development consent – unless within an environmentally sensitive area (ESA) or within 500m of a non-associated dwelling. (It is not clear whether any other minimum conditions would be given effect in the Exempt & Complying SEPP.)

We do not consider that the 2008 Exempt & Complying SEPP definition is sufficient in scope to protect ESAs. For example, it provides an arbitrary 100m buffer from some important sites such as Ramsar wetlands and littoral rainforest, but no buffer for other areas such as coastal lakes, Crown reserves or other areas of high significance.¹¹ Critical habitat is also protected as an ESA – yet we understand that only one marine and four terrestrial critical habitat areas have been declared across the entire state. Finally, this definition of ESAs is also inconsistent with that in the Planning Regulation – for example, the latter includes Environmental (E-)zoned land.

For a recent comparison in the context of rural zones, the *Local Land Services (LLS) Amendment Act 2016* and the LLS Regulation 2014 provide a more extensive list of 'sensitive regulated land' that requires greater oversight for land-clearing (i.e. code-based clearing is not permitted). Additional categories listed, beyond ESAs in the Codes SEPP, include core koala habitat, critically endangered ecological communities, old growth forests and high conservation value grasslands.¹²

We **recommend** the proposed SEPP adopt a broader and more contemporary definition of *environmentally sensitive areas*, rather than relying on the definition in the Exempt & Complying SEPP. We further **recommend** harmonising and updating the various definitions of *environmentally sensitive areas* under the planning system (including the proposed Primary Production SEPP) to ensure the highest level of protection. This would be consistent with other proposals to harmonise definitions (see Explanation, p 19).

¹¹ No definition of *coastal lakes* is provided in the Exempt & Complying SEPP or Planning Act.

¹² See *LLS Act 2013*, category 2-sensitive regulated land; LLS Regulation 2014 cll. 108, 113.

Additional environmentally sensitive areas should include for example: core and potential koala habitat (subject to future koala policy reforms), sensitive travelling stock reserves, old growth forests, and appropriate buffer zones for all listed sensitive areas (beyond 100m – for example the Explanation includes 500m buffers for local residents). Appropriate protections for E-zones should also be considered.¹³

Artificial waterbodies

With regard to the proposed transfer of existing exemptions from development consent for certain scales of artificial waterbodies (SEPP 52) and drainage channels (Explanation pp 11, 18), we **recommend** the size of exempt dams between 15-100 megalitres be reviewed. Specific consideration should be given to recent and ongoing inquiries into NSW water governance and compliance. This should ensure existing exemptions are not at risk of misuse, and assist in restoring public confidence in water governance and management.

Intensive livestock agriculture exemptions

The Explanation (pp 11-12) proposes more flexibility for farmers to provide temporary and emergency stock management without development consent. To ensure the scope of this flexibility is appropriate, we **recommend** that ‘temporary’ be defined, and that the SEPP ensure that this flexibility is not used for calculated avoidance of appropriate scrutiny or development approval. Intensive livestock agriculture is discussed further under Part 3 below.

Management of goats

According to the Explanation (p 12), the proposed SEPP would make ‘goat depots’¹⁴ exempt from development consent, when ‘fully accredited under assurance programs overseen by AUS-MEAT’, and when not located in an environmentally sensitive area (as defined by the Exempt and Complying SEPP – see concerns with this definition above).

The Explanation does not provide details of the accreditation or audit process with regard to the NLIS standards, although it does link to a Primary Industries factsheet. The Explanation also gives limited information about ‘proximity to sensitive receivers such as dwellings’. Further information should be provided at the next stage.

A potential concern with the proposed approach is that exempt development does not require any notification process, either to the local council or the Department of Primary Industries. This means that compliance – both with the initial requirement for industry certification and upkeep of facilities – will rely on regulators reacting to local complaints about environmental damage, mistreatment or overstocking.

We **recommend** any exemption for goat depots be subject to capacity limits and appropriately clear definitions. We **recommend** considering a mandatory notification requirement (e.g. to the Local Land Services or local council) that includes proof of certification with the industry body, verifying the goat depot meets industry standards.

¹³ As noted, environmentally-zoned land is included in the definition of ‘environmentally sensitive area’ under Schedule 3 of the Planning Regulation, but is omitted from the Exempt and Complying Development SEPP.

¹⁴ Enclosures used to temporarily hold feral goats prior to sale or slaughter.

Part 3 - Comments on proposed changes to other planning instruments and regulations

Ministerial Direction - Rural Lands 1.5 (Explanation of Intended Effect pp 13-14)

We **recommend** the aims of the revised Ministerial Direction 1.5 for Rural Lands refer to 'orderly, *environmentally sustainable* and economic use and development of land...' (emphasis added) to be consistent with the aims of the proposed SEPP. See above.

Planning and subdivision principles

The Explanation proposes a set of planning principles to be transferred from the Rural Lands SEPP and updated under Direction 1.5. The principles would continue to be mandatory considerations for planning proposals affecting Rural and E-zones. As noted it is important that agricultural and environmental principles work together.

On the planning principles, we **recommend**:

- A new principle to 'encourage integration of farming practices with best practice environmental management for biodiversity, pest control, native vegetation, carbon management, water and soil quality' – consistent with ecologically sustainable development principles under the Planning Act.
- Under the 'aim to protect environmental values...', replace 'having regard to' with the words 'including but not limited to' – maintaining biodiversity etc. In effect, the Direction should make clear that all planning proposals must protect environmental values. Words like 'having regard to' weaken the text.
- Cultural heritage protection should be a separate head of consideration to environmental values.

Standard Instrument LEP (SILEP) (pp 14-15)

Rural subdivision for agricultural purposes, and for rural dwelling houses

A key proposal in the reform package is to enable subdivision of rural farmland by splitting off an existing house into a separate lot from the main farm, that is below the minimum lot size. The current Rural Lands SEPP and SILEP explicitly prohibit this, despite some contention around their interpretation, in order to prevent land-use conflict and farmland fragmentation.¹⁵

The reasons for this policy change are not sufficiently clear. The explanatory material states that it could be used by retiring farmers to remain in their existing house while selling off or leasing the adjacent farmland. However, there is no indication that the looser subdivision rules would be limited to this situation. It could equally be used by large companies that own rural land and want to subdivide for additional profit, without necessarily having regard to the wellbeing of future occupants living adjacent to industrial activity such as farming (or indeed mining).

The proposed changes to rural subdivision rules may provide a one-off benefit to some existing landowners, but they also seem to conflict with some of the fundamental aims of the reforms – including the planning and subdivision principles –

¹⁵ See Rural Lands SEPP clause 9 and Standard Instrument LEP clause 4.2.

to avoid land-use conflict between agriculture and residents, to minimise rural land fragmentation and protect farmland for future generations (Explanation pp 13-14).¹⁶

New exemptions from minimum lot sizes may also create confusion and inconsistency with other legislation. For example, minimum lot size is used to determine assessment requirements for clearing native vegetation, either where development consent is required for agriculture, or for development in non-rural zones.¹⁷ It is unclear how land-clearing thresholds would apply to lots approved *below* the minimum size.

We **recommend** that the exemption from minimum lot size for rural subdivision with a dwelling attached does not proceed. If the proposal is ultimately adopted, any covenants to prevent further subdivision or new dwellings would need to be a mandatory legal requirement and be registered on title, in a way that prohibits future fragmentation and new dwellings that cause land-use conflict. Other safeguards beyond covenants would be needed, including via subdivision principles, and other SILEP provisions such as to prevent repeated subdivision.

Definition of 'intensive livestock agriculture', 'extensive agriculture' & 'feedlot' (pp 15-16 and Appendix E)

We **support** setting thresholds for stock capacity (and land sensitivity) to ensure development consent is required for larger operations with greater environmental or social impacts.¹⁸ The thresholds for different livestock proposed in the Explanation seem appropriate (see p 44), and we **support** the explicit inclusion to regulate egg production (including in the thresholds for high-impact 'designated' development).

We **support** requirements for consent near dwellings and environmentally sensitive areas. Nevertheless, as noted we **recommend** there are additional sensitive areas (beyond those defined in the Exempt & Complying SEPP) where smaller-scale intensive livestock agriculture should be more closely regulated via consents. The reforms should apply buffer zones to environmental areas as well as dwellings.

We **recommend** the SILEP be updated to clarify that intensive agriculture above the stock threshold should always require development consent (not only where the LEP already requires consent for intensive livestock agriculture).¹⁹ This is to ensure sufficient oversight and public scrutiny of larger-scale industrial impacts and operations that are, by way of the new definitions, considered significant to regulate.

We note the proposal to remove source of feed from the definition of feedlots (p 43). The Department should consider whether this was in place in part to deal with the

¹⁶ See also Department of Planning and Environment, 'SEPP Review Program - Primary Production and Rural Development planning reform package FAQs':

[The reforms will] ensure the rights of farmers to carry out farming activities, and the maintenance of rural land for the benefit of current and future generations, are key considerations when changes to local planning controls are proposed.

¹⁷ See Biodiversity Conservation Regulation cl. 7.2(4) (Biodiversity Offsets Scheme threshold). Larger minimum lot sizes in an LEP mean more clearing is permitted without assessment.

¹⁸ We frequently receive calls about agriculture and planning compliance on the EDO NSW community legal advice line, e.g. relating to poultry, berry or pig farms, or truck movements.

¹⁹ The Explanation states that the SILEP requires local councils (via LEPs) to permit intensive agriculture either with *or without consent* in RU1 primary production areas. We recommend revising LEPs to ensure that, for example, intensive agriculture above the stock threshold in an RU1 zone should always require development consent, in recognition of potential impacts.

impact of truck movements delivering feed (and if so, whether the impacts of truck movements could be dealt with in another way). We also **recommend** that revised definitions referring to temporary or supplementary feeding are clearly worded, to avoid ambiguity between feedlots (intensive) and pasture-based grazing (extensive agriculture).

Sydney Regional Environmental Plan 8 (SREP 8) & local planning for the Central Coast (pp 18-19)

We note the proposal to extend rural planning principles to rural lands under the Central Coast local government area (formerly Gosford and Wyong Councils).

We **recommend** specific consultation with environment groups and residents of the Central Coast plateau. The wording of the Explanation implies E-zones will not be affected, but this should be confirmed in further consultation on the draft instruments. For example, Ministerial Direction 1.5 currently applies to both Rural and E-zones. We do not support extending rural planning principles to such E-zones without specific consultation.

Environmental Planning and Assessment Regulations (p 19)

As noted above we welcome additions to the designated development threshold, including in relation to egg production. Consistent with our comments above, the threshold for designated development for artificial water bodies should be reviewed and potentially lowered to ensure appropriate assessment, especially for dams in sensitive areas. Outside of sensitive areas, the designated development threshold of 800ML should also be reviewed given the significant dam sizes below this threshold.

Draft Planning Guidelines - Intensive Livestock Agriculture Development

We **welcome** additional guidance to landowners, businesses, developers and communities to assist upfront compliance and best practice in the planning system. We **recommend** similar guidelines be made in future for intensive plant agriculture.

We make some brief **recommendations** on the draft livestock planning guideline:

- In the table of *Planning considerations for site selection* (pp 9-10):
 - under 'Community amenity...' give examples of 'sensitive receivers' such as children, the elderly and sensitive ecosystems;
 - the section on 'Water quality...' should note that it is an offence to pollute waters and give some other supporting information;
 - note that actions near watercourses may be designated development;
 - under 'Biosecurity', define and give examples of 'pest species';
 - under 'Climate', give examples of why this is important, such as for bushfire, flood planning and animal health.
- In Chart 2, *Development application process* (p 14):
 - 'The project is exempt development' should add native vegetation clearing as another example of additional approvals.
 - Refer to other approvals in relation to State significant and designated development also, such as environment protection (pollution) licences.
- Planning guidance on the development application process should include a section on compliance (after 4.8 Decision making, p 18). This should refer to

offences under the Planning Act, and local council powers to issue orders for compliance (currently under Planning Act s. 121B).

- Industry guidance links could also refer to guidance from RSPCA or other animal welfare bodies (pp19-21).

Conclusion

We hope this submission is of assistance in progressing the review of rural and agricultural SEPPs and related reforms. We would be happy to discuss any queries, and consistent with our recommendations, look forward to further consultation on draft instruments in due course.