

1 February 2018

Director, Planning Frameworks
NSW Department of Planning & Environment
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Submitted online: www.planning.nsw.gov.au/onexhibition

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Dear Director,

SEPP (Environment) Explanation of Intended Effect

EDO NSW welcomes the opportunity to comment on the *Explanation of Intended Effect for a new State Environmental Planning Policy (Environment) (proposed SEPP)*. We appreciate the opportunities provided to meet with the Department of Planning & Environment to discuss the ongoing program of SEPP reform.

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 seven existing SEPPs into one Environment SEPP.¹ Other updated provisions would be given effect via:

- Ministerial Directions for plan-making
- the Standard Instrument Local Environmental Plan and
- Amendments to other SEPPs (eg: for Mining, petroleum and extractive industries, Infrastructure, Seniors living).

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 very important that environmental protections and community engagement are maintained and improved, consistent with the aims of planning and environmental legislation. **EDO NSW can only support SEPP consolidation where there is no reduction of environmental protection, transparency, enforceability or accountability.** As the proposed SEPP reviews several instruments that are

¹ The instruments to be repealed are: State Environmental Planning Policy No. 19 – Bushland in Urban Areas; State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011; State Environmental Planning Policy No. 50 – Canal Estate Development; Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment; Sydney Regional Environmental Plan No. 20 – Hawkesbury-Nepean River (No.2-1997); Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005; and Willandra Lakes Regional Environmental Plan No. 1 – World Heritage Property.

decades old, this is an important opportunity to improve the effectiveness of environmental protections for urban bushland, waterways, drinking water catchments and other sensitive areas.

This submission briefly identifies important issues that require clarification. As previously noted, it is difficult to provide legal feedback on the proposed instruments without seeing the exact wording of the proposed SEPP, related SEPP amendments, and new Ministerial directions. This submission addresses:

- The reform context
- Development in environmentally sensitive areas
- Catchments
- Urban bushland
- Waterways

The reform context

EDO NSW has recently made a number of submissions on SEPP reform that are relevant to the proposed SEPP. For example, we refer you to:²

- *Draft Coastal Management State Environmental Planning Policy* – EDO NSW submission, January 2017
- *State Environmental Planning Policy (Infrastructure) Amendment (Review) 2016* – EDO NSW submission, April 2017
- A number of submissions on the expansion of *exempt and complying development* and related Codes (eg: *Proposed Medium Density Housing Code – Statement of Intended Effect* and *Draft Medium Density Design Guide - EDO NSW submission*, December 2016)
- We note that some environmental issues are not dealt with in the proposed SEPP, but are still under consideration, and we refer you to our submission on the *Koala SEPP Review (State Environmental Planning Policy 44 – Koala Habitat Protection)* – January 2017.

We also note that during the timeframe of the SEPP reform program there have been legislative amendments. We have had a number of calls to our legal advice inquiry line from community members seeking to understand how the reforms interact and relate. For example, the proposed SEPP indicates that certain issues (such as wetlands) will be addressed under the new Coastal SEPP, however the Coastal SEPP has not been finalised.

Development in environmentally sensitive areas

While we understand that housing delivery is a priority for the NSW Government, we submit that legal safeguards are essential to ensure impacts of development in environmentally sensitive areas (**ESAs**) are properly assessed or excluded where necessary. The SEPP reform process to date has increased exempt and complying

² All submissions on SEPP reforms are available at:
http://www.edonsw.org.au/planning_development_heritage_policy

development, albeit excluded from ESAs, and sought to facilitate other types of development.

In the catchments section of the proposed SEPP, requirements for development consent for housing in the Georges River catchment will be deleted as the EIE says the Government position on housing development is expressed in LEPs and the *SEPP (Exempt and Complying Development Codes)* (EIE, p18); with similar comment for the Hawkesbury Nepean River catchment (EIE, p24). EDO NSW has consistently submitted that this category of development is only appropriate for minor, low-impact development; and that development in environmentally sensitive areas needs proper assessment. We are concerned about increased exempt and complying development occurring in important, sensitive catchments and submit there needs to be more detail – for example, on how cumulative impacts will be properly assessed.

The proposed SEPP must take into account the recent and ongoing expansion of complying development over the past decade. Despite consistently raising this issue, we are not aware of any departmental analysis of the cumulative environmental impacts of expanded complying development (or Infrastructure SEPP development) in or adjacent to environmentally sensitive areas. (See our comments on urban bushland below). We strongly recommend the Department commission research into these impacts, and recommend the proposed SEPP, and other relevant SEPPs be amended to address such impacts. For example, this could require further Council assessment or build-in appropriate, equivalent safeguards and requirements into the SEPPs themselves.

EDO NSW often receives calls from community members concerned about the overriding of local development controls to facilitate certain developments. The existing SEPP facilitating housing for Seniors or people with a disability, does not currently apply to environmentally sensitive land, including water catchments. It is proposed to make amendments to allow seniors living development to be assessed and approved in catchments including drinking water catchments, with two safeguards. EDO NSW is concerned about water catchments being deleted from the list of environmentally sensitive land for the purposes of fast-tracking development on that land, without appropriate assessment and limits.

If seniors housing is to be facilitated in drinking water catchments with some qualifications, the safeguards need to be clear and robust, and the policy intent of increased housing delivery should not be achieved by weakening the definition of environmentally sensitive areas more generally. Further detail needs to be provided regarding the safeguards – for example what ‘referral, concurrence and assessment requirements’ will continue to apply (EIE, p11). (See also our comments below about the neutral or beneficial effect (**NorBE**) test). Further detail is also needed on the areas currently excluded that the Department considers appropriate for this type of development.

Catchments

EDO NSW has undertaken significant analysis of the current *SEPP (Sydney Drinking Water Catchment) 2011 (Drinking water SEPP)* as part of our successful Springvale litigation. We were disappointed to see special legislation introduced to NSW Parliament in late 2017 to overcome the Court decision and weaken the application of the NorBE test. This action appears to undercut the objectives of NSW pollution law, which aim to reduce risks ‘the making of progressive environmental improvements, including the reduction of pollution at source’.³

In relation to the SEPP we submit:

- **The Drinking water SEPP is a very important SEPP that should be retained and strengthened.** It is an important mandatory consideration for all development applications in the Sydney Drinking Water Catchment, including state significant development (SSD), and recognised in the EP&A Act.⁴
- **NorBE Guidelines (now administered by Water NSW) are only somewhat helpful, and not enforceable** where Minister is the consent authority (eg: for SSD). Some inconsistencies make the guidelines difficult to apply.
- **The ‘Satisfaction’ element in clause 10 should be replaced with objective test** – We suggest replacing ‘satisfaction’ with an objective test in ‘fact’, by removing the words “it is satisfied that” from clause 10(1). In the Springvale case, in initial assessments to the Planning Assessment Commission (ie, the delegated consent authority), DPE said that a 5-6% increase in salinity downstream (some 80km away) was neutral or beneficial (NorBE). This demonstrates a need for clearer criteria and cumulative impacts considerations.
- **Need clearer criteria on whether the impact is to be measured at point of discharge or downstream.** Point of discharge impacts recognise the importance of managing point source pollution and the impact that such pollution can have on water quality and the aquatic environment. If only downstream impacts are assessed, the full extent of catchment damage will not be known. The Guidelines allude to this interpretation but the guidelines are *not enforceable* for SSD, which given their size, can be significant sources of contaminants. There should be a mandatory requirement in the SEPP itself to apply the point of discharge test and cumulative impact assessment. In addition, further consideration should be given to the baseline for applying the NorBE test. A stronger test would involve a comparison between a non-polluted reference catchment and the expected discharge from the proposed development.

³ *Protection of the Environment Operations Act 1997*, s. 3(d)(iv). See also the objectives of the EPA under the *Protection of the Environment Administration Act 1991*, s. 6, including among other things:

- *promoting pollution prevention,*
- *adopting the principle of reducing to harmless levels the discharge into the air, water or land of substances likely to cause harm to the environment,*
- *minimizing the creation of waste by the use of appropriate technology, ...*
- *setting mandatory targets for environmental improvement,*
- *promoting community involvement in decisions about environmental matters, ...*

The *Protection of the Environment Operations Act 1997*, s. 3(d), aims ‘to reduce risks to human health and prevent the degradation of the environment by the use of mechanisms’ that reflect the EPA’s objectives above.

⁴ *Environmental Planning & Assessment Act 1979*, section 34B Special provision for development in Sydney water catchment relating to water quality.

- **Equity and risk-based approach.** Large infrastructure projects like coal mining (overseen by DPE) should not have less prescriptive standards than small scale development (where standards are set by SCA). Projects with greatest impacts deserve greatest scrutiny.
- **There is no requirement for Minister to take into account advice from Sydney Catchment Authority (SCA), now WaterNSW.** SCA/WaterNSW applies the NorBE test every day to smaller developments and has an overall approach of catchment health and understanding. We strongly support the concurrence requirement for Councils to seek SCA advice (clause 11).⁵ This is favourable compared to the internal consultation approach taken for SSD that if Minister is consent authority, he/she does not need to take SCA advice into account in NoRBE. **We recommend that there should be a mandatory SCA/Water NSW role for SSD.**⁶
- **Clause 3 water quality objectives** do not appear to exist (or be publicly available) for *all* sub-catchments. This lessens the effectiveness of the criteria and context. Objectives need to be referable to local sub-catchment planning level.
- **Recognition of ecosystem health as a factor contributing to water quality.** We submit that it is too narrow to interpret water quality by reference to, for example, faecal contaminants contributing to giardia. There needs to be recognition and consideration of the connectedness of how aquatic and riparian native species contribute to cleaner catchments. This ties in with need to make this clearer, preferably in the SEPP, as the NorBE Guidelines are unenforceable. Only some sub-catchment indicators recognise this link. We submit that there should be a mandatory reference to ecosystem health and services.
- **Need up to date information online.** Currently some information is available in hard copy only, for eg: the Hawkesbury/Nepean water strategy.
- **Systemic assessment:** The McClellan Report Royal Commission in 1990s was concerned with *giardia* risk etc, but also discussed contamination associated with coal mining, including salinity. It recognised that all types and sources of pollution must be considered – to understand the interactions within the system. We recommend that the NSW Government should revisit and update valuable work of CMAs in 2000s (e.g. Hawkesbury/Nepean CMA) given the increase in mining and residential/industrial development. The role of LLS in catchment-level planning could also be clarified, noting catchment-level impacts of SSD.

In relation to Georges River and Hawkesbury Nepean River catchments, in addition to our comments above regarding housing development, we support retaining existing SEPP prohibitions and considerations, and also support proposed mapping (eg: EIE, p26).

Regarding the proposed new Ministerial Direction – Catchment protection (EIE, p51), we welcome the requirement to consider cumulative impacts of development on water quality and river flows, but the wording for protecting and improving

⁵ We note that the SCA needs better resourcing to do this work – we understand they have less resourcing since merging with WaterNSW.

⁶ A comparable precedent is provided in the *EPBC Act 1999* (Cth) which contains a legal requirement to take into account advice from the Independent Expert Scientific Committee (IESC).

environmental values should be strengthened (ie, more than just a matter to have 'regard to'). Criteria or guidelines should be prepared to ensure cumulative impact assessment requirements are understood and effectively applied.

Urban bushland

Urban bushland and public open space in urban areas is extremely important to local communities and biodiversity (given the high number of threatened species and ecological communities in the Greater Sydney region). A high number of calls to the EDO NSW inquiry line are received every year from community members concerned about their local park or reserve. SEPP 19 has always been limited in application, but we strongly support its intent being retained in the proposed SEPP.

This review process presents an opportunity to strengthen protections, for example, requiring management plans to be made addressing prescribed criteria, rather than optional; and potentially expanding coverage of the provisions to other areas facing increased urban expansion.

In reviewing the effectiveness and updating the proposed SEPP, it is useful to consider the impacts of development currently *excluded* from the Urban Bushland SEPP. To date, the Urban Bushland SEPP's safeguards only apply to Council-assessed development. As exempt and complying development expands, and major projects are fast-tracked, protections for public bushland against 'edge effects' and the impacts of development on adjoining land continue to shrink. We recommend that the sorts of mandatory considerations the Urban Bushland SEPP applies to local projects should also apply to other non-Council assessed development such as major projects. Continuing to limit application of urban bushland protections and considerations is inconsistent with a risk-based approach to impact assessment.

Further detail is needed as to what the definition of 'bushland' will include. We are concerned that if only bushland of medium or good condition meets the definition then this may exclude some remnant patches of urban bushland from protection. Many patches are in low condition due to the fragmentation of bushland in urban areas, but have the potential to be restored. These areas should be restored to meet NSW biodiversity objectives.

There is also the issue of how public bushland is 'valued.' The EIE proposes SEPP clause 10 be delivered through a Ministerial Direction. The current clause requires a council to "give priority to retaining bushland, unless it is satisfied that significant environmental, economic or social benefits will arise which outweigh the *value of the bushland*"⁷ [emphasis added] when preparing an LEP. It is not clear how bushland will be valued compared with economic values of development. This should be clarified to include a range of values.

More broadly, we are concerned about the impacts of the new biodiversity laws on urban biodiversity – including how offsetting and approvals will be applied under the *SEPP (Vegetation in Non-Rural Areas)*. Our concerns are outlined in our previous submission on the *Explanation of Intended Effect for the State Environmental*

⁷ See clause 10 Preparation of local environmental plans, subsection (b).

*Planning Policy (Vegetation) 2017.*⁸ And as noted above, we remain concerned about the cumulative impacts of increased exempt and complying housing developments on urban bushland and biodiversity.

We support the updating and expansion of Local Government Areas covered by the SEPP and the proposal for a land application map. This should assist the community in understanding where SEPPs apply via the NSW Planning Portal System (EIE, p30).

Waterways

We strongly support continuing the prohibition on new canal estates in NSW.

We strongly support ongoing protection of critical habitat – ie, Manly little penguin population (EIE, p38), but recommend that broader provisions are drafted to ensure protection of species, communities and biodiversity beyond the limited category of critical habitat.⁹

It must be made clear that transitioning provisions from the Sydney Harbour Foreshores and Waterways Area DCP to 'design guidelines' (EIE, p41) does not reduce requirements or enforceability (ie, what is the consequence for development that is inconsistent with the guidelines).

More detail is required regarding the proposal to permit subdivision on foreshore land (EIE, p43).

The proposal to allow additional uses in Zone W7 Scenic waters to increase secure permanent berthing in mooring pens for private vessels should require the consent authority to be satisfied that the mooring pen and permanent berthing of a vessel will not cause habitat or sediment disturbance (EIE, p44).

Regarding the new Ministerial Direction – Sydney Harbour Foreshores and Waterways (EIE, p52-53), we support the precedence given to protection of the natural assets of Sydney Harbour for the public good, and public access.

For further information, please contact rachel.walmsley@edonsw.org.au or (02) 9262 6989.

Yours sincerely,

EDO NSW



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⁸ Available at: https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/3974/attachments/original/1497580555/Vegetation_SEPP_EIE_-_EDO_NSW.pdf?1497580555

⁹ Noting that the category of 'critical habitat' has been replaced by Areas of Outstanding Biodiversity Value under the *Biodiversity Conservation Act 2016*.