

5 June 2014



Director, Planning Coordination and Support  
Department of Planning and Environment  
GPO Box 39  
SYDNEY 2001

Dear Sir/ Madam

## **NORTHERN COUNCILS EZONE REVIEW INTERIM REPORT**

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The National Parks Association of NSW (NPA) welcomes the opportunity to comment on the *Northern Councils EZone Review Interim Report* prepared by Parsons Brinckerhoff ('Interim Report'), and the Department's response to the Interim Report.

Formed in 1957, NPA is a non-profit community organisation that promotes nature conservation and sound natural resource management. We have a particular interest in the protection of the State's biodiversity and its supporting ecological processes, both within and outside of the formal conservation reserve system. Our interests also extend to protection and management of the heritage values of natural and cultural landscapes.

One of the deficiencies of the local plan framework introduced by the *Standard Instrument (Local Environmental Plans) Order 2006* has been that, whilst establishing a standardised approach to planning zones, there has not been sufficiently detailed criteria as to how those zones should actually be applied. The Interim Report makes a significant contribution towards rectifying this deficiency in relation to environment protection zones.

As it is likely that the Interim Report will influence or form the basis of future Statewide planning practice guidelines, our comments are of a general nature, and are not necessarily limited to the specific application of environment protection zones within the Northern Rivers Region.

We also note the recent joining of planning and environment functions under a single departmental structure. This has the potential to promote much better integration between biodiversity conservation endeavours and local plan-making processes. As identified in the (draft) *NSW Biodiversity Strategy 2010–2015* (DECCW 2011), connectivity between the reserve system and the broader landscape is an important Statewide objective. A compatible planning framework will provide an important mechanism for promoting that connectivity.

### **Zone EI National Parks and Nature Reserves**

This zone is intended to cover the core protected area network, and is defined by tenure rather than physical or ecological characteristics *per se*. It currently applies to existing national parks and other reserve categories under the *National Parks and Wildlife Act 1974*, as well as future reserve proposals.

We fully agree with the logic of a clearly defined planning zone that corresponds to those areas of highest conservation significance, the permanent protection of which has been secured by legislative means. This will support the Government's commitment to a world-class protected area network.

However, the existing criterion for inclusion in the E1 Zone (reservation under the *National Parks and Wildlife Act 1974*) does not correspond with the full extent of the protected area network as recognised by the Government's *NSW National Parks Establishment Plan* (DECC, 2008: page 3). Other protected area categories currently omitted from the E1 Zone, but which should also be included, are as follows:

- *Other conservation reserves*—this would include flora reserves under the *Forestry Act 2012*. These reserves have equivalent conservation significance and status to national parks, their revocation requiring an Act of Parliament. Some Crown reserves administered by the Department of Lands are protected solely or primarily for conservation purposes, and would also be validly included in this category.
- *Marine parks and aquatic reserves*—these areas also have equivalent conservation significance and status to national parks, but are administered under other legislation.
- *Other lands subject to a statutory conservation regime*—this would include land under a conservation agreement, a registered biobanking agreement or similar instrument under the *National Parks and Wildlife Act 1974*, the *Threatened Species Conservation Act 1995* or certain other legislation. The legislation that supports these measures secures a similar degree of protection to that given to national parks, even though the land may be privately owned or administered by some other agency.

In general, the planning system is not a determinant of the activities that may be undertaken on land within the national park estate or other protected area categories. This is because the use of such land is primarily governed by the terms of its tenure, or by other strictly defined legislative controls. An enlarged E1 Zone that covers all protected area categories would more clearly indicate those areas where conservation management is effectively outside of the planning system. It would also warrant a change of terminology from 'National Parks and Nature Reserves' to 'Protected Area Network' or similar, as well as minor adjustments to objectives and permissible uses so as to reflect the wider range of tenures involved.

## Zone E2 Environmental Conservation

This zone recognises that important natural or cultural values are by no means confined to national parks or other protected areas, but commonly extend across the landscape under a variety of tenures. We strongly support the need for a planning zone outside of the reserve system that protects areas of 'high ecological, scientific, cultural or aesthetic values' (as described by the Standard Instrument LEP). We agree that the primary focus for use and management within this zone should be the long-term protection of those values.

The Interim Report recommends that E2 zones within the Study area should be defined according to seven listed criteria, which can be condensed as follows:

- coastal wetlands (SEPP 14)
- littoral rainforests (SEPP 26)
- endangered ecological communities (TSC Act 1995 or EPBC Act 1999)
- habitat for threatened species (TSC Act 1995 or EPBC Act 1999)
- over-cleared communities (>70% loss of pre-settlement extent) [Keith + Mitchell]
- lands of indigenous cultural significance.

Our view is that the recommended criteria inadequately capture locations having 'high ecological, scientific, cultural or aesthetic values'. In particular, the criteria need to give consideration to wider biodiversity values, not just to the protection of threatened species and ecosystems or over-cleared vegetation communities. Whilst such species and communities may indeed represent a high priority for conservation effort (though some would disagree), it would be a serious misunderstanding to confuse conservation priority with 'high biodiversity values'.

Notably, ‘biodiversity values’ are defined by the State’s biodiversity legislation (the *Threatened Species Conservation Act 1995*) as being ‘the composition, structure and function of ecosystems, and including (but not limited to) threatened species, threatened populations and threatened ecological communities, and their habitats’.

The detailed biodiversity criteria for Zone E2 should reflect this wider concept of biodiversity values. It should extend protection to locations that are ecologically significant within the wider regional landscape, by reason of:

- identified wilderness values
- important ecosystems (including those that have not suffered drastic ecological decline or loss of integrity)
- important ecological processes (such as habitat for key pollinators and seed dispersers)
- high regional connectivity value
- high-value ecosystem services (such as soil stability and water filtration).

In the context of the Northern Rivers Region, such an approach would recognise the exceptional conservation values of important stands of rainforest, old growth forest, heathlands, wetlands, coastal dunes and identified koala habitat. However, with the exception of SEPP 26 littoral rainforests and SEPP 14 coastal wetlands, these communities are proposed to be excluded from Zone E2 as a result of inherent deficiencies in the recommended criteria.

Due to extensive landscape fragmentation, Zone E2 should include sites having strategic connectivity value at the regional level. Major issues include habitat requirements for wildlife, pollinators and seed dispersers. Surprisingly, this issue receives almost no attention by the Interim Report, although it is briefly mentioned in relation to ‘camphor laurel forest’.

The recommended criteria also exclude areas of high aesthetic value, even though protection of this value is an objective of the Zone. Whilst the Government’s proposed response to the Interim Report downplays scenic amenity as a ‘highly subjective value’ not warranting specific protection by way of zoning or overlays, this ignores the long history of scenic protection controls in NSW, or indeed the considerable international literature on the subject. Sites of regional scenic significance are likely to also be important from an ecosystem services perspective (protection of steep land). Exclusion of high aesthetic value from the Zone E2 criteria might however be acceptable provided this issue were to be adequately catered for by a separate overlay control that imposes enforceable restrictions on inappropriate development. This would allow biodiversity and scenic values to be dealt with as separate layers (see ‘Environmental Overlays’ below).

We note the intention that ‘extensive agriculture’ be listed as permissible with consent within this Zone. Whilst this will generally be appropriate, there are nevertheless some legitimate concerns arising from (a) the likelihood that proposals will be incompatible with the values being protected in some instances, and (b) widespread misunderstanding of the nature of permissibility as being a development entitlement rather than a discretion. Accordingly, we consider that it is essential that the land use table be strengthened by additional provisions that require the consent authority to withhold consent from incompatible development (for example, where consistency with the Zone objectives cannot be satisfactorily achieved by design, management or other mitigation measures).

In summary, the proposed criteria for Zone E2 are inadequate, as there is a critical mismatch with the stated objectives that the zone is intended to achieve. This can be corrected by adopting a broader concept of ‘biodiversity values’, consistent with that intended meaning of that expression under the State’s biodiversity legislation.

## **Zone E3 Environmental Management**

Many sites have important natural or cultural values, but they occur within a predominantly agricultural or urban context. Such sites are typically small remnants, and will usually be of local significance when considered individually. However, when considered collectively, they may be of very great significance indeed.

We support the general approach underlying Zone E3 whereby sites of local significance are identified in local environmental plans. This is then linked to a planning control regime that requires development activities to be undertaken in a manner that supports retention of protected natural and cultural values, but within the predominant agricultural, urban or other context.

Our main contention with the proposals for Zone E3 is that the proposed criteria erroneously capture many locations that should actually be included in Zone E2, based on the objectives of the latter zone. This is discussed in detail under Zone E2 above. If implemented, the consequence of this misclassification would be the application of inappropriate planning criteria for a very large number of sites with very high biodiversity values. Such sites would then be considered from the standpoint of an agricultural or urban context, rather than protection of natural and cultural values as the primary consideration.

The inclusion within this zone of lands that would protect against ‘catastrophic’ flooding or erosion further illustrates our point that there is a mismatch between the underlying objective and the criteria for included lands. If the land is so steep or unstable that there is potential for catastrophic impact, the only valid planning strategy would be to exclude the risk altogether. This is a well-understood principle in the management of natural hazards, whereby only low or moderate risks are amenable to mitigation measures such as design or siting.

## **Zone E4 Environmental Living**

Compared to the other environment protection zones, Zone E4 has a much more limited application, and relates mainly to locations within a semi-urban context where there are special ecological, scientific or aesthetic values. Within the Interim Report Study Area, Zone E4 is only applied within the Byron council area.

The concept of an E4 zone is supported, and should be retained as a zoning option.

The proposed approach recommended by the Interim Report is that Zone E4 be replaced by a conventional residential zone, with environmental values protected by a tree preservation order (made under clause 5.9 of the Standard Instrument LEP). This recommendation does not take into account the intrinsic limitations of tree preservation orders, which are primarily intended for managing amenity issues associated with individual specimen trees within built-up urban areas. For example, tree preservation orders do not control the design or siting of buildings, nor the modification of non-vegetative habitat. Tree preservation orders are part of the tool box, but they are not ‘fit for purpose’ when it comes to protecting special ecological, scientific or aesthetic values.

## **Environmental overlays**

Environmental overlays perform a very useful planning function by identifying important attributes that bear upon planning decisions, but which would not otherwise figure in the traditional one-dimensional ‘predominant purpose’ approach to planning zones. This approach tends to conflate separate and distinct planning issues that may be more meaningfully considered as a series of separate layers. The strict adherence to single-purpose zoning taken by the Standard Instrument LEP is one of its key deficiencies, and sets it apart from more progressive planning approaches taken in other parts of Australia and internationally.

We would generally support the Interim Report’s recommendation that overlay controls be used to identify spatially-based issues not otherwise identified by zoning, but which are of some significance in the determination of development proposals. Obviously, excessive proliferation of overlays could

be unnecessarily complex, and therefore their use should be limited to matters that would serve a beneficial planning purpose. In all cases, overlays should be linked to a substantive clause in the instrument that stipulates actual controls, considerations or requirements applicable to development undertaken within that layer.

The suggested reasons in opposition to the use of biodiversity overlays, as presented in the Government's response to the Interim Report, are rather non-sensical and lack credibility. To suggest that overlays would duplicate controls under the *Threatened Species Conservation Act 1995* shows a surprising unfamiliarity with how that Act operates, which is primarily through the assessment of development proposals under the planning legislation. We would suggest that planning overlays provide many fruitful opportunities for integrating a variety of biodiversity and natural resource management issues that currently are subject to an extremely fragmented and outdated regulatory regime, or which are simply not considered at all.

## Conclusion

The Interim Report introduces for the first time detailed criteria for the application of environment protection zones. This is welcome. However, we do not agree with the very narrow way in which biodiversity values have been conceptualised by the Report, or indeed with several aspects of the Government's proposed response, such as its rather regressive attitude to biodiversity-related planning overlays. The narrow criteria recommended by the Report results in a very large number of locations with very high biodiversity or other conservation values being excluded from the zone intended to accommodate those values (E2 Environmental Conservation). This will result in poor planning outcomes, especially when the cumulative effect of multiple decisions are considered.

We suggest that suitable guidelines for environment protection zones should be prepared for each region of the State, taking into account wider biodiversity values, appropriate application of overlays, and regionally-specific circumstances. These should then be incorporated in applicable regional plans or s.117 Directions.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Anne Reeves'.

Anne Reeves  
Senior Vice President  
National Parks Association of NSW