

2 July 2015

Director, Planning Frameworks
NSW Department of Planning & Environment
GPO Box 39
Sydney NSW 2001

Submitted online: www.planning.nsw.gov.au/proposals

Dear Ms Wing

SEPP Review 2015 – Integration and Repeal of 16 SEPPs

Thank you for the opportunity to make a submission on the ‘Explanation of Intended Effect’ (**Explanation**) for the proposed *State Environmental Planning Policy (Integration and Repeal) 2015* (**proposed SEPP**).

EDO NSW is a community legal centre specialising in public interest environmental and planning law. We also had significant involvement in the NSW Planning Review from 2011 to 2013, including in the context of the future of SEPPs and related plans.¹

Thank you for making the time to meet with us to discuss some of the details of the proposed SEPP, and the Department’s ongoing review of SEPPs generally. We note that the SEPPs involved here are of limited local application, and we consider it is appropriate to review them in the circumstances. We provide some brief comments and recommendations, summarised below:

1. **Consultation on draft SEPP text:** Communities should fully understand where environmental and heritage objectives or protections have not been carried over and the reasons why.
2. **Regional Strategies versus RGIPs:** Translation of environmental and heritage objectives, principles and controls – such as from REPs to Regional Strategies and then to future RGIPs – must be clear, and explanations given. Important contemporary protections should not be left out of future instruments. Their continuity should be clear and effective.
3. **Heritage in the Hunter:** Ensure that all relevant community members and groups are consulted as part of further heritage investigations, including for Aboriginal heritage.
4. **North Coast REP:** Defer the repeal of the North Coast REP until the ongoing Review of Environmental Zones is complete, and the implications for ‘deferred lands’ are clear to local communities, including Aboriginal peoples.
5. **Rural Landsharing:** Explanatory guidance and communication from the Department and local councils should note the extent of existing uses, and assist landholders and communities to understand what they can and can’t do under revised LEP provisions, relating to the repeal of SEPP 15 – Rural Landsharing Communities.
6. **Koala SEPP:** We welcome the proposed re-inclusion of Coffs Harbour under SEPP 44.
7. **Transitional provisions:** Transitional provisions and commencements must ensure there is ‘no gap’ in protections provided by existing SEPPs that are to be repealed.

8. **Future SEPP reviews:** The Government should articulate its proposed approach to developing state planning policies, and the criteria guiding future reviews of SEPPs. This approach should include early and iterative consultation that reflects the nature of the policies, and the extent and importance of the areas involved to NSW communities and their environment.

Background

We note that and that the overall intention of the proposed SEPP is to:

- 'remove policy and controls that are now superseded by Regional Strategies, Standard Instrument local environmental plans [(LEPs)], and other existing [SEPPs]'; and
- update and integrate 'policy to be retained into the relevant local plans to provide controls in the one place' to make them 'easy to find and use.' (Explanation, p 5)

More specifically we understand that the proposed SEPP would:

- repeal 11 SEPPs integrated elsewhere (including some Regional Environmental Plans (**REPs**) first made in the 1980s, now classified as 'deemed' SEPPs);
- continue the operation of 2 REPs (Illawarra and Jervis Bay) over small parts of land in the Shoalhaven (and repeal the REPs' operation for other lands);
- update and integrate 2 REPs for the Siding Spring Observatory and Defence facilities in the Riverina into modern planning instruments (to enable the repeal of these 2 REPs);
- repeal the Rural Landsharing Communities SEPP (No. 15) and propose that LEPs be amended to provide for such communal land arrangements where local councils consider it appropriate (presumably protecting existing uses); and
- re-insert the Coffs Harbour area into SEPP 44 – Koala Habitat Protection.

Our comments and recommendations are set out below.

1. Consultation on Draft SEPP text

We note that a draft SEPP has not been exhibited alongside the Explanation. We welcome early public exhibition and explanation of the proposed changes, however this does mean that public comments are limited to what is in the Explanation rather than the legal text. We consider that the Explanation provides a useful amount of information and explanation (including maps). The only further caveat is that it is not always clear what has *not* been carried over from REPs, by way of policy objectives or planning controls.

Recommendation: *Communities should fully understand where environmental and heritage objectives or protections have not been carried over and the reasons why.*

2. Regional Strategies versus Regional Growth and Infrastructure Plans

In a number of cases the Explanation notes that provisions of the soon-to-be-repealed REPs have been carried over into Regional Strategies and Standard Instrument LEPs (see for example, Explanation p 6, *Illawarra REP No.2 – Jamberoo Valley*; and *Lower South Coast REP No. 2*).

However we understand that Regional Strategies themselves will soon be repealed and replaced with proposed Regional Growth and Infrastructure Plans (**RGIPs**). We note that RGIPs were proposed in the former Planning Bill 2013. Following the defeat of the Bill, we

understand the intention is to progressively consult on around a dozen RGIPs across the regions of NSW; and implement them via Ministerial Directions under s. 117 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, so that future LEPs are consistent with the RGIPs.

It is not always clear whether the plan-making objectives and contents of Regional Strategies have been (or will be) carried over into RGIPs (even though the Explanation does mention RGIPs in some places).

One example of policy objectives or principles that may be omitted relates to encouraging renewable energy in the Illawarra. The Explanation (p 14) notes the ‘comprehensive controls’ in the Illawarra REP No. 1 include, among other things, ‘promotion of renewable energy’ (for example, clauses 43 and 46). The Explanation also notes that the Illawarra REP No. 1 has been superseded by LEPs and the Illawarra and South Coast Regional Strategies (and the REP has only limited application in Kiama, Wollongong and Shoalhavenⁱⁱ).

While the *Illawarra Regional Strategy 2006-31* includes a brief reference to encouraging renewable energy (p 35), we understand the draft Illawarra RGIP, to replace the 2006 Strategy, does not. It is therefore unclear whether or how renewable energy will be promoted in future regional planning, although there are sound reasons to do so. These include the growing challenges and opportunities of climate change; awareness of the need for regional economic diversification;ⁱⁱⁱ the NSW Government’s Renewable Energy Action Plan;^{iv} and the State Plan target for 20% renewable energy within the next 5 years (Goal 22).

Recommendation: *Translation of environmental and heritage objectives, principles and controls – such as from REPs to Regional Strategies and then to future RGIPs – must be clear, and explanations given. Important contemporary protections should not be left out of future instruments. Their continuity should be clear and effective.*

3. Heritage in the Hunter

The proposed SEPP will transfer heritage items from the *Hunter REP 1989 (Heritage)* that are not yet incorporated into LEPs, ‘except where further investigation and the relevant council confirms that protection is no longer warranted’ (Explanation p 11). The Planning Department and local councils should ensure that all relevant community members and groups are consulted as part of the ‘further investigation’, including in relation to Aboriginal heritage. The Department and councils should clarify how this will occur. Consultation should include discussing whether the community is satisfied with the heritage protections that have been progressively transferred into LEPs to date.

Recommendation: *Ensure that all relevant community members and groups are consulted as part of further heritage investigations, including for Aboriginal heritage.*

4. North Coast REP and ongoing E-Zone Review

The proposed repeal of the North Coast REP is complicated by the ongoing Review of Environmental Zones on the Far North Coast, discussed in the Explanation (p 13). The E-Zone review affects all 4 local government areas that the North Coast REP still applies to (plus Byron). Namely, ‘deferred lands’ in the Tweed, Ballina, Kyogle and Lismore (out of an original 17 local areas). Once repealed, the North Coast REP ‘will no longer apply to “deferred areas” where previous LEPs are still in place’ in the 4 areas (Explanation, p 13). The Explanation states that these previous LEPs have zones and special provisions that continue to provide suitable protection consistent with the North Coast REP. However, more specific detail should be provided on the equivalence of environmental and cultural

protections for deferred lands that continue under previous LEP provisions, compared with protections provided for in the REP.

It is significant that the REP was applicable to these deferred lands when local councils proposed E-Zones in draft LEPs (lands now subject to the E-Zone review). In most cases the REP formed part of the guiding documents that informed councils in proposing the E-Zones.^v Given that the REP has informed North Coast zoning proposals, it may be appropriate to await the outcome of the E-Zone review, and to understand its local implications, before repealing the North Coast REP.

The E-Zone review should also take into account the Land & Environment Court decision in *Ryan v Minister for Planning* (2015). In this case EDO NSW represented an Aboriginal elder who challenged the Planning Department's removal of e-zones, without re-exhibition, from the draft LEP covering the North Lismore Plateau (land that is sacred to the Aboriginal community, with several culturally significant sites). In finding the revised LEP was invalidly made, the *Ryan* case affirms the central role of the local community participation process in LEP-making under the EP&A Act.^{vi}

Recommendation: *Defer the repeal of the North Coast REP until the ongoing Review of Environmental Zones is complete, and the implications for 'deferred lands' are clear to local communities, including Aboriginal peoples.*

5. Rural Landsharing Communities SEPP

We understand that existing use rights will continue to apply for lands and communities already living under rural landsharing arrangements, in accordance with the EP&A Act (Part 4, Division 10). While existing uses are not discussed in the Explanation (p 34), this should be clarified in a way that reassures existing landholders and communities. For example, by way of explanatory notes in the proposed SEPP, departmental FAQs, local council factsheets and/or direct letters.

Recommendation: *Explanatory guidance and communication from the Department and local councils should note the extent of existing uses, and assist landholders and communities to understand what they can and can't do under revised LEP provisions, relating to the repeal of SEPP 15 – Rural Landsharing Communities.*

6. Coffs Harbour and SEPP 44 – Koala Habitat Protection

EDO NSW welcomes the proposed re-inclusion of Coffs Harbour under SEPP 44.

7. Transitional arrangements

The Department and relevant local councils should ensure that there is no 'gap' between protections provided by the existing SEPPs and inclusion of those protections in the other instruments that are intended to supersede them, where the transition has not yet fully occurred. We understand this may be the Department's intention, and this is noted for certain SEPPs to be repealed (for example, Spit Island Bird Habitat). However, it is not made clear in the 'Savings and transitional provisions' section (Explanation, p 36). While the Explanation (p 5) says 'the new planning controls will take effect when they are published on the NSW Legislation website', we presume a 'no gaps' approach will require staged commencement.

Recommendation: *Transitional provisions and commencements must ensure there is 'no gap' in protections provided by existing SEPPs that are to be repealed.*

8. Future SEPP reviews

EDO NSW would welcome and appreciate consultation on the legal detail of future SEPP reviews, particularly SEPPs dealing with statewide protections of environmentally sensitive areas (including, but not limited to, Coastal Wetlands, coastal development, Littoral Rainforests, Urban Bushland and Koala Habitat Protection etc).

We understand the Department's policy intent is to ensure that existing environmental and heritage protections continue under modern planning instruments. EDO NSW supports such continued protection in ways that recognise the full value of environmental assets, and that are legally equivalent or stronger than existing protections (not always the case under the standard instrument LEP).

This process of translation and modernisation can also be assisted by early input, not only from local councils and environmental agencies, but also from local community members and groups who know and live in these areas, or who visit and appreciate these areas' diverse values (including traditional owners); as well as other stakeholders with special expertise.

Recommendation: *The Government should articulate its proposed approach to developing state planning policies and the criteria guiding future reviews of SEPPs. This approach should include early and iterative consultation that reflects the nature of the policies, and the extent and importance of the areas involved to NSW communities and their environment.*

Thank you for considering our submission and we hope it assists the Department. We look forward to further engagement on the detail of future SEPP reviews. For further enquiries please contact me or Policy & Law Reform Director, Rachel Walmsley, on (02) 9262 6989.

Yours sincerely,
EDO NSW

Nari Sahukar
Senior Policy & Law Reform Solicitor
Our Ref: 1557

ⁱ For further information see EDO NSW, *Submission on the Planning White Paper* (June 2013), pp 33-40, available at http://www.edonsw.org.au/planning_development_heritage_policy.

ⁱⁱ The Explanation of Intended Effect (p 14) states that the Illawarra REP No. 1 will continue operating at Culburra only, and be repealed for other lands. The REP 'now applies only to Kiama, Wollongong (deferred lands) and Shoalhaven (deferred lands) local government areas'.

ⁱⁱⁱ See for example, *The Illawarra over the next 20 years – Consultation Outcomes Report* (2014) p 23.

^{iv} See for example, <http://www.resourcesandenergy.nsw.gov.au/energy-consumers/sustainable-energy/renewable-energy-action-plan>.

^v For example, the interim E-Zone review consultant's report suggests the North Coast REP was one of several guiding documents for Ballina, Byron and Lismore councils in proposing E-Zones (but not for Kyogle or Tweed, according to the report). See Parsons Brinckerhoff, *Northern Councils EZone Review Interim Report* (September 2013), p 60.

^{vi} See EDO NSW, *Aboriginal Elder wins court case to protect environment*, 5 June 2015, http://www.edonsw.org.au/aboriginal_elder_wins_court_case_to_protect_environment_at_lismore.