Submission on the Review of the Environmental Planning and Assessment Regulation 2000 (Issues Paper)

prepared by

EDO NSW

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About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law.
Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their states.

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Introduction

EDO NSW welcomes the opportunity to comment on the September 2017 **Issues Paper** to inform the Review of the Environmental Planning and Assessment Regulation 2000 (**Planning Regulation**).

The Regulation is very important, even though it is technical, as it underpins the day-to-day operation of the *Environmental Planning and Assessment Act 1979* (**Planning Act**). The Regulation guides the processes, plans, public consultation, impact assessment and decisions made by the Department of Planning and Environment (**Department**) and other planning authorities under the Planning Act.

This submission makes comments and recommendations on the Planning Regulation and the Department's Issues Paper in two parts.

Part A suggests some guiding principles to inform the Review and development of a draft revised Planning Regulation. In particular:

1. ***Achieving the aims of the Act and government policy objectives:***
    a. *Setting and achieving environmental goals*
    b. *Continue to encourage provision of land for public purposes*
2. ***Transparent information and effective engagement on planning matters:***
    a. *More effective consultation and increased transparency (not just 'streamlining')*
    b. *Adopt the principle of 'non-regression' for rights and obligations*
    c. *Everyone should be able to engage with decisions that affect them*
    d. *The Regulations should help make people's submissions count*
3. ***Development categories – ensure the greatest impacts receive the greatest scrutiny***
4. ***Specific consultation needed on giving effect to the Planning Bill 2017.***

Part B examines 'Existing provisions and known issues' noted in the Issues Paper that are relevant to the public interest; and 'Other issues' that EDO NSW sees as important for the Review to address in any redrafted Regulation based on our expertise and experience. **Part B** comments are set out as follows:

1. **Planning instruments (see Issues Paper, pp 12-14)**

    Issues Paper (**IP**) matters

- *Notification of determination (IP 1.1)*
- *Requirements for exhibition of Development Control Plans (IP 1.2)*

    Other issues

- *Fairer and more transparent meetings and procedures for Planning Panels needed*
- *Rezoning 'Gateway' conditions must be binding and enforceable*
- *Explain the relationship between state, regional, district and local plans*

2. Development assessment and consent (Issues Paper pp 15-19)

Issues Paper matters

- *Prescribed policy guidance for state significant development (IP 2.1)*
- *Provision for a modification application to be rejected or withdrawn (IP 2.2)*
- *Locating public exhibition requirements (IP 2.4) – and non-regression principle*
- *Requirements for notices of determination (IP 2.5)*
- *Notification of internal review decision (IP 2.6)*
- *Classes of designated development (IP 2.7) – key issue*
- *Definition of 'environmentally sensitive area' in Schedule 3 (IP 2.8) – adopt a highest common denominator approach*
- *Signage on sites*

Other issues

- *Key issue: Environmental performance, compliance history and fitness of character as new mandatory considerations in evaluating development applications*
- *Key issue: Climate change impacts and greenhouse gas emissions as a new mandatory consideration in evaluating (major) development applications*

3. Environmental assessment (Issues Paper pp 19-22)

Issues Paper matters

- *Environmental assessment for State Significant Infrastructure and certain other* [Part 5] *activities* (IP pp 19-20)
- *Requirement for public agencies to make their environmental assessment public (IP, 3.1)*
- *Requirements for environmental impacts statements* (IP p 21)

Other issues

Key issue: EIS requirements should include a climate impact statement for major projects
Key issue: Mining and gas exploration should not be exempt from consent as Part 5 activities
Integrated development – procedure to withdraw agency's approval
Terminology – 'development without consent'

4. Fees and charges (Issues Paper pp 22-23)

5. Development contributions (Issues Paper pp 23-24)

Issues Paper matters

- *Practice notes for Voluntary Planning Agreements (IP 5.1)*
- *Public inspection of draft and final planning agreements (IP 5.2)*
- *Affordable housing (IP p 24)*

Other issues

- *Transparency, public participation, clearer procedures and anti-corruption measures*

6. Planning Certificates (Issues Paper pp 27-28).

7. Miscellaneous operational & administrative provisions (Issues Paper pp 28-30).

Importantly, the NSW Parliament has passed the Government's Environmental Planning and Assessment Amendment Bill 2017 (**Planning Bill 2017**).[1] As noted in Part A below, it is very difficult to consider the impact of this Bill as well as comment on the existing Regulation. Legitimate concerns have also been raised about the effect of certain amendments in the Bill.

We therefore strongly recommend that the Department prepare specific consultation material detailing how it proposes to amend the Regulation to give effect to the Planning Bill 2017. We recommend this occur in advance of a draft Regulation.

We hope this submission assists the Department to progress the Regulation Review in a way that helps achieve the objects of the Act, including to increase community engagement and public participation in decision-making and encourage and facilitate ecologically sustainable development. We look forward to more consultation in 2018.

Part A - Guiding principles to inform Review of Planning Regulation

In this part of the submission EDO NSW suggests some guiding principles to inform the Review and development of a draft revised Planning Regulation for further public consultation. These principles are grouped as follows:

1. ***Achieving the aims of the Act and government policy objectives***
2. ***Transparent information and effective engagement on planning matters***
3. ***Development categories – ensure the greatest impacts receive the greatest scrutiny***
4. ***Specific consultation needed on giving effect to the Planning Bill 2017.***

1. Achieving the aims of the Act and government policy objectives

The Issues Paper calls for stakeholders to identify known issues or inefficiencies in the current Planning Regulation, and for reform suggestions to better achieve the Government's policy objectives. It seeks broad opportunities to modernise, update, simplify, consolidate and digitise (pp 5 and 8).

The two objectives suggested in the Issues Paper both relate to housing supply and approvals, including complying development). However, the Act contains a broad range of aims (see section 5, 'Objects'), and so should the Government – particularly in relation to environmental protection. Research suggests nine out of ten NSW residents believe that regulation in general should aim to increase, not merely

[1] Passed by Parliament on 15 November 2017. See: https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3456, accessed 20 Nov. 2017.

maintain, the health of the environment.[2] This aim is reflected in the ESD principle of *intergenerational equity* which underpins the Planning Act and impact assessments.[3]

a. Setting and achieving environmental goals

We strongly **recommend** the Department of Planning and Environment should make clear what the government's environmental objectives and priorities are, and how the Regulation and planning system can help to achieve these objectives. We give three examples below – in relation to climate change, biodiversity and plastic pollution.

First, the Department should specifically consider how provisions of the Regulation can contribute to the Government's objective of net-zero greenhouse gas emissions by 2050. The planning and development decisions being made now, by this Government and by planning authorities, will have a profound effect on the State's ability to deliver on that aim – now just 32 years away.

In particular we **recommend** a Climate Impact Statement as a mandatory requirement as part of any Environmental Impact Statement (**EIS**) under Schedule 2 of the Regulation. A Climate Impact Statement would explain and highlight upfront:

- whether a proposal (major project or other high-impact 'designated development') is consistent with this aim of net-zero emissions, and
- how it contributes to achieving this aim, consistent with national and international goals to avoiding dangerous global warming of 2 degrees or more.

Second, the Department should specifically consider how the Regulation can be amended to better integrate and support the aims of the *Biodiversity Conservation Act 2016* (**BC Act**).[4] The BC Act relies heavily on the Planning Act and Regulation to achieve these aims as any development activities with significant biodiversity impacts must pass through assessment under the planning system.

Third, for several years the Government's primary environmental goal related to litter – a 40% reduction in litter by 2020. This will be assisted by the 'cash for containers' system due to commence on 1 December 2017. But while visible litter may be going

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[2] NSW Office of Environment and Heritage, *Who cares about the Environment? 2015* survey results (OEH 2015).

[3] '…namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations'. See for example, Planning Regulation Schedule 2, cl. 7 and *Protection of the Environment Administration Act 1991* s. 6.

[4] The objects of the BC Act include, among other things:

> *(b) to maintain the diversity and quality of ecosystems and enhance their capacity to adapt to change and provide for the needs of future generations, and*
> *(c) to improve, share and use knowledge, including local and traditional Aboriginal ecological knowledge, about biodiversity conservation, and*
> *(d) to support biodiversity conservation in the context of a changing climate, and*
> *(e) to support collating and sharing data, and monitoring and reporting on the status of biodiversity and the effectiveness of conservation actions, and …*
> *(h) to support conservation and threat abatement action to slow the rate of biodiversity loss and conserve threatened species and ecological communities in nature, …*

down, waste production is going up.[5] From global to local level, there has been a particular interest in the explosion of plastic production and its ecological consequences. The Planning Regulation could more clearly enable planning authorities to use planning controls to deal with 'upstream' problems like plastic waste production. For example, prescribing or limiting takeaway plastic by vendors.

b. Continue to encourage provision of land for public purposes

The Issues Paper notes the current objects of the EP&A Act (p 6, Box 2). However the Planning Bill 2017 inexplicably deleted two important objects from the Act (which EDO NSW submissions sought to retain):

- to provide land for public purposes; and
- to provide and coordinate community services and facilities.

We **recommend** the Regulation should continue to support these important functions. This is consistent with the Government's claim, noted in the Bill's second reading speeches, that amendments to the objects do not reflect a substantive change in government policy or emphasis.

2. Transparent information and effective engagement on planning matters

The Issues Paper (p 10) seeks feedback on ways the community can make submissions on a planning matter, such as a rezoning proposal, a new local environmental plan (**LEP**) or a site-specific development application (p 10, Box 6). We **support** the aim of a modern and more accessible planning system and Regulation.

We make four comments here: on more effective engagement, *non-regression* of rights to information, accessibility and informative community guidance.

a. More effective opportunities for consultation and increased transparency (not just 'streamlining')

We **recommend** the Department's primary aim in the area of document lodgement and access should be to make the planning system easier to engage with, and to make community consultation more effective. This is consistent with the objects of the Act to increase public participation in planning matters. We also **recommend** the Review be informed by the new 'community participation principles' enacted by the Planning Bill 2017 (section 2.23).[6]

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[5] According to the ABS, 'Australia's economic production… rose 73% over the period 1996-97 to 2013-14. Over the same period… [w]aste production rose 163%, energy consumption increased 31% and GHG emissions increased 20%.' Australian Bureau of Statistics (ABS), *4655.0 - Australian Environmental-Economic Accounts, 2016*. Available at http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/167944D8C7C4332CCA25811600185D02?opendocument, accessed November 2017.

[6] See Environmental Planning and Assessment Amendment Bill 2017 (Planning Bill 2017), as passed by Parliament 15 November 2017. Section 2.23 notes (among other things - bold emphasis added):

(2) A planning authority is to have regard to the following when preparing a community participation plan:
*(a) The community has a **right to be informed** about planning matters that affect it.*

The Issues Paper focuses more on 'streamlining' (or reducing administrative and cost 'burdens') than effectiveness. This presents a risk that community access to information, engagement and participation in decision-making may be reduced to save costs. This focus should be reversed. Reduced administrative burden may be a positive consequence of better-designed consultation processes.

For example, where existing requirements are considered 'outdated, administratively burdensome, or… no longer necessary' (p 10) – the first step should be to consider whether technology, such as the ePlanning Portal (as noted in the Issues Paper) or other online access would improve public access to planning information.

EDO NSW **supports** the increased use of digital communication options (Issues Paper p 8) alongside other ways of engaging that meet diverse community needs and preferences. Reading the Issues Paper, we **recommend** a greater emphasis is needed on digital *community engagement* tools, not just development lodgement tools. A guiding principle should be that digitisation provides 'increased opportunity for public involvement and participation', in keeping with the Act's objects.

b. Adopt the principle of 'non-regression' for rights and obligations

We **recommend** the Government's approach to Regulation reform is guided by the principle of 'non-regression' – both in relation to environmental protection and (here) public participation and transparency. This is consistent with the aims of the Act.

Non-regression is a recognised and emerging concept in environmental law.[7]
We refer to non-regression to mean that rights, obligations and safeguards related to public participation in the planning system should be maintained (where fully effective) or advanced (where improvement is required). Put simply, it means that policy and law reform should protect and advance existing rights, obligations and environmental safeguards, and ensure they are not reversed.

By contrast, an example of *regression* is where 'outdated' requirements to maintain hard copies of documents for public exhibition are removed altogether, instead of

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*(b) Planning authorities should encourage effective and on-going **partnerships** with the community to provide **meaningful opportunities** for community participation in planning.*
*(c) Planning information should be in **plain language, easily accessible** and in a form that facilitates community participation in planning.*
*(d) The community should be given **opportunities to participate in strategic planning as early as possible** to enable community views to be genuinely considered.*
*(e) Community participation should be **inclusive** and planning authorities should **actively seek views that are representative** of the community.*
(f) Members of the community who are affected by proposed major development should be consulted by the proponent before an application for planning approval is made.
*(g) Planning decisions should be made in an **open and transparent way** and the community should be provided with **reasons for those decisions** (including how **community views** have been taken into account).*
*(h) Community **participation methods** (and the **reasons given** for planning decisions) should be **appropriate** having regard to the **significance and likely impact** of the proposed development.*

[7] See the Australian Panel of Experts on Environmental Law (APEEL), *Blueprint for the next generation of Australian environmental law* (2017), p 12. Available at http://apeel.org.au/, accessed November 2017. APEEL recommends *non-regression* as a key legal design principle: '(that is, there should be no reduction in the level of environmental protection provided by the law)'.

updating this obligation to require online access.[8] At a minimum, updated regulations should require *online* publication, and clear signposts for access in this and other forms.

c. Everyone should be able to engage with decisions that affect them and their community – but not everyone can engage online

As well as increasing online accessibility, the Government should continue to consider accessibility for community members who do not or cannot use the internet.

For example, the Issues Paper notes the administrative burden on local councils or other consent authorities mailing documents where individuals choose not to receive information by email (p 11, Box 7). In some circumstances it may be appropriate for planning authorities to use email as the default communication option (e.g. an opt-out system that still enables receipt by post, or to phone a number to request documents).

In all cases though, people without internet access should not be penalised or excluded from engagement with the planning system. This is particularly important as vulnerable groups are often less likely to have reliable internet access.
We recommend the Regulation should help less engaged and vulnerable groups to engage in the planning system. To give a small example, email should not be a mandatory field (or should include a 'no email' option) if submitters provide other contact details or elect to make an anonymous submission (in accordance with privacy laws).

With regard to Voluntary Planning Agreements (**VPAs**) and Environmental Impact Statements (**EIS**) (Issues Paper p 11), we support mandatory access via the ePlanning Portal. Nevertheless, individuals should have a right to request a copy of a VPA (or EIS) in person from the local council, or from the proponent if they choose. Access arrangements for voluminous documents should remain fair and equitable.

d. The Regulation should help make people's submissions count

According to the Issue Paper, the Regulation Review is an opportunity to consider the process and 'channels' for making a formal submission to a planning authority on development applications, planning instruments etc (p 10, Box 6).

Every day, EDO NSW receives calls from community members seeking advice on how to respond to development proposals that are of interest or concern to them. We advise callers that a starting point is to consider what the decision-maker must take into account when determining whether to refuse or approve a development proposal – including (but not only) the project's social, economic and environmental

[8] For example, when the *Biodiversity Conservation Act 2016* commenced, requirements to publicly exhibit reasons for granting or refusing concurrence (at the national parks office or fisheries agency) were removed altogether rather than shifting the requirement to online publication. See Environmental Planning Regulation 2000, subcl. 63(2) *Reasons for granting concurrence* (repealed by *Environmental Planning and Assessment Amendment (Biodiversity Conservation) Regulation 2017*, item [6]).

impacts, state environmental planning policies (**SEPPs**) and LEPs.[9] Not surprisingly, few people are aware of the 'section 79C' considerations.

To maximise the community's opportunity to have their say in a meaningful way, we **recommend** development advertisements give additional guidance alerting the community to the general s. 79C matters the decision-maker must take into account.

The Regulation should specify should that whenever development applications are advertised for comment (online, in print or elsewhere), the public be advised that considerations in s. 79C (or equivalent) are a central part of the decision-making process (and that other considerations may apply to specific kinds of development). This will enable the public to make informed, relevant and influential submissions.

3. Development categories – ensure the greatest impacts receive the greatest scrutiny

The Regulation plays a very important role in defining environmental assessment requirements for different development categories and approval pathways. In particular:

- setting out the standard features of an EIS, including for all major projects (Schedule 2),
- defining categories of high-impact 'designated development' that also require an EIS, additional community consultation and merit appeal rights (Schedule 3) and
- setting out the environmental assessment requirements for activities that don't need planning consent, but do need another form of authorisation and assessment under Part 5 of the Planning Act (**'Part 5 activities'**, Regulation clause 228).

We **recommend** the Regulation ensure the greatest impacts receive the greatest level of scrutiny – from regulators and the public. This is in line with a risk-based approach to regulation. Among other things, in this submission we propose:

- revising the State Significant Development (**SSD**) category to remove 'sensitive areas' as a trigger for SSD – as this has perverse implications that may result in less scrutiny (approvals and appeal rights) instead of more;
- continuing to align the high-impact 'designated development' category with the requirement to hold an Environmental Protection Licence (**EPL** or **pollution licence**) – this should include prescribing Coal Seam Gas (**CSG**) exploration as designated development instead of a 'Part 5 activity';
- improvements to the standard EIS requirements in Schedule 2 – such as consideration of cumulative impacts of past, existing and likely future development.

[9] Currently found in s. 79C of the Planning Act, as well as some regulation and SEPP provisions.

4. Specific consultation needed on giving effect to the Planning Bill 2017

During the consultation period on this Issues Paper, the NSW Parliament passed the Environmental Planning and Assessment Amendment Bill 2017 (**Planning Bill 2017**).[10] The Bill is 125 pages long and will result in many structural and substantive changes to the Regulation. It is very difficult for the community to consider the impact of this enactment at the same time as commenting on the existing operation of the Regulation. Legitimate concerns have also been raised about certain amendments, such as increasing the Planning Secretary's powers to step into the shoes of another agency or resolve inconsistencies between agencies (and the limits of this power); and the functions and procedures of the reconstituted Independent Planning Commission.

We therefore strongly **recommend** that the Department prepare specific consultation material detailing how it proposes to amend the Regulation to give effect to the Amendment Act. We recommend this occur in advance of a draft Regulation.

Part B – Existing provisions and identifying known issues

This part of the submission examines existing provisions and known issues identified in the Issues Paper (from p 12) – focusing on matters relevant to the public interest, and EDO NSW expertise and experience. We also address 'Other issues' that EDO NSW sees as important for the Review to address in any redrafted Regulation.

For ease of reference, Part B is structured according to the Planning Department's Issues Paper (**IP**):[11]

1. **Planning instruments**
2. **Development assessment and consent**
3. **Environmental assessment**
4. **Fees and charges**
5. **Development contributions**
6. **Planning Certificates**
7. **Miscellaneous operational and administrative provisions**

Note that the principles and additional recommendations in **Part A** above may require additional revisions to specific provisions of the Regulation discussed here.

[10] Passed by Parliament on 15 November 2017. See: https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3456, accessed 20 Nov. 2017.
[11] Page references or parts marked in brackets refer to the Issues Paper ('**IP, pp**…'). Available at: http://www.planning.nsw.gov.au/~/media/Files/DPE/Discussion-papers/review-of-the-environmental-planning-and-assessment-regulation-2000-issues-paper-2017-09.ashx, accessed November 2017.

1. Planning instruments (see Issues Paper, pp 12-14)

Matters raised in the Issues Paper

Notification of determination (IP 1.1)

The Issues Paper proposes to set a timeframe for Councils to notify development proponents if their rezoning application has been refused (instead of 'as soon as practicable'). However, current and proposed notification arrangements and the rights to seek review of decisions remain inequitable, and not publicly transparent. Fairer, more transparent review procedures are discussed below under *Other issues*.

Requirements for exhibition of Development Control Plans (DCPs) (IP 1.2)

We **support** the Issue Paper's proposal that exhibited DCPs, which are substantial altered after public consultation, should be re-exhibited (p 14). In addition to this, we **recommend** the Regulation require a plain-language summary of the changes made and the reasons for them, to assist further consultation.

We note the Planning Bill 2017 provides for a move towards standardised DCPs, however we don't comment on the detail of that proposal here.

Other issues related to Planning instruments

Fairer and more transparent meetings and procedures for Planning Panels needed

The Regulation Review is an opportunity to make the role of Joint Regional Planning Panels (**JRPPs**) and local planning panels clearer and more transparent.
For example, we raise two issues based on calls to our free legal advice line.

The first issue is that JRPP meetings are not necessarily held in public. The current Regulation states that JRPP and other planning body meetings 'may' be held in public, subject to the Planning Minister's direction (clause 268H). There is no default requirement that meetings to be held in public.

We **recommend** amending the Regulation to *require* panel meetings to be notified and held in public (a proposal noted in the Issues Paper) – *unless there are exceptional reasons in the public interest* that justify a closed-session meeting.
In that case, the reasons, considerations and resulting decisions must still be sufficiently transparent.

The second issue relates to expanded rights to have various planning decisions reviewed – rights that are now available to development proponents, despite the process effectively shutting out community voices. Most relevantly a JRPP can review a Council decision to refuse a 'spot rezoning' request.[12]

[12] It should be noted that EDO NSW opposes these and other 'developer-only' review rights as inequitable. Furthermore, the Planning Bill 2017 proposes to expand review rights further to integrated development and higher-impact state significant development, further entrenching this inequity.

There is a 40-day administrative time window for a proponent to request the decision review. However, this time limit does not appear to be enforceable because it is not set out in the Regulation.[13] Rather, it is given effect in a planning circular. Communities cannot be certain that this time limit will be adhered to, or enforce the law if the limit is breached.

With regard to decision review rights for development proponents only, we **recommend** that inequitable review rights be removed.

However, if decision review rights are retained, then amendments are required to make them fair and transparent:

- the Regulation be amended to prescribe a time limit for proponents to request a review of rezoning decision (see for example clause 10A)
- we recommend 28 days instead of the 40 days noted in the relevant 2016 Planning Circular; and
- the Regulation be amended to require *public notice* of the refusal, and of any review requested, and give objectors 28 days to request to appear before the JRPP to inform its rezoning review (clause 10A), as applies to Court hearings.

Rezoning 'Gateway' conditions must be binding and enforceable

We are concerned that the community has little recourse to ensure that planning authorities comply with the procedures and conditions of the 'gateway process' that is designed to ensure rezoning proposals ('spot rezoning' and new or revised LEPs) are appropriate. For example, the Planning Act states that breaches of procedure do not invalidate a planning instrument unless the breach relates to public consultation (s. 56(8)).

We **recommend** that to the extent legally possible,[14] the Regulation includes mechanisms to hold planning authorities accountable for following the correct plan-making procedures, and that, local councils or other planning authorities are required to comply with any conditions or limitations noted at the Gateway stage (such as a recommendation for additional studies, buffer zones or agency consultation)

Relatedly, we **recommend** the Regulation prescribe that all documents that are required to be prepared under the Gateway Determination must be made publicly available as part of the public exhibition stage (such as environmental studies, agency consultation or concurrences). Requiring this information would greatly aid public consultation, which is already a mandatory element of the Gateway process.

In some cases, environmentally sensitive sites may be subject to repeated 'spot rezoning' applications by their owners who are seeking to develop the site. This

[13] We understand the Regulation was amended in relation to review rights in November 2012. Clause 10A now requires local councils to notify a proponent of a rezoning refusal as soon as practicable. However, the rights to have the decision reviewed appear to be given effect *administratively* via a planning circular (first in 2012 now 2016).

[14] Amendments to both the Act and Regulation may be needed to make the gateway process more binding and enforceable, but accountability should be ensured.

practice has been coupled with increased review rights noted above, giving developers a 'second bite of the cherry' without effective community participation.

The Government has previously expressed a desire to limit spot rezoning through better strategic planning. With regional, district and now local planning statements in train, we **recommend** that state and local planning authorities be enabled to prevent further applications to 'upzone' a site until the expiry of a certain number of years (such as to coincide with an LEP review). This would provide some assurance to the local community that Environmental-zoned land is protected, at least in the interim.

Explain the relationship between state, regional, district and local plans

State (**SEPPs**) and local plans (**LEPs**) are 'environmental planning instruments' (**EPIs**), while regional and district plans (under Part 3B of the Planning Act) are given effect via ministerial directions (under section 117 of the Act). The community is largely unaware of 'section 117 directions' or what they require, and are often confused and perplexed at the role of SEPPs, which can and often do override local planning controls.

We **recommend** the Department consider how best to explain the role and influence of state, regional, district and local plans in the planning hierarchy, and legal effect of ministerial directions and SEPPs. At a minimum this could include making various plans more accessible on the Department's website and the NSW Legislation page. However there may also be a role for the Regulation to clarify their legal relationship, which could be considered in further consultations.

2. Development assessment and consent (Issues Paper pp 15-19)

<u>Matters raised in the Issues Paper</u>

Prescribed policy guidance documents for state significant development (IP 2.1)

The Issues Paper's description of 'applicable guidelines' is too generic to provide meaningful comment. It is possible this refers to EIS requirements that refer to particular documents, but this is unclear. The implications of the issue and proposed solutions should be more clearly set out to allow effective consideration.

Provision for a modification application to be rejected or withdrawn (IP 2.2)

We **support** listing additional, non-exhaustive) grounds for rejecting modification applications (see Regulation cll. 51-52). We **recommend** the listed grounds include:

- where the applicant has a poor compliance history under the current consent or previous consents;
- where the applicant is not a fit and proper person; and/or
- where there is significant and reasonable doubt that the applicant does not have the capacity to fulfil appropriate conditions of development consent.

There is precedent for a fit and proper purpose test in relation to licences under NSW mining law.[15] There is precedent for considering environmental performance and compliance history under Commonwealth environmental law and elsewhere in the NSW Planning Regulation itself.[16]

Locating public exhibition requirements (IP 2.4) – and non-regression principle

We **generally support** the proposal to co-locate public exhibition requirements so they can be found in the same part of the Regulation (and any other relevant instruments).

We **do not generally support** 'streamlining', as this can be a euphemism for removing important processes that may take time, but improve community confidence. For example, the Planning Bill 2017 will reduce public exhibition of SSD from a minimum of 30 days to 28 days.[17] No clear explanation has been given for reducing these important community rights.

We therefore **recommend** that co-locating public exhibition requirements meet the principle of 'non-regression' – ensuring no lesser rights of consultation, and no less enforceability of those rights. Where possible, these rights should be expanded.

Requirements for notices of determination (IP 2.5)

We address the need for inclusive community consultation and notification in **Part A**. While we support the use of cost-effective default settings such as email, information access and delivery channels should also be informed by people's choices. If an interested community member doesn't use email or the internet, they should not be excluded by restrictive delivery options or default settings. Nor does this prevent greater efficiencies. For example, a letter in the post could still invite the person to view the documents online, or to request hard copy documents by phone.

Clauses 100-101 of the Regulation require notice of a range of useful information. We **recommend** that the Regulations specifying notification requirements should aim to be clear and informative about what decision has been made and why, what the next steps, rights or options are, and where to find more information.

At a minimum, the Regulations should require all documents are made available online, and prevent Councils from *requiring* a person to visit Council offices during business hours to view documents (as this is highly restrictive). The number of access channels should respect people's choices, and reflect the diversity of community needs and the likely level of interest in the development.

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[15] Fit and proper person consideration in making certain decisions about mining/petroleum title rights: *Mining Act 1992* (NSW) s. 380A*;* and *Petroleum (Onshore) Act 1991* (NSW) 24A..

[16] The provisions of Chapter 4 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) that allow a person's environmental history to be taken into account are expressed broadly. Environmental history is relevant to decisions under ss 136(4), 143(3), 144(3), and 145(3). See also the NSW Planning Regulation Schedule 3, cl. 36, which requires the consideration of 'previous environmental management performance, including compliance', in assessing whether the impact of expansions amounts to designated development.

[17] Planning Bill 2017 (as passed by Parliament), Schedule 2, item 9 (cf Planning Act s. 89F(1)(a)).

We strongly **support** the Planning Bill 2017's requirements to provide reasons for decisions and look forward to consultation on the details as recommended in **Part A**.

Notification of internal review decision (IP 2.6)

We discuss decision review rights above, noting inequities between proponent and community rights, and the need for community voices to be heard. If proponent review rights are retained, we strongly **support** the proposal to amend the Regulation and require any person who made a submission to be notified of the result of the review (Issues Paper p 18). In cases where there is no opportunity for public submissions (as for early council refusals to rezone) the Regulation should require these decisions to be publicly notified.

Classes of designated development (IP 2.7) – key issue

As a general rule we **support** continued alignment of designated development with requirements for an EPL or pollution licence (although EPL categories are also under review). This should include prescribing coal seam gas (**CSG**) exploration as designated development instead of a Part 5 activity. It is a strange anomaly that mining and gas exploration sits under Part 5 alongside public infrastructure and utilities, despite recognition that it needs a pollution licence (discussed further under 'Environmental assessment' – other issues below).

The *Leewood* case demonstrates a need for clarity about what is and is not development for the purposes of petroleum exploration.[18] In the absence of a definition there is no clarity or limits for the community, landholders or companies. We **recommend** the Regulation and relevant SEPPs define and limit these activities. The Regulation should ensure major effluent treatment plants and irrigation areas are designated development, even if they are related to mining or gas exploration.

As a separate issue, we remain strongly concerned that some development may be classed as SSD *because* it is proposed in an environmentally sensitive area.[19] This is problematic and can lead to perverse outcomes, as SSD often overrides various environmental safeguards, transparency and public oversight.[20]

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[18] *People for the Plains v Santos* (2017): http://www.edonsw.org.au/mining_coal_seam_gas_cases. This case, run by EDO NSW on behalf of People for the Plains, concerned a water treatment plant proposed by Santos, and whether that plant could properly be considered as part of CSG exploration, or required separate public exhibition, assessment and development consent via Planning Act Part 4.

[19] SSD categories are largely given effect via the SEPP (State and Regional Development) 2011.

[20] The effect of SSD is fourfold:

- SSD is exempt from a range of approvals under biodiversity, native vegetation, heritage and Aboriginal cultural heritage legislation (EP&A Act ss 89J-K).
- An environmental impact statement (**EIS**) and (with the BC Act commencing) Biodiversity Development Assessment Report (**BDAR**) are required – but these already apply to designated development as well;
- SSD also takes the decision out of the local council's hands. While there would be mixed views on the merits of the Department of Planning making these decisions, some community members feel this removes local influence;
- This is compounded when SSD includes a public hearing held by the Planning Assessment Commission, which removes merit appeal rights that the community would otherwise have for designated development.

We **recommend** the Regulation be amended to remove these categories from SSD and insert or retain them as designated development (thereby requiring an EIS, retaining local input, ensuring other environmental approvals or concurrences are required, and preserving merit appeal rights for communities regarding high-impact proposals.) This would address the perverse outcome that development in sensitive areas may receive *less* environmental protection and oversight if it is declared SSD.

Definition of 'environmentally sensitive area' in Schedule 3 (IP 2.8) – adopt a highest common denominator approach

The Issues Paper seeks feedback on whether the definition of 'environmentally sensitive area' in Schedule 3 remains appropriate; and whether the use of specific locations or environmental criteria for some classes of development should continue (p 19).

EDO NSW **supports** the concept of limiting impacts to defined *environmentally sensitive areas*. We **recommend** the review of this definition should adopt the principle of non-regression. That is, existing environmental protections should be retained, with reform efforts focused on making them more effective and comprehensive.

Consistent with non-regression, we also **recommend** harmonising the definition of *environmentally sensitive areas* using a highest common denominator approach – across different SEPPs, EPIs and the regulation. 'Buffer zones' around these areas (e.g. 100m for natural water bodies and wetlands; 40m from other sensitive areas[21]) should also be scientifically reviewed for their adequacy and consistency. A stronger, harmonised definition would be simpler and more protective, at a time when the benefits of ecological integrity are more widely recognised in planning – from social, economic and environmental perspectives (including for biodiversity and carbon storage).

We also **recommend** resisting pressure to weaken environmental assessment requirements for poultry farms (the example used in the Issues Paper) and similar development, given their potential to cause water pollution, odour and other amenity issues that concern and affect neighbouring residents. This is based on in our experience fielding and assisting community legal enquiries. Detailed upfront assessment and public participation enables such impacts to be predicted, assessed, exhibited and (if approved) appropriately managed. If there are genuine reasons why certain parts of an EIS are inappropriate or not needed in particular contexts, evidence should be provided and reviewed by the EPA, OEH and independent experts.

The Department should also clarify the interaction between the Regulation review and the proposed agriculture SEPP (which is also on exhibition until 18 December 2017).[22] We are currently reviewing the detail of that proposed SEPP in detail, but stakeholders could potentially seek to reduce agricultural categories of designated

[21] See various examples in the Planning Regulation 2000, Schedule 3, *Designated development*.
[22] See: http://www.planning.nsw.gov.au/Policy-and-Legislation/State-Environmental-Planning-Policies-Review/Draft-Primary-Production-SEPP, accessed November 2017.

development, or expand development permitted without consent. Given the concerns noted above, feedback on these two processes must be integrated and transparent.

Other issues relating to development assessment and consent

Key issue: Environmental performance, compliance history and fitness of character as new mandatory considerations in evaluating development applications

The Planning Act allows the Regulation to specify additional considerations when the consent authority decides to approve or refuse a development, and what conditions may apply to any approval.[23]

We **recommend** that the Regulation be amended to require consent authorities and decision-makers to consider:

- the past *environmental performance* of the proponent and its directors, and
- whether the proponent is a *fit and proper person* with the skills, capacity and good faith to comply with development consent conditions if a development is approved.

Consideration of environmental performance should extend beyond NSW, to other states and, where practicable, overseas operations, performance and compliance.[24]

In other jurisdictions, and other NSW laws, decision-makers are required to consider the environmental performance (or compliance history) of the proponent, and/or a character test as to whether they are a fit and proper person to be granted a licence. Examples include the *EPBC Act 1999* (Cth) and the *Mining Act 1992* (NSW).

EDO NSW receives a number of calls from concerned community members dealing with planning matters that often have a long and controversial history in the local community. In some cases residents see development approved and, despite subsequent concerns about non-compliance with consent conditions, they see the same developer applying to expand their development over time.

The public's inability to raise past non-compliance or environmental performance as a relevant consideration threatens to erode public confidence in the planning system. This recommendation will have the dual benefit of excluding unscrupulous developers and business models, and rewarding positive environmental behaviour and compliance. It is therefore consistent with the aim to encourage ecologically sustainable development (**ESD)**.

[23] i.e. matters for evaluation under s. 79C or equivalent section under the 're-numbered' Planning Act.
[24] Note this is separate but related to our recommendation regarding *modification applications* above.

Signage on sites

The Issues Paper (p 15) notes that Part 13A of the Regulation requires signage on sites, where works are being undertaken via a development consent or complying development certificate.

We **recommend** consideration also be given to clearer minimum, informative and legible size requirements for signage where a development application has been lodged but not necessarily determined (e.g. proposed subdivisions). Clearer and more engaging signage would reflect the Act's object to increase public participation.

Key issue: Climate change impacts and greenhouse gas emissions as a new mandatory consideration in evaluating (major) development applications

The planning decisions we make now on infrastructure, land use and resource development strategies and proposals will profoundly affect the future. In 2016, EDO NSW made 14 recommendations to make the planning system responsive to the need to reduce greenhouse gas emissions and avoid dangerous global warming.[25]

Most relevantly to the development assessment and consent stage:

> ***Recommendation 8***
> *Strengthen decision-making requirements for development approvals and conditions in the EP&A Act, with the aim of achieving emissions reduction targets. In particular, establish new duties to:*
> *• have regard to state and national emissions trajectories and act in accordance with short and long-term reduction targets;*
> *• consider the level of greenhouse gas emissions as grounds for refusal (or a duty to refuse unacceptable impacts);*
> *• impose specific conditions on development consents and mining titles to minimise emissions, meet certain standards if the project is approved, and to offset emissions that cannot be minimised or avoided; and*
> *• apply clear guidelines, rules and standards to minimise and offset emissions.*

We **recommend** the Planning Regulation be amended[26] to require climate change and greenhouse gas emissions to be a mandatory consideration under s. 79C (or its future equivalent). At a minimum this should apply to all major projects in conjunction with a Climate Impact Statement (discussed in 'Environmental Assessment' below).

[25] EDO NSW, *Planning for Climate Change: How the NSW planning system can better tackle greenhouse gas emissions*, July 2016.See: http://www.edonsw.org.au/planning_for_climate_change.
[26] See for example Planning Regulation cl. 92 *Additional matters that consent authority must consider*.

3. Environmental assessment (Issues Paper pp 19-22)

Matters raised in the Issues Paper

***Environmental assessment for State Significant Infrastructure and certain other activities* (i.e. under Part 5 of the Act) (IP pp 19-20)**

In our experience there is significant community concern about the level of assessment and oversight of Part 5 activities (often 'self-assessed' and approved by the agency proposing the development). This is of particular concern with regard to environmentally sensitive areas and heritage areas.

We have made extensive submissions on these issues in recent SEPP reviews.[27] As our 2017 submission on the Infrastructure SEPP Review noted, we **recommend** that Part 5 assessment and approval processes need:

- improved transparency, notification and consultation based on the scale of change to the environment, community or streetscape;
- harm minimisation guidelines to ensure the SEPP is properly applied – for example, how agencies meet the test of 'minimal environmental impact'[28];
- exemplary environmental compliance within agencies that rely on Part 5 assessment; and
- strong and properly resourced oversight and enforcement by regulators, including the Department of Planning and Environment.

We **recommend** these considerations also guide this part of the Regulation review. At a minimum, the Regulation review should require additional oversight of agency 'self-assessment' as to whether Part 5 development is of 'minimal environmental impact'; or is likely to have a 'significant effect' on threatened species and ecosystems.[29]

Requirement for public agencies to make their environmental assessment public (IP, 3.1)

We **support** the Issues Paper proposal (p 21) to require publication of Reviews of Environmental Factors (**REFs**), which assess the impacts of Part 5 activities where a full EIS is not required. However, it is not sufficient to publish REFs *after* approval. We **recommend** REFs must be published *for community input prior to* any approval. Requirements to consider community feedback will help to instil public confidence.

We also **recommend** the Regulation require regular publication of statistics related to environmental assessment of Part 5 activities. For example, reporting how many

[27] See http://www.edonsw.org.au/planning_development_heritage_policy. For example, see EDO NSW submission on the State Environmental Planning Policy (Infrastructure) Amendment (Review) 2016, April 2017, Download PDF.

[28] Section 76 of the Planning Act requires that exempt development must be of 'minimal environmental impact', as noted under Part 2 Division 4 of the SEPP (Infrastructure) 2007 (**Infrastructure SEPP**), and in relation to heritage areas under cl 20 of the Infrastructure SEPP; and in the related SEPP (Exempt and Complying Development Codes) 2008.

[29] For example, Planning Regulation, cl. 228 – with *likely* meaning a reasonable chance or possibility.

activities assessed and approved in a given year, by each State agency or local council, are subject to an REF or EIS; and how many assessments led to refusal or re-design.

Requirements for environmental impacts statements (EIS) (IP p 21)

There is no explicit reference in the Regulation requiring major projects to be considered in the context of *cumulative impacts* (unlike clause 228 for assessing 'Part 5' activities). We **recommend** the EIS requirements for major projects require consideration of cumulative impacts with past, present and likely future development.

EDO NSW has long-standing concerns that state significant development and infrastructure (**SSD**, **SSI**) are exempt from a list of important approvals under other environmental laws, such as Aboriginal heritage impact permits. Other approvals must be issued in accordance with the project approval, including pollution licences (EPLs issued by the Environmental Protection Authority).[30]

In place of this transparent approval system, for major project proposals the Planning Secretary 'must consult relevant public authorities'[31] to determine the Secretary's Environmental Assessment Requirements for the project. This consultation happens behind closed doors, and its outcomes rely on inter-agency negotiation. Agencies may later put in submissions commenting on the EIS. While such submissions are published, it is not always clear how agency concerns are resolved.

The process for major projects, which often have the greatest impacts, is therefore less transparent and less certain than the standard 'integrated approval' pathway.

At a minimum, we **recommend** the Regulations provide greater transparency as to which agencies must be consulted on a particular category of project (or a process for determining this, via the Regulation or binding guidelines); and transparency as to what they recommended. Later, where an agency raises problems in comments on the EIS, it should be clear how each of these issues has been addressed (or if not, why not).

Ultimately the Regulations must give the public confidence that the right agencies are consulted, that they give comprehensive advice, that assessment requirements are based on the best available evidence, and that the EIS addresses all agency concerns.

[30] Planning Act, ss 89J-89K for SSD. Equivalent exemptions apply to SSI at ss 115ZG-115ZH.
[31] EIS requirements are set out in Schedule 2 of the Regulation (see in particular clause 3(4) of the Schedule).

Other issues related to environmental assessment provisions

Key issue: EIS requirements should include a Climate Impact Statement for major projects

In 2016 EDO NSW released a report on *Planning for Climate Change: How the NSW planning system can better tackle greenhouse gas emissions*.[32] The report assessed six stages of the planning system, from its objects to post-approval mechanisms, and made 14 recommendations to address critical gaps related to reducing emissions.

Most relevantly this included:

> ***Recommendation 5***
> *Require consistent and independent assessment of the likely greenhouse gas emissions of all major projects. This must include a Climate Impact Statement that states:*
> - *how the project proposal contributes to relevant goals and targets to reduce greenhouse gas emissions;*
> - *specific measures to avoid, minimise and offset emissions from the project;*
> - *the measures in place to ensure downstream emissions are avoided, minimised and offset;*
> - *the full cost of the project's emissions; and*
> - *full and proper consideration of alternative options.*

We **recommend** the Planning Regulation (Schedule 2, EIS requirements) be amended to require a Climate Impact Statement for all major projects.

Key issue: Mining and gas exploration should not be exempt from consent as Part 5 activities

As noted, EDO NSW has frequently raised the anomaly that exploration for coal, gas and minerals can proceed without development consent from the local council, and is assessed with limited (if any) public scrutiny via a Part 5 'Review of Environmental Factors'.[33] It is difficult to justify why a house may require development consent, yet drilling bore holes or building water treatment plants for gas exploration may not.[34]

We **recommend** all mining and gas exploration require development consent (as for other private development under Part 4 of the Planning Act), with legal rights and obligations to publicly exhibit the proposal. It is important that public participation rights are given effect in enforceable laws or instruments, not rely on agency policy.

As recommended above, the Regulation should prescribe effluent treatment plants, irrigation projects etc. (even if related to exploration) as designated development.[35]

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[32] See: http://www.edonsw.org.au/planning_for_climate_change, accessed November 2017.
[33] Via the *SEPP (Mining, Petroleum Production and Extractive Industries) 2007*, cl. 6. See also EDO NSW, *Ticking the Box: Flaws in the assessment of coal seam gas exploration* (2011), Download PDF.
[34] See for example the *Fullerton Cove* case (2013) and *Leewood* case, *People for the Plains v Santos* (2017) run by EDO NSW, at: http://www.edonsw.org.au/mining_coal_seam_gas_cases.
[35] See *People for the Plains v Santos (*2017), run by EDO NSW on behalf of People for the Plains: http://www.edonsw.org.au/mining_coal_seam_gas_cases. That case concerned a water treatment plant proposed by Santos, and whether that plant could properly be considered as part of CSG

Integrated development – procedure to withdraw agency's approval

The Planning Regulation deals with integrated development applications and EIS requirements.[36] As part of this process, concurrence agencies (i.e. whose approval is also needed) provide 'general terms of approval' that the proponent is to satisfy.

We **recommend** the Regulation be amended to:

- require that agencies be notified if the Planning Department Secretary proposes to override any terms of an agency's concurrence; and
- explicitly permit agencies to withdraw their concurrence or approval if the agency's conditions are not to be included in the final approval.

This would give effect to the intention of the current law – that agencies may either grant concurrence (with or without specific terms) or refuse to grant concurrence. If terms of a concurrence are, in the agency's view, integral to the granting of concurrence (i.e. without those conditions, concurrence would not be granted at all), then agencies must have an opportunity to withdraw any concurrence, where essential terms of approval are not to be included in the final consent conditions.

Terminology – 'development without consent'

Relatedly, the term 'development without consent' (Part 5 activities) causes some confusion in the community. Explaining that an activity requires 'approval' but not 'consent' is difficult. The Department should consider whether amendments to the Act or Regulation could help address this confusing terminology. New terminology could refer to the fact that some form of assessment and approval is required. We discuss the substantive categories of Part 5 development without consent above.

4. Fees and charges (Issues Paper pp 22-23)

The Issues Paper notes various fees, including to help fund planning reform in NSW.

EDO NSW **supports** the use of development fees and levies for environmental protection, restoration and community facilities. This approach is not currently used in the Regulation, but such levies would reflects various objects of the Act and the principles of ESD, including the *polluter pays principle* and *improved valuation* of environmental costs and benefits.

For example, with increasing reliance on complying development (and government policy to expand it), we **recommend** certain complying development could be subject to a biodiversity and environmental restoration levy – particularly as the

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exploration, or required separate public exhibition, assessment and development consent via Part 4 of the Planning Act.

[36] Integrated development requires approval from multiple agencies (such as the Rural Fire Service, National Parks and Wildlife Service or the Heritage Council) in addition to development consent. See the Planning Regulation, Division 3 of Part 6 (applications) and Schedule 2 (EIS requirements).

complying development codes do not consider the cumulative impacts of many small changes, and complying development is not subject to the new Biodiversity Offsets Scheme.[37]

Nevertheless, income from a levy can easily be dwarfed by the cost of damaging or destroying valuable natural assets or heritage, or the painstaking cost of restoration. It is therefore critical that exempt and complying development is excluded from defined *environmentally sensitive areas*, and must not adversely affect those areas.

We **support** user-pays and cost recovery systems that enable councils and other public authorities to charge for their administrative processes funded by the public. Nevertheless, there is a legitimate concern from community members that new 'rights' for developers can be 'bought' at the expense of community voices.

One example is a $20,000 fee to seek JRPP review of a council's decision to refuse a rezoning (pre-Gateway review). Another example relates to the Planning Bill 2017. The draft Bill proposed to *prohibit* retrospective approval of modifications in order to disrupt a business model of 'build first, get approval later'. However, the Bill as passed will instead permit such retrospective modifications, with a council fee. This could give the impression that otherwise unlawful conduct can be 'bought' for a fee (particularly where there is an economic incentive to exceed conditions of consent).

We **recommend** the Department ensure that fees in the Regulation support public interest levies and cost recovery, but do not legitimise poor planning practices, or provide perverse incentives to breach standard development pathways or avoid public participation.

5. Development contributions (Issues Paper pp 23-24)

Matters raised in the Issues Paper

Practice notes for Voluntary Planning Agreements (IP 5.1)

We **support** the proposal to require planning authorities and developers to consider practice notes when proposing or entering into a voluntary planning agreement. Please note that we have not reviewed the draft VPA policy framework noted in the Issues Paper and cannot comment on that framework. Other comments are below.

We also **recommend** VPA practice notes emphasise the role and public benefits of green infrastructure (existing and planned), such as waterways, bushland, parks and cycleways. We discuss the role of public participation below.

We **support** requirements for clear Council policies on when VPAs are considered (Issues Paper, 5.3).

Public inspection of draft and final planning agreements (IP 5.2)

[37] Established under the *Biodiversity Conservation Act 2016.*

We **support** requirements for draft and final planning agreements to be publicly exhibited on the Planning Portal. Revised and final VPAs should be required to include a summary of what has changed since exhibition and why.

We **recommend** the Regulations and practice notes reinforce the need to consider community input, and base VPAs and other contributions on the best available evidence (such as a community needs analysis, upfront local surveys and up-to-date council information).

Communities should not be presented with a draft VPA in isolation. We **recommend** the Regulation and practice notes empower communities with sufficient explanatory information to make informed comment on draft VPAs and development proposals. For example, information about how a VPA fits within the context of council budgets for public facilities, recent and upcoming investments, and relevant strategies and actions to improve community services, facilities and infrastructure. Explanatory notes could also outline what alternative options were considered but not adopted.

We also **recommend** that requirements to keep a register of VPAs should specify a requirement for that Register to be publicly accessible *online*. It is unacceptable to limit access to planning agreements during business hours (Regulation cl. 25F).

Affordable housing (IP p 24)

We **recommend** the Department consult closely with the NSW Tenants Union and other social housing experts with regard to affordable housing – including on the extension of designated areas where these contributions are available, and alternative or complementary funding solutions.

Other issues regarding development contributions

Transparency, public participation, clearer procedures and anti-corruption measures

EDO NSW **recommends** increased transparency, public participation and clearer procedures for development contributions (and associated plans and agreements) – including for state and local infrastructure, facilities or services. These include direct 's. 94' contributions, indirect 's. 94A' infrastructure levies,[38] voluntary planning agreements (**VPAs**), affordable housing contributions in designated areas and special infrastructure contributions.[39]

We **recommend** the Department consider how best to adopt previous ICAC recommendations to increase transparency and reduce corruption risks around planning agreements.[40] In particular we **recommend** the expansion of third party

[38] See sections 94 and 94A of the EP&A Act 1979 respectively.
[39] See Issues Paper pp 23-25.
[40] See for example ICAC, *Anti-corruption safeguards in the NSW planning system* (2012), recommendations 4 and 12 (introduce changes consistent with uncommenced 2008 Planning Act amendments; and expand third party merit appeal rights to development subject to VPAs) available at

merit appeal rights for community objectors, for developments where VPAs apply. Regulations and guidelines should also guard against inappropriate leverage that may be applied to local councils or their staff.

Finally, while we welcome the scrutiny of development contributions for public purposes in the Issues Paper, we are concerned that at the same time, the Department's Planning Bill 2017 will soon remove two important objects from the Act.[41] As noted, we **recommend** the Regulation continue to support these important public functions.

6. Planning Certificates (Issues Paper pp 27-28)

We **recommend** the Department consider adding further information to s. 149 planning certificates in relation to two issues – climate change and biodiversity.

First, planning certificates should advise of any likely elevated risks to a property as a result of climate change (such as from storm surges or sea level rise).[42] The NSW Government previously committed to fine-scale mapping of climate risks under the State Plan, *NSW 2021*. Existing and prospective land owners, local councils and other planning authorities should have access to the best available information and evidence to plan for adaptation and risk management. Additional notations may be appropriate on commencement of the *Coastal Management Act 2016* and its SEPP.

Second, with the commencement of the *Biodiversity Conservation Act 2016* and land-clearing reforms under the *Local Land Services Act 2013*, planning certificates could note whether local, state or federal biodiversity values have been mapped as occurring on the property (or likely to occur there or nearby, for example, from a biodiversity development assessment report or regional plan) – the source of that information (such as previous local biodiversity assessments or indicative maps of occurrence under NSW legislation or the *EPBC Act 1999* (Cth)) and where to find it.

We would also **support** online access to planning certificates via the Planning Portal (Issues Paper p 28), with hard copy certificates available where the user prefers this format.

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http://www.icac.nsw.gov.au/documents/preventing-corruption/cp-publications-guidelines/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012/file.

[41] EP&A Act 1979, subsections 5(a)(iv) and (v), to encourage:

- *the provision of land for public purposes; and*
- *the provision and coordination of community services and facilities.*

[42] See EDO NSW, *Submission on draft planning circular: Coastal hazard notations on s 149 planning certificates*, 2014, Download PDF, http://www.edonsw.org.au/planning_development_heritage_policy/.

7. Miscellaneous operational and administrative provisions (pp 28-30)

Planning bodies (IP pp 29-30) – including Planning Assessment Commission

We raise two issues here, relating to community merit appeal rights and Planning Assessment Commission governance (**the Commission**, soon to be renamed the Independent Planning Commission).

First, a major criticism of development assessment by the Commission is that community merit appeal rights can be removed at the Planning Minister's discretion. It is now standard practice for the Minister to remove these community rights by directing the PAC to hold a 'public hearing' into high-impact state significant development proposals. This tips the balance further away from community participation – as development applicants routinely have internal review and merit appeal rights where they are dissatisfied with a planning decision.

The NSW Parliament has legislated to give limited merit appeal rights to the community under the Planning Act, to ensure high-impact state significant development (**SSD**) proposals receives appropriate input and scrutiny.
We **recommend** the Act and Regulations give full and proper effect to community merit appeal rights, and the Government abandon the practice of removing these essential rights via public hearings.

Second, amendments to the Regulation regarding the Commission's procedures provide a logical opportunity to implement any remaining recommendations of the Auditor-General's 2017 performance audit.[43]

We **recommend** the Planning Department report on whether the NSW Audit Office's 2017 recommendations to reform Commission procedures have been adopted (such as for meeting procedures, notification processes and conflict of interest declarations); and that any outstanding recommendations are given effect in the revised Regulation.

Registers and records

The Issues Paper asks for feedback on register and record-keeping requirements in the Planning Act (s. 100) and Regulation (Part 16).

As this submission notes, we recommend these provisions be reviewed based on:

- non-regression of existing community rights to participate;
- maximising public transparency and access to information; and
- expanding mandatory requirements to provide *online access* to documents while respecting differing access needs and using resources efficiently.

[43] NSW Auditor-General's Report, *Performance Audit - Assessing major development applications - Planning Assessment Commission* (January 2017), available at www.audit.nsw.gov.au. We note that the Audit Office is limited to its performance audit functions, including assessing internal agency processes and compliance with existing laws. It does not review whether current laws are suitable, or the best legislative model for decision-making.

We note three examples.

First, given the planning system's generally poor record of tracking environmental outcomes, we **recommend** the Regulation be integrated with the new requirement in the *Biodiversity Conservation Act* (s. 14.3) to monitor and report on biodiversity outcomes.

Second, and relatedly, we **recommend** the Regulation integrate with requirements under the *Biodiversity Conservation Act* to record all biodiversity 'offset site' locations and details, as determined by past consent conditions under the Planning Act.

Third, our 2016 *Planning for Climate Change* report noted that specific limits on greenhouse gas emissions in development approvals can be vague, absent or unenforceable; and there is little information available on compliance and audits. We **recommend** the Regulation review give effect to the following 2016 proposal:

> ***Recommendation 14***
> *Establish a comprehensive greenhouse gas monitoring and auditing register to report on individual facilities with significant carbon footprints in NSW. This would draw on existing and new data, to track and report on approved and actual emissions.*[44]

Penalty notice offences

EDO NSW **supports** the tiered offence approach of the Act, including the use of substantial penalty notices or on-the-spot fines, and ensuring penalties are sufficient. We **recommend** considering whether the Regulation could require fines under the planning system to be deposited into an environment protection or monitoring fund.[45]

We also **recommend** that the offence for providing false or misleading information should specifically refer to reckless or negligent inclusions or omissions from planning documents.[46] This would ensure appropriate diligence and higher public confidence.

Finally we **recommend** penalty notice amounts be reviewed regularly to ensure they continue to provide effective deterrent functions against unscrupulous behaviour. For example, where current penalty notice amounts are a few hundred dollars, it should be considered whether this provides a sufficient deterrent or needs to be increased.

[44] *Planning for Climate Change: How the NSW planning system can better tackle greenhouse gas emissions*. See: http://www.edonsw.org.au/planning_for_climate_change, accessed November 2017.
[45] See for example *Protection of the Environment Administration Act 1991* (NSW) s. 34A *Environment Protection Authority Fund; Protection of the Environment Operations Act 1997* (NSW), s. 295ZA *Environmental Monitoring Fund*.
[46] For examples of an offence of 'recklessness' as to whether information is false or misleading, see EPBC Act 1999 (Cth) ss 489-90. On 'reckless or negligent' conduct of executive officers see ss 494-5.