

Draft submission on SEPP (Environment): Explanation of Intended Effect, October 2017

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW welcomes the opportunity to make a submission to the Department of Planning and Environment's *SEPP (Environment): Explanation of Intended Effect*, October 2017.

This is a draft submission awaiting review by LGNSW's Board. Any amendments will be forwarded in due course.

Introduction

The review of SEPPs

The Department of Planning and Environment (DP&E) has placed the *SEPP (Environment): Explanation of Intended Effect* on public exhibition. The EIE outlines the content of a proposed new State Environmental Planning Policy (SEPP) that will include a number of existing SEPPs on environmental planning issues. Much of the new SEPP will be a consolidation of existing planning laws, with limited changes.

The planning documents on exhibition are part of a wider review by the DP&E of all SEPPs in NSW. DP&E intends to simplify and consolidate the current suite of SEPPs, under a series of themes, where possible removing out-dated laws and referring key provisions to Ministerial Directions and some detailed provisions to councils' Local Environmental Plans (LEPs).

LGNSW has long called for the reform of the SEPPs to reduce complexity, improve legibility and reduce the layers of plans that apply to a parcel of land. SEPPs currently:

- constitute another layer of plan making in the NSW planning system that is hard to access, navigate and interpret locally;
- are not well understood by the public, in comparison to council LEPs (while they are referenced in zoning certificates, whether they apply to the specific context or proposed development is not explained);
- may apply to diverse planning matters – both broad state-wide issues and matters of technical detail; and
- are used to override LEP provisions.

LGNSW supports the use of SEPPs as an integrated set of policies that provide the state's broad planning objectives, priorities and policy directions, as proposed in *A New Planning System for NSW: White Paper*, 2013.¹ However, any amendment and consolidation of SEPPs must not reduce opportunities for community participation in planning and development decisions or the protection provided to the environment as is consistent with the NSW planning and environmental laws. We are concerned that this approach has not been adopted by DP&E in this review process.

¹ *A New Planning System for NSW: White Paper*, 2013, sections 5.2 and 5.3

The proposed changes

The proposed changes will create a SEPP (Environment) consolidating 7 existing SEPPs into one with the intention of modernising provisions, clarifying and coordinating definitions, avoiding duplication and simplifying process.

The new SEPP (Environment) will entail the following:

1. Combining the following 7 SEPPs:
 - SEPP 19 - Bushland in Urban Areas;
 - SEPP – Sydney Drinking Water Catchments 2011;
 - SEPP 50 - Canal Estate Development;
 - Greater Metropolitan Regional Environmental Plan 2 – Georges River Catchment;
 - Sydney Regional Environmental Plan 20 – Hawkesbury- Nepean River,
 - Sydney Regional Environmental Plan – Sydney Harbour Catchment 2005; and
 - Willandra Lakes Regional Environmental Plan 1 – World Heritage Property.
2. Grouping environmental issues under four themes allowing for other issues to be added later:
 - catchments;
 - bushland;
 - waterways; and
 - protected areas.
3. Developing a series of Ministerial Directions that will provide the policy framework for plan making for:
 - catchment areas generally – new;
 - the Sydney Drinking Water Catchment - update;
 - Sydney Harbour Foreshores and Waterways - new;
 - Urban Bushland – new; and
 - Willandra Lakes World Heritage Area – amend.
4. Making minor changes to the Standard Instrument LEP to enable some planning controls to be shifted to councils' local environmental plans, such as for canal development.
5. Include specific requirements and objectives for the Sydney Harbour foreshores and waterways, which support the current broad vision for the Harbour.
6. Making changes to the management of urban bushland by revising terms and aligning provisions with other instruments.

LGNSW comments

1. Reducing the number of SEPPs

LGNSW supports the review of all SEPPs to reduce the overall complexity of the planning system, that is; by regrouping SEPPs under themes, reducing the number of SEPPs and relocating local provisions to relevant LEPs, where possible. However, LGNSW notes some inconsistencies and discrepancies in the proposed SEPP.

The Environment SEPP combines SEPPs that apply to specific parts of NSW (e.g. Sydney Harbour REP) as well as state-wide (SEPP 50 - Canal Estates). In one part of the EIE it states that the new SEPP is intended to apply state-wide, but other aspects of the EIE contradict this. For example, Part 1 of the EIE states that “the catchments part in the proposed SEPP (Environment) will provide a set of consistent, clear and modern objectives and planning controls for the four catchments”. The proposed title of the SEPP implies it will cover the breadth of environmental issues of state or regional significance, rather than simply collating location-specific provisions into one document.

There is also discrepancy in how some issues are dealt with. For example, wetland provisions from the Sydney Harbour REP are not being transferred to the SEPP (Environment) on the premise that the matters are dealt with in the Coastal Management SEPP. However the SEPP (Environment) will include some heads of consideration for wetlands – presumably freshwater wetlands – such that wetlands will be dealt with in at least two SEPPs.

2. The use of Ministerial Directions

The proposed changes will result in plan making and policy matters on environmental issues being contained within a series of s117 Ministerial Directions. Some Ministerial Directions will be retained and others added, such as a new Ministerial Direction on catchment protection, covering management and water quality protection. LGNSW is concerned about key planning policy matters being shifted to s117 Ministerial Directions

LGNSW is of the view that removing policy direction from a SEPP, such as existing principles, aims and objectives for plan making, undermines the rationale for, and ‘backbone’ of, the SEPP.

LGNSW supports the approach to plan making proposed under *A New Planning System for NSW: White Paper* in 2013 as:

- the hierarchy of plans in NSW would be better integrated;
- the NSW SEPPs would ‘present the state’s broad planning objectives, priorities and policy directions’²;
- each subordinate plan would follow similar elements, where applicable, such as: vision, objectives, policies, actions and monitoring/reporting and delivery; and
- the system would create a ‘clear line of sight between each successive layer of planning’³, meaning that the policies and actions in one plan would be advanced in the subsequent plan in a consistent manner.

This approach considered SEPPs as the pinnacle of the hierarchy of plans for NSW with LEPs at the bottom rung and regional plans in between. This approach has been followed by the

² *A New Planning System for NSW: White Paper*, 2013, page 65

³ *Ibid.*, page 66

NSW Government with the recent strengthening of NSW regional plans and district plans in Sydney.

LGNSW is concerned that DP&E has significantly changed its approach to the role of a SEPP by moving all references to plan making policy to the s117 Ministerial Direction. This approach has been more widely adopted under the review process and will result in many new and updated Ministerial Directions being created on an increasingly wide range of plan making matters.

LGNSW believes this is a substantial shift and a backward step because it will:

- undermine the legitimate role of a SEPP as a plan to provide long term guidance to councils on planning issues of state and regional significance;
- reduce community consultation on plan making matters at a state level, because Ministerial Directions are not required to be placed on public exhibition in any form and can be amended with minimal notice;
- reduce the task of plan making to a Ministerial function more susceptible to the policy and political imperatives of the government of the day;
- reduce transparency, as Ministerial Directions are not identified on zoning certificates and not understood to be 'plans' within the hierarchy of plans under the EP&A Act; and
- make the planning system less clear – as Ministerial Directions are not well understood by the public and are difficult to find.

LGNSW seriously questions the increasing use of Ministerial Directions by the DP&E to deliver state planning policies. Where Ministerial Directions were once more sparingly used in exceptional circumstances, it appears they are to now become the primary means of delivering planning policy direction to councils. SEPPs should have this role. LGNSW cautions the DP&E from taking such a short sighted view. The local government sector strongly urges DP&E to reconsider the increasing reliance on Ministerial Directions, as this will result in a more fragmented and less coherent planning framework, and one that increases the Minister's discretion to interfere in local planning matters.

3. Comments on particular aspects of the SEPP

- ***Wetlands***

The SEPP proposes to move coastal wetland provisions from the Sydney Regional Environmental Plan (Sydney Harbour Catchment) to the recently drafted SEPP (Coastal Management) while retaining seagrasses and rocky foreshore protections in the heads of consideration. While there is support for this approach, there is some concern that the Coastal SEPP has been drafted, but is yet to commence. The Coastal SEPP must commence prior to the removal of any protections in the new SEPP to ensure that wetlands continue to receive protection. The two SEPPs should clearly cross reference each other to avoid any confusion.

As a consequence of referring the coastal wetlands provisions to the Coastal Management SEPP it is proposed to delete the definition of wetlands from the Environment SEPP. We believe that the definition is still required in the Environment SEPP for freshwater or non-coastal wetlands in the remainder of NSW.

- ***Expansion of Environment SEPP to all urban waterways***

Provisions for the protection of urban catchments for the Georges River and Hawkesbury-Nepean will be included in the SEPP (Environment) and will include prohibitions for certain

development types, including potentially hazardous or offensive industries and intensive animal industries in a floodway, for example. The draft planning principles developed for combining the Georges Regional Environmental Plan, Hawkesbury Nepean Regional Environmental Plan and the Sydney Harbour Regional Environmental Plan into the Environment SEPP are as follows:

- consistent with any applicable catchment management strategy published by a NSW Government agency or authority
- consider the cumulative impact of development on water quality and river flows
- aim to identify, protect and where possible improve environmental values, having regard to maintaining biodiversity, the protection of native vegetation and cultural heritage and the importance of water resources
- consider the natural and physical constraints of the land
- consider the social, economic and environmental interest of the community

Further exploration of the option of broadening these protections to other urban catchments is encouraged. The Cooks River and Botany Bay would benefit from the same provisions, however if the intention of the SEPP is to create a state-wide approach to protections, then the same protections should also be applied to all urban waterways within the Sydney Region, and across NSW.

The creation of the SEPP (Environment) provides an opportunity to strengthen provisions to enhance water sensitive urban design, however this is not evident in the EIE. LGNSW supports including such provisions to ensure stormwater and water quality improvements continue to be made.

- ***Inclusion of water quality standards into Environment SEPP***

Providing for catchment-wide water quality standards for residential, commercial and industrial developments would provide greater consistency in managing water quality. In urban areas, this catchment wide approach is particularly relevant to ensure councils work towards agreed standards and downstream impacts are minimised due to more consistent water quality decisions across the catchment. An example of how such standards can be used is the Botany Bay Water Quality Improvement Plan (BBWQIP) which includes stormwater pollution reduction targets that can be reflected in council Development Control Plans (DCPs).

- ***Bushland SEPP***

SEPP 19 Bushland in Urban Areas aims to protect and preserve bushland within the urban area in recognition of its value to the community as part of the natural heritage; aesthetic value and value as a recreational, educational and scientific resource. It recognises the importance of bushland, however it remains focussed on publicly owned bushland or bushland that directly adjoins publicly owned space. Therefore significant areas of privately owned bushland will not be protected by this policy.

Greater protections for biodiversity, bushland and remnant vegetation in urban areas are sought given the increasing development pressure placed on such areas.

- ***Reference to legislation***

Attachment A of the EIE – SEPP (Environment) lists legislation relevant to the SEPP (Environment) including a reference to the *Native Vegetation Act 2003* and *Threatened*

Species Conservation Act 1995. These Acts have been repealed and replaced by the *Biodiversity Conservation Act 2016*.

4. Reduced environmental protections through changes to provisions

The draft SEPP includes a repeal of clauses which are deemed to be covered by other instruments or legislation. Councils have raised concerns that in reducing the scope of some of these provisions, environmental protections may have also been lost. This is contrary to DPE's approach of not weakening existing protections, and may be an unintended consequence.

An example is in the Georges River Regional Environmental Plan where the repeal of Clause 9(2) is proposed because Flood Planning provisions will address bank disturbance. However the Flood Planning provisions will not apply to the tributaries of the Georges River so a repeal of Clause 9(2) is a reduction in protection for those areas. Other examples of weakened protection relate to the *Fisheries Management Act 1994* and the definition and regulation of dredging and artificial lakes.

It may be necessary to have specific provisions that apply to specific areas or environments only eg a NSW-wide section of the SEPP and then a section for specific catchments with more detailed requirements. Alternatively the more technical, catchment-specific provisions could be included in the relevant District Plans (where they exist).

5. Themes of the SEPP

The proposed SEPP (Environment) collates seven existing SEPPs into one covering a range of environmental issues including water catchment issues, protection of remnant urban bushland and regional place-based plans including the Sydney Harbour REP and Willandra Lakes REP. Some of these matters are of state significance, however others are site specific, with no state-wide application so may be better placed in District or Regional plans where they exist.

The framework of the SEPP allows for other issues to be added over time. The EIE outlines the intention to include SEPP 44 - Koala Habitat Protection and the Murray Regional Environment Plan No. 2 – Riverine Land which are being independently reviewed and updated, however there may be other environment issues which could also be incorporated into the SEPP (Environment) to more broadly reflect environmental issues of state level significance.

The current focus on water catchments, bushland management and a couple of regional heritage plans is a narrow focus for a SEPP entitled 'Environment'. If the intention is not to broaden the scope of the SEPP to a greater suite of environmental issues, then a renaming of the SEPP to better reflect its purpose and contents may be appropriate.

6. Exhibition of SEPP

LGNSW recommends that the final draft SEPP be placed on exhibition for 28 days as it constitutes an environmental planning instrument similar to a LEP (which requires public exhibition). This process would mean the sector knew what changes had been made and give councils more time to prepare for the pending changes. Exhibiting a preliminary SEPP would also enable DP&E to receive final feedback from councils on the detail before the SEPP becomes law.

LGNSW recommends that preliminary SEPPs be routinely exhibited for 28 days in their final form, similar to the exhibition period for LEPs.

Conclusion

The new SEPP combines existing SEPPs covering diverse environmental planning matters. LGNSW believes that the SEPP (Environment) would be stronger if its focus were on broader environmental matters of state significance that are relevant to planning today. To this end LGNSW recommends that the DP&E reconsiders the role of this SEPP and includes policy direction on issues such as climate change, the application of principles of ESD to plan making and more generally the protection and delivery of green space.

Although the SEPP (Environment) will collate a number of existing SEPPs, it will still result in some councils having land which is covered under three different environmental SEPPs including the SEPP (Environment), the draft SEPP (Coastal Management) and the State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 - Vegetation SEPP. As such, it is important that complementary controls are in these SEPPs to avoid any confusion in their application and to ensure broader environmental objectives are achieved.

This new SEPP is missing a unique opportunity to provide high level planning guidance on environmental issues of state importance, as per under the objects of the Act. This SEPP provides a good first step in simplifying the planning process, however DP&E should continue to look to broadening the SEPP as outlined above and extending provisions in the SEPP across NSW, where appropriate, to continue to support the strategic management and protection of our natural assets.

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