



# Nature Conservation Council

The voice for nature in NSW

Director, Legislative Updates  
Department of Planning and Environment  
GPO Box 39 Sydney NSW 2001  
Via email: [Regulation.Review@planning.nsw.gov.au](mailto:Regulation.Review@planning.nsw.gov.au)

24 November 2017

## **RE: Submission into Review of the *Environmental Planning and Assessment Regulation 2000***

Dear Sir or Madam,

Thank you for the opportunity to provide comment on the Issues Paper to inform the Review of the Environmental Planning and Assessment Regulation 2000 (Planning Regulation).

The Nature Conservation Council and the environment groups we represent have been winning protections for nature in NSW for more than 60 years. We've been at the centre of many of the state's iconic conservation battles, and have notched up countless wins for nature and local communities.

### **Introduction**

The Planning Regulation supports the day-to-day operation of *Environmental Planning and Assessment Act 1979* (Planning Act). It sets out the procedures *inter alia* for the making of plans and decisions, as well as public consultation under the Planning Act.

### **Simplification of the Planning Regulation**

While NCC supports the simplification of the Planning Regulation, including it being written in plain English, any changes must not reduce community participation or environmental safeguards and protections in the current Planning Regulation.

### **Digital Distribution of Information and Collection of Submissions**

We support greater use of digital methods to distribute information and collect submissions as well as applications provided that there are safeguards to ensure that no one is denied ready access to information and the opportunity to make submissions. Not everyone is able to use or has access to the Internet.

## **Achieving the objectives of the Planning Act**

It is important that the Planning Regulation promotes the objectives of the Planning Act. In particular, we consider that the principles of ecologically sustainable development must underline decision-making and other functions under the Planning Regulation. These principles and programs are:

- the precautionary principle;
- the principle of inter-generational equity;
- the principle of conservation of biological diversity and ecological integrity; and
- improved valuation, pricing and incentive mechanisms.

## **Development Assessment should be commensurate with the level of likely environmental impact**

The types of development, which are likely to cause significant environmental impacts, should be subject to the greatest assessment and public scrutiny.

NCC proposes that the Planning Regulation make any development located on environmentally sensitive areas, which is likely to significantly impact the environmental values of the site, designated development. This would mean an EIS and environmental concurrences and approvals would be required and merit appeals would be available.

The Issues Paper (p. 19) asks whether:

- the definition of 'environmentally sensitive area' in Schedule 3 remains appropriate; and
- for certain classes of development the use of specific locations or environmental criteria should continue.

NCC considers that it is critical to limit the environmental impacts of development in environmental sensitive areas. If the provisions in the Act change, they must provide at least equivalent and arguably, better protection for such areas.

We consider that the definition of environmentally sensitive areas should be consistent in the Planning Regulation, all environmental planning instruments, other plans and s 117 directions. This approach would:

- be simpler;
- avoid inconsistent provisions in different documents; and
- promote ecological integrity and better protection for these areas.

We recommend retention of "buffer zones" around these areas but consider that they should be scientifically reviewed to ensure that they are adequate.

All designated development should continue to require the holding of an Environmental Protection licence or pollution licence. Coal Seam Gas (CSG) exploration should be prescribed as designated development rather than being dealt with under Part 5 because it requires a pollution licence.

The requirements for environmental impact statements, currently in Schedule 2, should be strengthened, including, requiring consideration of the cumulative impacts of relevant past, present

and likely future developments.

### **Notification of Rezoning Proposals**

The current scheme for the lodging and determination of rezoning applications lacks transparency. We consider that the public should be consulted on all rezoning proposals even if they do not proceed to the draft plan stage. We do not consider it necessary to set a timeframe for councils to respond to requests for rezonings and favour the Planning Regulation requiring that applications be dealt with as soon as possible as at present.

### **Re-exhibition of Development Control Plans**

NCC supports the proposal to require re-exhibition of development control plans (DCPs) that are significantly amended after public exhibition. We suggest that information explaining the proposed changes should be exhibited with the amended DCP.

### **Increasing the Transparency and Accountability of Regional Planning Panels**

NCC considers unless there is a valid reason such as the discussion of sensitive commercial information all meetings of Joint Regional Planning Panels (JRPPs) should be held in public. The reason(s) for closing a meeting to the community should be made public.

We also consider that an applicant for a rezoning proposal should not have a right of review to a JRPP given that there is no opportunity for public comment on such reviews. If such review rights are retained, amendments are required to ensure fairness and transparency:

- a time of 28 days should be prescribed in which a review can be brought as opposed to the present 40 days which is not prescribed in the regulation;
- the public should be advised of a refusal of a proposal and of any subsequent request for review; and
- objectors should be given 28 days to make written submissions on the review and have the right to appear before the JRPP to make oral submissions on the review.

### **Increasing the Transparency and Accountability of the “Gateway” Process**

We are concerned that only breaches of procedure relating to public consultation can invalidate a planning instrument. This means that the public has limited means to ensure that planning authorities comply with the requirements of the “gateway” process.

NCC considers that as far as possible the Planning Regulation should include provisions requiring that:

- planning authorities carry out plan-making procedures correctly;
- conditions imposed at the “Gateway” stage are binding;

- planning authorities to make public all documents prepared under the “gateway” process including consultation with other public authorities.

We oppose spot rezonings of environmentally sensitive sites, particularly when repeated applications to rezone a site are made. We consider that planning authorities should have the power to reject further rezoning applications for at least two years or until the next LEP review occurs. This is consistent with the Department’s stated intent of improving strategic planning.

### **Clarifying the relationship between environmental planning instruments and other plans and directions**

The role and legal status of state, regional, district, local plans, SEPPS and ministerial directions are confusing to the public. All these documents should be publically available on the Department’s website or the NSW Legislation website. In addition, consideration should be given to clarifying their role in the Planning Regulation.

### **Policy documents for state significant development**

The current prescribed documents are not sufficiently specific. They need revision.

### **Grounds for rejecting a modification application**

We consider that additional grounds for rejecting a modification application should include:

- The applicant has a history of non-compliance with development consents or pollution licences.
- The applicant is not a fit and proper person;
- There is reasonable doubt that an applicant will be able to fulfil the conditions of the development consent.

### **Public Exhibition Requirements**

NCC supports putting all public exhibition requirements in the same part of the Planning Regulation.

However, we do not support any reduction in community consultation requirements. We are concerned this could occur under proposed “streamlining”. Any reduction in community consultation requirements or their enforceability would further decrease public confidence in the planning system.

Notification requirements that development consent has been granted should be give clear information about:

- what the decision is and the reasons for it,
- what happens following the decision and whether there are appeal rights
- where to find further information.

Council should make all relevant documents available on-line as well as exhibiting them in the council chambers.

We support requirements to provide reasons for decisions.

We oppose any reduction in environmental assessment requirements for poultry farms or similar development because of the likelihood they will cause water pollution and reduce other aspects of the amenity for neighbours, particularly through the increase in odours.

It is unclear how the draft Primary Production SEPP will interact with the Planning Regulation. We oppose:

- removal of certain types of agricultural activities from designated development; and
- any expansion of agricultural activities as development without consent.

The Planning Regulation can specify that the consent authority take into account additional considerations when determining a development application. We propose that the following matters should as for modification be taken into account when a development application is determined

- The applicant and in the case of a corporation, its directors, have a history of non-compliance with environmental approvals in the state, interstate or overseas.
- The applicant is not a fit and proper person.

Introducing such consideration would instil greater public confidence in the planning system and weed out unscrupulous developers.

### **Considering Climate Change in Assessing Development**

There is an urgent need to reduce greenhouse gas emissions and avoid dangerous global warming. Consideration of the potential for greenhouse gas emissions at the development assessment and determination stage is critical to achieve this goal.

We propose that s. 79C of the Planning Regulation (or its future equivalent) be amended to require the potential greenhouse gas emissions and their impact on climate change to be a mandatory consideration at least for all major projects. In addition, requirements could be included to have regard to state and national emissions targets.

Conditions of consent could require both during construction and operational stages:

- compliance with short and long-term reduction targets; and
- minimisation of emissions, and offsetting of emissions that cannot be minimised or avoided.

We also consider that a climate impact statement (CIS) should be prepared for all major developments and activities (including designated development, SSD and SSI development and Part 5 activities. The CIS should state:

- how the project aims to meet relevant goals and targets to reduce greenhouse gas emissions;
- how emissions from the project will be avoided, minimised and offset;
- how downstream emissions will be avoided, minimised and offset; and
- alternative options which have been considered.

### **Environmental assessment for Part 5 activities**

There is significant community concern about the how Part 5 activities are assessed and the transparency of such assessments.

The level of assessment, as indicated above, should be commensurate with the likely environmental impacts of a proposal. To achieve this, NCC considers that there needs to be improved transparency, public notification and consultation for Part 5 activities. We propose the development of guidelines for determining authorities to ensure proper understanding and compliance with the “minimal environment impact” and “is likely to have a significant effect on threatened species and ecosystems” tests. NCC considers that the Department should have a greater oversight role in ensuring that rigorous environmental assessment occurs for Part 5 activities.

### **Public consultation and Reviews of Environmental Factors**

NCC supports the proposal in the Issues Paper to require publication of Reviews of Environmental Factors (REFs), where an EIS is not required. However, we consider that there should also be mandatory consultation about draft REFs before they are approved. This would significantly increase public confidence in the operation of Part 5 of the Planning Act.

### **Requirements for environmental impacts statements**

NCC does not consider that the level of environmental assessment SSD and infrastructure (SSI) are commensurate with the likely significant impacts of such developments. For example, they do not require approval under a number of environmental approvals and some other approvals such as EPLs must be consistent with the project approval.

We consider that the Planning Regulation should require public notification for SSD and SSI developments of:

- all agencies which are consulted;
- all issues raised by agencies; and
- how these issues were resolved.

This would greatly increase the transparency and accountability of assessment and decision-making in relation to SSD and SSI developments.

## **Mining and gas exploration should require development consent**

NCC considers that all mining and gas exploration should require development consent under Part 4 of the Planning Act.

## **Procedures for Integrated development**

NCC considers that to properly reflect the intent of the current law that provides that agencies may either refuse or grant concurrence with or without conditions:

- the Secretary of the Department should advise an agency if he/she intends to override the terms of the agency's concurrence
- an agency should be able to refuse a development if the condition(s) which it imposes on the development is(are) not incorporated in the development consent.

## **Other Matters**

### **Planning Agreements and Development Contributions**

NCC opposes the use of planning agreements and voluntary planning agreements (VPAs) because:

- of corruption risks;
- they often do not achieve their stated outcomes; and
- they can undermine orderly planning of an area.

Assuming that planning agreements will be retained, NCC supports requirements for draft and final planning agreements including voluntary planning agreements (VPAs) to be publicly exhibited on the Planning Portal or council's website as applicable. Amended and final planning agreements and VPAs should include a summary of what has changed since exhibition and reasons for those changes.

The public when considering a draft VPA should be provided with sufficient explanatory material to properly understand how it operates and what implications it has for council's budget, provision of public services etc.

NCC considers that there needs to be increased transparency, public participation and greater clarity in procedures for development contributions (s 94 contributions and s 94A infrastructure) special infrastructure contributions, affordable housing contributions and voluntary planning agreements for state and local infrastructure, facilities or services.

The Independent Commission Against Corruption's (ICAC's) recommendations relating to increasing transparency, accountability and corruption risks in relation to planning agreements should be implemented.

## **Affordable Housing**

NCC considers that the provision of affordable housing is essential. We consider that the Department must consult with relevant government and non-government agencies to set binding targets for affordable housing.

## **Planning Certificates**

NCC proposes that the Department add further information to s. 149 planning certificates about:

- climate change risks from storm surges or sea level rises; and
- biodiversity indicating whether local, state or federal biodiversity values occur or are likely to occur on the property following commencement of the *Biodiversity Conservation Act 2016*.

We support on-line access to s. 149 planning certificates.

## **The Planning Assessment Commission**

We consider that the Minister should not have discretion to determine whether there are merit appeal rights in respect of decisions by Planning and Assessment Commission. Such merit appeals should be mandatory.

## **Penalty notice offences**

NCC supports the use of penalty notices, provided that the penalties are sufficient. We propose the establishment of an environment protection or monitoring fund into which fines could be paid.

## **Summary of Recommendations**

The Nature Conservation Council makes the following recommendations:

1. The object of the Planning Act to encourage ecologically sustainable development should underpin the Planning Regulation.
2. The level of assessment of a proposal should be commensurate with the likelihood it will have significant environmental impacts. The greater the likelihood of significant environmental impacts the more thorough assessment should be.
3. Provisions relating to development of environmentally significant areas should be strengthened and made more consistent. Development, which is likely to significantly impact the environmental values of such sites, should be assessed as designated development.
4. Exploration for CSG should be designated development and mining and exploration should be dealt with under Part 4 and not Part 5 of the Act. The scheme for designated development should be retained without other significant modification.
5. Public consultation should be enhanced in all aspects of decision-making under the Planning Regulation including in relation to the gateway process, meetings of JRPPs and REFs in accordance with the object of the Planning Act to provide increased opportunity for public

involvement and participation in environmental planning and assessment and decision-making.

6. Objectors should have the right to appeal the merits of all decisions of the PAC.
7. Streamlining the Act must not result in the removal of environmental protections nor provisions relating to public consultation.
8. ICAC recommendation in relation to reducing corruption and increasing the transparency and accountability of the planning system should be incorporated in the Planning Regulation wherever relevant, including, in relation to planning agreements.
9. Digital information distribution and collection is supported. However, planning authorities must make information available and allow for the making of submissions by other means. Not all people use or have access to the Internet.

Thank you for the opportunity to provide a submission in to this important Review of the *Environmental Planning and Assessment Regulation 2000*. Please do not hesitate to contact me on [ncc@nature.org.au](mailto:ncc@nature.org.au) or (02) 9516 1488 should you require any further information.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Daisy Barham', followed by a period.

Daisy Barham  
Campaigns Director  
Nature Conservation Council of NSW