



Blue Mountains Conservation Society Inc

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Nature Conservation Saves for Tomorrow

Land Management and Biodiversity Conservation Reforms
Office of Environment and Heritage
PO Box A290
Sydney South NSW 1232

cc NSW Premier
Ministers Upton
Minister Roberts
Minister Blair

20 June 2017

Dear Sir/Madam

Submission to the draft Biodiversity Conservation Regulations and Codes, draft (urban) Vegetation State Environmental Planning Policy (SEPP) and other related codes and documents

The Blue Mountains Conservation Society (BMCS) is a community based volunteer organisation with over 800 members. It is the oldest continuing environmental organisation in the Blue Mountains. The goal of the Society is to promote the conservation of the environment in the Greater Blue Mountains region.

The society would like to make a submission in relation to the draft Biodiversity Conservation Regulations and Codes, draft (urban) Vegetation State Environmental Planning Policy (SEPP) and other related codes and documents currently on exhibition. It should be noted the Society made a comprehensive submission to *Biodiversity Conservation Bill 2016* and *Local Land Services Amendment Bill 2016* (which will replace the *Native Vegetation Act* and *Threatened Species Conservation Act*) when they were publicly exhibited in 2016, and our serious concerns with the Acts as outlined in our submission remain the same.

The legislation and codes are a significant issue for our community, as 10% of all threatened species in NSW can be found in the Blue Mountains. The Blue Mountains is home to 65 threatened animals species and 30 threatened plants, including a number of plant and animal species found nowhere else in the world. This high level of biodiversity in the Blue Mountains is due to the significant amounts of high quality bushland both within the national park and importantly on private land.

In addition, the Blue Mountains LGA has a unique status as one of only two cities in the world located in a World Heritage Area. It is the responsibility of all levels of government to ensure that the World Heritage Area is managed with care and diligence (Ministers' Foreword to Greater Blue Mountains World Heritage Area Strategic Plan 2009).

Removal of native vegetation and urban development must not adversely impact on and pose threats to World Heritage values. These issues were identified in the Greater Blue Mountains World Heritage Area Strategic Plan (2009), signed off on by both state and federal governments, as key threats and having significant potential impacts. We do not want to find ourselves in a Great Barrier Reef-type situation where World Heritage listing is threatened because the proposed regulations and accompanying codes result in a loss biodiversity and increased native vegetation clearing in the Greater Blue Mountains World Heritage Area.

The society is especially concerned that the proposed regulations, SEPP and codes will undermine or overtake the native vegetation management controls that currently exist in the Blue Mountains LEP 2015. The community fought long and hard for the BMLEP 2015 to ensure it has strong and robust environmental provisions, which protect the unique environment of the Blue Mountains and the BMWHA. It is the responsibility of all levels of government to ensure that the BMWHA is managed with care and diligence (Ministers' Foreword to Greater Blue Mountains World Heritage Area Strategic Plan 2009). Any removal of native vegetation must not adversely impact on and pose threats to the World Heritage area.

The society has the following concerns draft Biodiversity Conservation Regulations and Codes, draft (urban) Vegetation State Environmental Planning Policy (SEPP) and other related codes and documents currently on exhibition.

KEY INFORMATION NOT AVAILABLE AND EXHIBITION PERIOD NOT ADEQUATE

We understand the NSW Government's draft Biodiversity Conservation Regulations and Codes, as well as an outline of the draft (urban) Vegetation State Environmental Planning Policy (SEPP), are on public exhibition until 21 June, with the Government's stated intention being to operationalise them by end August 2017. However:

- The Draft Vegetation SEPP itself has not been exhibited (only the Explanation of Intended Effects has been released).
- The detailed map of land classified as 'Environmentally Sensitive' is not publicly available.
- The map of Category 1 and Category 2 rural land (ie- land that can be cleared under self-assessable codes or otherwise) is not publicly available.
- The mapping of core koala habitat across NSW has not been completed.
- The details of the Biodiversity Offsets Calculator are not publicly available.

It is impossible for the public to provide accurate feedback on the draft regulations, codes and SEPP without access to the above elements. It is also irresponsible and risky for the Government to operationalise its legislation and regulations before these elements have been finalised.

The regulations, codes and associated documents on exhibition are incredibly complex, long and inter-related. An exhibition period of 6 weeks is far too short and completely inadequate to allow proper community consultation and input. On this basis we recommend at a minimum:

1. Extension of the public exhibition of all Regulations and Codes under the *Biodiversity Conservation Act 2017*, as well as the Vegetation SEPP, until the components listed above are made publicly available and *for at least a three*

- month period.
2. Ensure that operation of the *Biodiversity Conservation Act 2017* does not commence until all relevant mapping, included that listed above, has been completed and reviewed for accuracy by key stakeholders.

BROADSCALE LAND CLEARING

Habitat loss due to excessive tree clearing is a key threat to many plant and wildlife species, as well as a driver of climate change through the release of greenhouse gas emissions. The equity code will enable broad scale tree clearing (up to 625ha in any three year period). Professor Hugh Possingham, who was a member of the Government's original review panel, stated that a return to broad-scale tree clearing was not an intended outcome of the review.

We therefore recommend that the Equity and Farm Plan Codes should be removed and code-based clearing be applied, as the review panel originally intended, only to small-scale everyday works such as clearing for fence lines.

ENDANGERED ECOLOGICAL COMMUNITIES

Vulnerable and Endangered Ecological Communities can be cleared under the codes with very little or no oversight from ecologists or relevant government departments. This makes a mockery of listing them for protection in the first place, as allowing these vulnerable and extremely significant areas to be cleared will make their existence even more threatened. There are currently six listed Endangered Ecological Communities that occur in the Blue Mountains LGA, with some communities exclusively found in the Blue Mountains.

We therefore recommend that Vulnerable and Endangered ecological communities should be mapped as Category 2 – sensitive land and thus excluded from code-based clearing.

KOALA HABITAT

Under the proposals, 'core koala habitat' will be considered part of Category 2 – Sensitive land. The definition of 'core koala habitat' is that identified under SEPP 44. However, the definition of 'core' koala habitat is widely known to be inadequate as across the entire range of the koala, only five local government areas have identified core koala habitat under SEPP 44. This means that the majority of core koala habitat on private remains formally unidentified and therefore unprotected.

We therefore recommend that code-based clearing should not be permitted within the range of the koala. Koala habitat should be determined by the review of SEPP 44 and local government mapping of core koala habitat in koala plans of management.

ADDITIONAL BIODIVERSITY VALUES – SOIL, WATER, SALINITY AND CARBON.

The new laws do not include a mechanism to assess and avoid the negative impacts of clearing on additional biodiversity values including soils, water, salinity and carbon stores. This puts the future of our farmland at risk, and ignores the contribution to climate change caused by tree clearing.

We therefore recommend that the regulations prescribe additional biodiversity values and a method to assess and protect these additional values drawing on the existing Environmental Outcomes Assessment Methodology (EOAM). A scientific process must be developed to assess the carbon impacts of clearing. Serious and irreversible impacts on these values should be prescribed and prevented.

AREAS OF OUTSTANDING BIODIVERSITY VALUE

The inclusion of 'Areas of Outstanding Biodiversity Values' (AOBVs) is welcome in the regulations, however the application of such values remains unclear and unsatisfactory. The criteria for listing Areas of Outstanding Biodiversity Value are adequate as proposed via the Sensitive Biodiversity Values Map, however it is not clear as to whether third parties (i.e. community members, or not-for-profit environment organisations) will be able to nominate them.

We therefore recommend that areas of Outstanding Biodiversity Value be excluded from code-based clearing as should areas *under consideration* as AOBVs should be protected from clearing. Any person should be able to nominate an AOBV, consistent with the ability of third parties to nominate threatened species and ecological communities.

BIODIVERSITY OFFSETS

Protection of the environment under the new laws relies too heavily on a flawed offsets scheme that fails to meet best practice standards for biodiversity offsetting. The use of offsets will result in the degradation of nature in exchange for cash payments, and other unsatisfactory outcomes. The current use of offsets as included in the proposals will reduce environmental outcomes.

The Society in its submission to the draft Bills strongly opposed the use of biodiversity offsets stating that *"Biodiversity offsetting has negligible scientific merit and provides no basis for destroying exceptional environmental values. Offsetting is repugantly devious and is designed to ensure that the vast majority of development proposals receive 'conditional approval', irrespective of public opinion and environmental outcomes."*

We therefore recommend that if offsets continue to be pursued that they be underpinned by the maintain or improve principle; be genuine 'like for like' to the level of plant community or fauna species; occur within the same sub-bioregion; and clearly identify threatened and endangered species and ecosystems that cannot be offset and therefore are off-limits to clearing. Offsetting requirements should not be subject to 'discounts' at decision-makers' discretion and payments in lieu of genuine offsets must be prohibited

BIODIVERSITY CONSERVATION FUND

The Biodiversity Conservation Fund is a completely unknown entity as the Biodiversity Conservation Investment Strategy has not been released. Until the Strategy is released, the new legislation should not become operational, otherwise valuable biodiversity areas may be cleared before the Fund can implement conservation agreements with landowners.

We therefore recommend that the new laws should not come into force until the community has had an opportunity to input in to the Biodiversity Conservation Strategy, and the Strategy is ready to be implemented. The Fund should also receive a specific budget allocation and not divert money from the Climate Change Fund.

SENSITIVE LAND

The Society strongly supports excluding sensitive environmental values from clearing Codes via comprehensive mapping. However, the categories of sensitive land are not sufficient as important biodiversity values are excluded.

We therefore recommend that in addition to the definition proposed in the regulations, the Category 2 - Sensitive Land category must be broadened to include the following:

- Core and potential koala habitat, that must be mapped in a statutory plan prior to the laws being implemented;
- Matters of National Environmental Significance, including nationally listed threatened species and;
- Mapped environmentally sensitive land in Local Environmental Plans (LEP) and land zoned environment protection. Specifically for the Blue Mountains this would include land mapped under the Blue Mountains LEP 2015 as Protected Areas – vegetation constraint; Protected Areas – ecological buffer and Protected Areas – riparian lands and watercourses and all land zoned under the LEP as E2 Environment Protection.

CLEARING ON STEEP LAND

Land over 18 degrees is currently mapped as Category 2 – vulnerable land. This means that certain codes, such as the equity code and farm plan code cannot be applied, which is welcome as this reduces the risk of erosion.

We therefore recommend that code-based clearing should not apply to steep or highly erodible land, including all land above 18 degrees, as well as land mapped under the Blue Mountains LEP 2015 as Protected Areas –slope constraint area.

WETLANDS AND STREAMS

There are insufficient protections of wetlands, swamps and streams. For example, Local Land Services (LLS) is given the discretion to ‘determine that a watercourse is not a stream’ if it does not have a defined channel with beds and banks. This means that many first order streams are likely to be unprotected, with knock-on effects for higher order streams. The endangered ecological community Blue Mountains Swamps, which is listed under both State and Commonwealth threatened species legislation, is found throughout the Blue Mountains and is mapped under the BM LEP 2015.

We therefore recommend that all riparian land should be protected and excluded from code-based clearing including land mapped under the Blue Mountains LEP 2015 as Protected Areas – riparian lands and watercourses, as well as first and second order streams that do not have an incised channel should be defined as streams and 100m buffers should be placed around swamps and wetlands.

URBAN TREES AND BUSHLAND

The proposed Vegetation State Environmental Planning Policy (SEPP) will allow some clearing above certain thresholds that is not subject to a development assessment in urban regions and environment protection zoned areas across the state. It applies the weak offset rules which allow cash payments for clearing and it does not ensure offsets will be 'like for like'. The latest version of the proposed 'offsets calculator' is weaker, and will not adequately factor in the scarcity of offsets in the urban environment.

The impact of the SEPP in the Blue Mountains is a key issue given the bushland character of the area, and the importance of urban bushland to provide links to the world heritage listed national parks and other bushland reserves. The conservation of native vegetation at the interface between the Blue Mountains World Heritage Area and urban development is critical given there is no buffer between the BMWHA and urban areas.

The Society is concerned that the proposed SEPP will undermine or overtake the native vegetation management controls that currently exist in the Blue Mountains LEP 2015, including the current clause 5.9 related to the preservation of trees and vegetation. The Blue Mountains also has a significant amount of areas mapped as environmental conservation zones (E2) under the BM LEP 2015, in order to protect the BMWHA and urban bushland areas.

The community fought long and hard for the BMLEP 2015 to ensure it has strong and robust environmental provisions, which protect the unique environment of the Blue Mountains and the BMWHA. It is the responsibility of all levels of government to ensure that the BMWHA is managed with care and diligence (Ministers' Foreword to Greater Blue Mountains World Heritage Area Strategic Plan 2009). Removal of native vegetation and accompanying urban development must not adversely impact on and pose threats to the World Heritage area. These issues were identified in the Greater Blue Mountains World Heritage Area Strategic Plan (2009), signed off on by both state and federal governments, as key threats and having significant potential impacts on the BMWHA.

We therefore recommend that the proposed SEPP does not in any way undermine the native vegetation controls in the BM LEP 2015, that loopholes in the offset rules be removed and that the rules be amended to ensure maximum protection of native vegetation in urban and environment protection zoned areas. The regulation should also not permit developers to pay into the Biodiversity Conservation Fund as an offset; this is unacceptable.

SERIOUS AND IRREVERSIBLE IMPACTS

The Act and Regulation set out requirements and principles to consider when land-clearing or development may have serious or irreversible impacts on biodiversity values. If such impacts will occur, local projects must be refused but it is concerning that major projects can still proceed if further protection measures are considered. However, the definition as to what constitutes "serious and irreversible impacts" under the regulation is not adequate. There should be clear, objective criteria for determining whether there are serious and irreversible impacts on biodiversity values and it should be clear that this refers to NSW rather than Australia.

We therefore recommend that the regulations should clarify that serious and irreversible impacts must be determined objectively, and include, but not be limited to, any adverse effect on the following:

- Critically endangered species and ecological communities (i.e. those at extreme risk of extinction);
- Areas of Outstanding Biodiversity Value, as well as World Heritage Areas;
- Wetlands that can be shown to meet the criteria of Nationally and Internationally Important Wetlands (i.e. Ramsar wetlands and/or those listed in Commonwealth Directory of Important Wetlands); and
- Any significant effect on the following (as determined by a species impact statement or equivalent BAM process):
 - o Endangered species and ecological communities, including Vulnerable species and ecological communities;
 - o Salinity, erosion, soil quality, water quality and hydrological processes (building on the existing Environmental Outcomes Assessment Methodology) and
 - o Important rivers and biodiversity corridors.

ANIMAL WELFARE AND PROTECTION

The new Biodiversity Conservation ACT 2016 and Local Land Services Amendment Act 2016 and associated regulations and codes, significantly focus on the use of self-regulation. However, they do not consider the very significant need for the training of communities and professionals in order to prevent injury to or death of wildlife from land clearing under the proposed new land clearing regime. The professionals involved with land clearing include arborists, State Emergency Services and Rural Fire Service and the development industry.

Use of tree hollows by native wildlife in NSW

In NSW, hollow-dependent species include at least 46 mammals, 81 birds, 31 reptiles and 16 frogs. Of these, 40 species are listed as threatened with extinction. The loss of hollow-bearing trees has been listed as a key threatening process in NSW (*Hollows as Homes* 2016, project coordinated by The University of Sydney, The Royal Botanical Gardens Sydney, The Australian Museum, supported by Sydney Coastal Councils groups through Australian Government funding).

Inadequacies of self regulation

There are a number of lessons to be learnt from the current use of self-regulation in the implementation of the 10/50 bushfire protection in terms of the impact on the serious impacts on wildlife.

- Current use of the self-regulation rule, for instance, 10/50 in the Blue Mountains has already raised very significant concerns regarding its impact on animal welfare. Injury and death of wildlife have occurred where appropriate conservation and wildlife management training has not been provided and protocols have not been developed and implemented to prevent this from happening. Following the 2013 Bushfires in the Blue Mountains the 10/50 rule was developed to allow vegetation clearing to occur close to homes. As a result of

- this rule there was a significant increase in land clearing throughout NSW including in the Blue Mountains area and also in areas not likely to be impacted on by bushfires in the future such as in the central and inner suburbs of Sydney. In the Blue Mountains there was a very significant increase in the work of arborists, including arborists actively door knocking property owners, resulting in widespread whole tree and tree branch removal throughout the Blue Mountains area. Arborists currently have no conservation, wildlife management and animal handling skills and do not have the equipment and processes in place needed to determine if an animal is living in a tree hollow before chopping a tree down or removing branches. They are also an unregulated industry.
- No training or protocol processes have been established for arborists, property owners, SES, RFS or the development industry to identify if an animal may be actively using a tree hollow or how to relocate an animal if found before whole tree removal or tree branch removal to prevent animal injury and death. Tree hollows can be very deep in size. It is the same for birds who may be nesting in the tree at the time. The time of year to clear land under the self-regulation of the 10/50 rule to avoid nesting birds has not been considered. Alternative habitats such as cut in hollows and nest boxes have also not been thoroughly investigated, fully implemented and regularly monitored for use by wildlife.

Reports of wildlife injury and deaths following the implementation of the self regulated 10/50 rule in the Blue Mountains

The Blue Mountains Conservation Society has been informed of some reports that have come in from arborists, practising vets and WIRES in the Blue Mountains of injury and death to animals following the implementation of the self regulated 10/50 rule. These reports include:

- Arborists who had to stop a Ringtail possum going down a shredder at one site and take an Eastern Pygmy Possum to a vet that was found at another site. Another arborist who reported that a possum only appeared after the tree was dropping to the ground and the possum was killed.
- Another report of a possum in the upper Blue Mountains who was inside the tree hollow at the time the tree was cut into where the arborist was unaware that the possum was there and the possums tail was severed and the possum had to be euthanised.
- The clearing of land at a site in the upper Blue Mountains where a nest of baby birds was found only when the tree branches were already in the back of a truck.
- Some vet practices in the Blue Mountains and also WIRES are reporting increased direct and indirect injuries and deaths of wildlife following the implementation of the self-regulated 10/50 rule in land clearing. Direct injuries have included animals, including several species of possums and birds, being found on the ground injured and unable to move following land clearing and being brought into local vet practices and to WIRES; adult breeding possums being euthanised at one land clearing site in the lower Blue Mountains and the baby possums from these adults being brought into WIRES.
- Some vets in the Blue Mountains are reporting more animals being on the ground since the implementation of the 10/50 self-regulated rule. Animals more on the ground are then subject to dog and cat attacks and road injury or death due to loss of habitat. If they are already injured by falling from trees, it is much harder for them to move quickly to protect themselves.

Potential impacts on wildlife - Biodiversity Conservation Act 2016 and Local Land Services Amendment Act 2016 be delayed and these Acts and associated codes and regulations

The examples from the impact of the 10/50 rule in the Blue Mountains provide warnings about the impact of self-regulation legislation on the protection of wildlife. If the new Biodiversity Conservation Act 2016 and Local Land Services Amendment Act 2016, which also rely on self-regulation, are implemented without appropriate conservation wildlife management training and protocols for arborists, the general community, the development industry, SES and RFS, then it is likely that these reports of wildlife deaths and injury will escalate. This raises very serious concerns that the implementation of the new Biodiversity Conservation Act 2016 and Local Land Services Amendment Act 2016 will impact on existing native animal welfare and conservation. Members of the community, arborists, the development industry, SES and RFS, would also be at risk of breaching the current animal welfare legislation.

We therefore recommend that the implementation of the new Biodiversity Conservation Act 2016 and Local Land Services Amendment Act 2016 be delayed and these Acts and associated codes and regulations be reviewed to include mandatory training for arborists and independent regulation of arborist activities to protect wildlife from injury or death from land clearing. Also needed prior to the implementation of this Act is the development of protocols which address the appropriate time of year for land clearing in order to avoid impacts on nesting wildlife including birds; the development and use of appropriate equipment for checking tree hollows for wildlife activity; and animal relocation.

If you have queries in regard to the issue raised in this submission please contact me.

Yours sincerely

A handwritten signature in black ink that reads "Madi Maclean". The signature is written in a cursive style with a large initial 'M' and a trailing flourish.

Madi Maclean
President
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