



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:PWib1259453

13 February 2017

The Director
Environment and Building Policy
Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

By email: luke.walton@planning.nsw.gov.au

Dear Director,

Draft State Environmental Planning Policy (Coastal Management) 2016

The Law Society of NSW welcomes the opportunity to comment on the draft State Environmental Planning Policy (Coastal Management) 2016 ("draft SEPP"). The Law Society's Environmental Planning and Development Committee contributed to this submission.

The Law Society supports the coastal reform process and draft framework, but emphasises that it can only operate effectively if it is supported by accurate maps and not undermined by exceptions. Before the reform process can succeed, it is critical that the issue of accurate and comprehensive mapping of the coastal management areas is addressed. The oversight of residential development in the proximity area of coastal wetlands and littoral rainforests is also a key concern.

General comment

We have had the benefit of reviewing the submissions made to this consultation by Local Government NSW ("LGNSW") ("LGNSW submission") and by the EDO NSW and we endorse those submissions. Copies of the submissions, which we refer to below, are attached.

Mapping

We support the EDO NSW submission's emphasis on the accuracy of mapping. We agree that it is important that the ecological communities that the draft SEPP is designed to protect are appropriately identified and more accurately mapped. There should be a clear and transparent method for the development and approval of maps that will inform the SEPP.

The Law Society supports the comments made in the LGNSW submission in relation to the mapping of coastal wetlands and littoral rainforests.

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809
www.lawsociety.com.au

Law Council
OF AUSTRALIA
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We note that the coastal vulnerability maps are not available for comment at this stage as they are still being compiled. We support LGNSW's proposal that the coastal vulnerability area map be released in stages, as it becomes available, and be updated periodically, rather than having no hazard areas identified, as is currently the case. It is in the public interest for the best available information pertaining to coastal vulnerability to be made available to be used to protect these areas.

Key concern- Impacts of expanded residential development on sensitive environmental areas

Clause 12

Clause 12 is designed to ensure that development in the proximity area of coastal wetlands and littoral rainforests (100m buffer) will not have a significant impact on those ecological communities, but it does not apply to land zoned residential.

As noted in the LGNSW submission, there appears to be inconsistency between the conditions for residential development in the proximity area of coastal wetlands/littoral rainforest and residential development within the coastal environment area. Under the *Coastal Management Act 2016*, the management objectives for coastal wetlands and littoral rainforest areas are set at a higher level than the management objectives for coastal environment areas. Yet the draft SEPP sets stricter controls for residential development in coastal environment areas than it does for the proximity area of coastal wetlands and littoral rainforest.

Residential development within the proximity area can have impacts detrimental to coastal wetlands and littoral rainforest. It would be appropriate, subject to our comments below, that conditions similar to the coastal environment area apply. Consideration should be given to likely impacts such as effluent and stormwater management, site coverage, bushfire protection zones.

EDO NSW, while noting the protections of environmentally sensitive areas in the relevant provisions of the *Standard Instrument- Principal Local Environment Plan* and in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, stresses the need for the new SEPP to clarify and confirm these protections. We agree with the key recommendation by EDO NSW that "the draft SEPP explicitly confirm that exempt and code-complying development is not permitted in or near environmentally sensitive areas, including areas of proximity or adjacent to a coastal wetland or littoral rainforest area; and full impact assessment requirements apply to residential development on land in proximity to coastal wetlands or littoral rainforest."

Specific clause changes

We agree with the LGNSW recommendations in relation to changes to specific clauses. In particular we support replacing the words "significantly impact" in clause 14 (1)(b), which states that development consent must not be granted if the proposed development "is not likely to significantly impact on geological and geomorphological coastal processes", with "is not likely to adversely impact" consistent with the phrasing of 14 (1)(a) and (c).

We support the removal of the sunset provisions in clause 16(2) and the incorporation of an environmental assessment step into the Emergency Action Sub Plan process through the Coastal Management Manual.

Conclusion

We recognise that the coastal reform process provides a significant step forward in the effective management of the NSW coastal zone. We suggest, however, that for such effective management to become a reality, it is critical that the matters raised in this submission are addressed.

Please do not hesitate to contact Liza Booth, Principal Policy Lawyer, on (02) 9926 0202 or by email at liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Pauline Wright
President

20 January 2017

Director Environment and Building Policy
NSW Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

Submitted online: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Coastal-Reforms>

Dear Director,

Draft Coastal Management SEPP

EDO NSW welcomes the opportunity to comment on the draft *State Environmental Planning Policy (Coastal Management) 2016 (draft SEPP)*.

EDO NSW has extensive experience advising on all aspects of coastal and planning law and policy, particularly in relation to the *Coastal Protection Act 1979 (CP Act)*, SEPPs 14, 26 and 71 and the *Environmental Planning and Assessment Act 1979 (EPA Act)*. We also engage on an on-going basis with coastal, marine, biodiversity and planning reform processes in NSW, writing submissions in response to proposed legislative and policy amendments. In response to frequent requests for legal advice and assistance from concerned coastal residents and communities, EDO NSW regularly runs community workshops and provides legal advice regarding local coastal development and management issues.

EDO NSW is supportive of law reform that will improve environmental outcomes within the coastal zone, and therefore supports many elements of the new Coastal Management Act 2016.

Our previous submission on the legislation is available on our website.ⁱ Many of our recommendations to ensure that the new Act and supporting instruments *conserve* sensitive coastal environments, *build resilience* to the impacts of climate change and ensure that all development in the coastal zone is *consistent with the principles of ecologically sustainable development (ESD)* still need to be addressed. In particular, and relevant to this submission, are our recommendations regarding the creation of 'red flag areas' to protect sensitive coastal environments, and the proper assessment of cumulative impacts.ⁱⁱ

In this context, this short submission focuses on a key element of concern in the draft SEPP – the impacts of **expanded urban development in and near sensitive coastal environments**. Our primary recommendation is that the new coastal SEPP explicitly confirm that exempt and code-complying development is not permitted in or adjacent to environmentally sensitive areas. These comments are in addition to those already expressed in our submission on the Bill.

Environmental context

The need to comprehensively assess and manage the potential cumulative impacts of coastal development will only increase with:

- existing levels of impact and degradation,ⁱⁱⁱ
- projected urban development in coastal areas,
- the impacts of climate change,^{iv} and
- relaxed land clearing laws passed late last year by the NSW parliament.^v

These four factors mean that the new regulatory architecture must ensure any future coastal development is comprehensively assessed and appropriately curbed to ensure resilience across the coastal zone. The expansion of development in the new coastal use areas will put increased pressure on adjacent sensitive environmental areas, such as coastal wetlands and littoral rainforests.

In this regard, it is important that the ecological communities that the draft SEPP is designed to protect are appropriately identified and more accurately mapped. For example, the definition of coastal wetlands should be expanded to include wet heath, degraded saltmarsh, all swamp forests, and wet meadows. Ground truthing of wetland areas should be undertaken to more accurately delineate the boundaries of wetlands, particularly to identify small isolated wetlands that were excluded from the original mapping produced in the 1980s (i.e. those less than <0.5 hectares). There should be a clear and transparent method for the development and approval of maps that will inform the SEPP.

What is proposed?

Part 2, Division 1 of the draft SEPP provides for development in coastal wetlands and littoral rainforest areas. As expressed in the consultation note “the intention is to maintain existing levels of protection of terrestrial native vegetation in the coastal wetlands and littoral rainforest area,^{vi} and carry over protections from the current SEPP 14 and SEPP 26. Clause 12 provides for development on land that is in proximity to coastal wetlands or littoral rainforest areas.

The draft SEPP removes concurrence requirements, and requires only development consent from the relevant consent authority. The current listing of specific matters requiring consideration has been removed. (These include specific consideration of ‘feasible alternatives’ and ‘impacts on migratory species’ etc.^{vii}) Instead, the consent authority is required to be satisfied that sufficient measures have or will be taken to protect the biophysical, hydrological and ecological integrity of the coastal wetland or littoral rainforest (clause 11(4)), or in relation to areas of proximity, that the development will not significantly impact on the coastal wetland or littoral rainforest, or the quantity and quality of surface and ground water flows (clause 12(1)).

Given the removal of specific considerations, we would recommend including a definition and further guidance on what is meant by 'biophysical, hydrological and ecological integrity' to remove any ambiguity regarding the meaning of these terms, and to ensure that relevant standards are met.

Key concern – Impacts of expanded residential development on sensitive environmental areas

We welcome the requirement that a consent authority must be satisfied that measures are or will be in place to protect a range of environmental factors, however, such efforts may be undermined due to the continued exemption for residential development in proximity zones (clause 12 (2)(a)). That is, development on land zones R1, R2, R3, R4 or RU5.

We do not support the continued exemption and recommend that clause 12(2) be deleted from the draft SEPP.

As noted in our previous submission, the proposed SEPP must be considered within the context of proposed amendments to the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Exempt and Complying Development SEPP)* and more recently, the proposed *Medium Density Housing Code – Statement of Intended Effect and Draft Medium Density Design Guide*.

These related reforms are likely to result in a significant increase in exempt and code-complying development occurring in coastal use zones adjacent to environmentally sensitive areas. Specifically, in 2016 the NSW Government proposed to expand the General Housing Code to include 3 forms of medium density housing, which could mean that:

- up to 10 dwellings per 600m² lot could be constructed just outside of the 100m perimeter of a littoral rainforest without any need to obtain development consent.
- up to 10 dwellings per 600m² lot could be constructed just outside the 100m perimeter of a coastal wetland without any need to obtain development consent.

We note that mandatory clause 3.3 of the *Standard Instrument – Principal Local Environment Plan* currently prohibits exempt and complying development within 100m of a littoral rainforest or coastal wetland, with reference to SEPP 14 and SEPP 26,^{viii} and the *Exempt and Complying Development SEPP* currently excludes complying development from environmentally sensitive land.^{ix} However, EDO NSW remains particularly concerned about the impacts of sites adjacent to littoral rainforests or coastal wetlands being subdivided into multiple, 600m² lots with up to 10 code-assessed dwellings on each lot. As noted in our submission responding to the Government's proposal,^x we do not think a 100m buffer is sufficient to protect these sensitive coastal environments from the possible impacts of residential development, in particular development that has not been assessed or approved by local council (or subject to the proposed assessment of impacts on 'biophysical, hydrological and ecological integrity').

Complying development is not appropriate in or near to environmentally sensitive areas. In such areas, specific impacts need to be properly assessed. We welcome the reference in the *Medium Density Housing Code – Statement of Intended Effect and Draft Medium Density Design Guide* (p16) that complying development cannot occur in environmentally sensitive areas. This must be made explicit in the draft coastal SEPP. In addition, we recommend increasing the 100m buffer zones that apply to certain sensitive areas, in accordance with advice provided by appropriately qualified, independent experts.^{xi}

Complying development should by definition be *low-impact* in order to justify exemption from assessment and determination by local councils. The cumulative impacts of multiple code-assessed dwellings across large areas near sensitive environments remain unknown. The Government must clarify how it proposes to ensure that cumulative impacts of multiple code-based approvals and increased density are identified, managed and continually monitored (including to avoid cumulative land-clearing and biodiversity impacts). This is particularly important where cumulative impacts of multiple complying developments may impact on neighbouring zones that are environmentally sensitive such as coastal wetlands and littoral rainforests.^{xii}

Not only should development in a proximity area be fully assessed (ie not code assessed), but the consent authority should – in addition to considering impacts pursuant to clause 12(1) - be satisfied that measures will be put in place to address impacts and protect the adjacent area. This is consistent with the objects of the *Coastal Management Act 2016*, and with the requirements for development within the coastal wetlands or littoral rainforest areas (clause 11(4)).

Similarly, code-assessable clearing under the new biodiversity laws must not occur on or near sensitive coastal areas.^{xiii} EDO NSW will be providing further input to this effect on the proposed biodiversity SEPP when it is drafted.^{xiv}

Drafting a new SEPP presents an opportunity to clarify and confirm these protections and ensure that multiple developments in and near sensitive coastal areas are not exempt, complying or self-assessed. Instead, it is vital that the impacts of individual and multiple developments are comprehensively and holistically considered. **We therefore recommend that the draft SEPP explicitly confirm that exempt and code-complying development is not permitted in or near environmentally sensitive areas, including areas of proximity or adjacent to a coastal wetland or littoral rainforest area; and full impact assessment requirements apply to residential development on land in proximity to coastal wetlands or littoral rainforest.**

Please contact me if you require further information.

Yours sincerely,
EDO NSW

Rachel Walmsley
Policy & Law Reform Director

References

- ⁱ Submission responding to the NSW Coastal Management Reforms, February 2016, available at: http://www.edonsw.org.au/coastal_marine_fisheries_management_policy
- ⁱⁱ As proposed in our submission “7 key actions” – see actions, 2,3 and 5.
- ⁱⁱⁱ According to the NSW Government’s own data: in coastal NSW, 60% of wetlands have been lost or degraded over the past 200 years. (See: <http://www.environment.nsw.gov.au/wetlands/ThreatsToWetlands.htm>; Urban development and sand mining have considerably reduced the naturally fragmented distribution of littoral rainforests along the coast, and 114 species found in the ‘littoral rainforest class’ are listed as vulnerable, endangered, or critically endangered, or as an endangered ecological population or community (See : <http://www.environment.nsw.gov.au/threatenedspeciesapp/VegClass.aspx?vegClassName=Littoral%20Rainforests>; Coastal lakes are the most sensitive of all estuaries to human intervention, with only 16 out of 90 coastal lakes in NSW are in natural or near natural condition, with the extent of impacts directly related to the extent of development and rural uses in their catchments. Continuing population growth and urban development are expected to intensify pressures on estuaries and coastal lakes(NSW Healthy Rivers Commission, *NSW Independent Inquiry into Coastal Lakes*, 2002, p. 17, 72-74); and land clearing is most significant threat to native vegetation in NSW – with coastal development is one of the two main causes of native vegetation clearing in this State. (NSW Government, *NSW State of the Environment*, 2012, pp. 224, 230.)
- ^{iv} In addition to urban and peri-urban development, climate change poses a significant threat to coastal environments, in particular sensitive ecosystems such as littoral rainforests. The projected impacts of sea level rise are also well documented, with the most recent NSW State of the Environment Report noting that ‘rising sea levels are likely to have a significant effect on human settlements in NSW.’(See for example: Australian Government, *Environment Protection and Biodiversity Conservation Act 1999*, Littoral Rainforest and Coastal Vine Thickets of Eastern Australia – a nationally threatened ecological community (Policy Statement 3.9), p. 14. Available online at : <http://www.environment.gov.au/system/files/resources/19747170-3fd3-4930-9ca5-6ca89508b571/files/littoral-rainforest.pdf>; Lipman, Zada and Stokes, Robert, That sinking feeling : A legal assessment of the coastal planning system in New South Wales (2011) 28 *EPLJ* 182 ; and NSW Government, *NSW State of the Environment*, 2012, p. 199).
- ^v See: *Biodiversity Conservation Act 2016* and the *Local Land Services Amendment Act 2016*. Regulations and SEPPs made under the new Biodiversity Conservation Act will directly affect coastal vegetation and biodiversity.
- ^{vi} Clause 11910(a).
- ^{vii} See *State Environmental Planning Policy No 14 – Coastal Wetlands*, clause 7 (2).
- ^{viii} *Standard Instrument – Principal Local Environment Plan*, clause 3.3(2)(c) and (f).
- ^{ix} *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, clause 1.19(1).
- ^x Available at: http://www.edonsw.org.au/planning_development_heritage_policy
- ^{xi} https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/3480/attachments/original/1481851862/Medium_Density_Complying_Development_Code_EDO_NSW_Submission_Dec_2016.pdf?1481851862
- ^{xii} See: *Housing, housing everywhere but not a DA in sight: the possible consequences of expanding complying development on sensitive coastal environments* By EDO NSW Policy and Law Reform Solicitor Dr Emma Carmody, 26 May 2016, available at: http://www.edonsw.org.au/the_possible_consequences_of_expanding_complying_development_on_sensitive_coastal_environments.
- ^{xiii} The scale of vegetation clearing proposed to be permitted under new self-assessable codes could have significant impacts on rural coastal areas. For further detail see: *EDO NSW Submission on the draft Local Land Services Amendment Bill 2016* available at: http://www.edonsw.org.au/nsw_biodiversity_reform_package_2016
- ^{xiv} Our submissions outlining significant concerns with the new NSW biodiversity laws are available at: http://www.edonsw.org.au/biodiversity_legislation_review

Draft Submission on the State Environmental Planning Policy (Coastal Management) 2016

January 2017

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general-purpose councils and associate members including special-purpose county councils and the NSW Aboriginal Land Council. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW welcomes the opportunity to make a submission on the State Environment Planning Policy (Coastal Management) 2016 (SEPP). LGNSW is supportive of the draft SEPP including stricter protections for coastal wetlands and littoral rainforests and a changed approval pathway for coastal protection works.

Please note that in order to meet the consultation deadline, this submission is provided in draft form in anticipation of the LGNSW Board approval in February 2017. LGNSW will advise the NSW Department of Planning and Environment (DPE) of any amendments to the submission at that time.

Overall Comments

Burden of proof

LGNSW supports the higher threshold of “the consent authority must be satisfied” used throughout the draft SEPP, rather than the usual phrasing of “the consent authority must consider”. This is considered a positive improvement to decision-making processes, allowing councils to request additional information to support development applications. However, it would be useful to have a practice note or guidance on how to prove ‘satisfaction’. For example, to what extent is a consent authority to be satisfied? Is it the civil standard of “balance of probabilities” or the criminal standard of “beyond reasonable doubt”, or somewhere in between?

Coastal Wetlands and Littoral Rainforest Areas

Individual councils have noted that the mapping of coastal wetlands and littoral rainforests provided in the maps accompanying the SEPP is somewhat inaccurate within their local government area. LGNSW appreciates that changes to the maps can be made as part of the first year Policy Review (clause 10(a)). However to ensure councils undertaking the necessary studies to identify these areas provide data at suitable resolution and accuracy for inclusion in the SEPP maps, it would be useful if the criteria used to identify littoral rainforests and coastal wetlands could be made available (including how the expansion and contraction of wetlands is taken into account). Feedback to those councils who have provided maps identifying additional areas of coastal wetlands and littoral rainforest that have not been included in the draft SEPP would further assist councils to understand the standard of mapping DPE requires.

Coastal Vulnerability Areas

LGNSW notes that the coastal vulnerability maps are not available for comment at this stage as they are still being compiled. LGNSW supports the inclusion of all available and trusted coastal hazard information, including information from previous local hazard studies (as inferred by Community Factsheet on the SEPP).

Councils are currently making planning decisions that affect private property and public assets in the coastal zone, considering both current and future hazards. Basing decisions on the best available information is one way local government reduces its legal risk. In the absence of a local hazard study, information held by the NSW Government on coastal hazards should be used as an interim measure. LGNSW strongly advocates for the coastal vulnerability area

map to be released in stages (as it becomes available) and be updated periodically rather than having no hazard areas identified as is currently the case.

It is also within the public interest for the best available information pertaining to coastal vulnerability to be made available. When the community is aware of the risks, they are better able to prepare and mitigate them, and adaptation pathways can be developed in a collaborative way.

Comments relating to specific clauses

Clause	LGNSW Comment
11 (2)	<p>This clause will declare development of coastal wetlands and littoral rainforest as designated development (a change from the current situation where it is considered integrated development).</p> <p>LGNSW welcomes the higher protections this change affords, as it provides for a longer public exhibition time and requires an Environmental Impact Statement for the proposed development.</p>
12 (2)(a)	<p>Clause 12 ensures that development in the proximity area of coastal wetlands and littoral rainforests (100m buffer) will not have significant impact on those ecological communities, but it does not apply to those lands zoned residential.</p> <p>There appears to be inconsistency between the conditions for residential development in the proximity area of coastal wetlands/ littoral rainforest and residential development within the coastal environment area. Under the <i>Coastal Management Act 2016</i>, the management objectives for coastal wetlands and littoral rainforest areas are set at a higher level than the management objectives for coastal environment areas. Yet the draft SEPP sets stricter controls for residential development in coastal environment areas than it does for the proximity area of coastal wetlands and littoral rainforest.</p> <p>LGNSW agrees that residential development within the proximity area should not be declared designated development. However, nearby residential development can have impacts detrimental to coastal wetlands and littoral rainforest and it would be appropriate that conditions similar to the coastal environment area apply. For example, matters for consideration include effluent and stormwater management, site coverage, bushfire protection zones etc.</p>
14 1	<p>Clause 14 1(b) states that development consent must not be granted if the proposed development “<i>is not likely to significantly impact on geological and geomorphological coastal processes</i>”. The term “significant impact” is open to interpretation. LGNSW recommends that it be replaced with “is not likely to adversely impact” consistent with the phrasing of 14 1(a) and (c).</p> <p>Clause 14 1(d) refers to undeveloped headlands and rock platforms. These features have not been defined. LGNSW recommends the inclusion of these undeveloped headlands and rock platforms in the coastal environment area map. Some councils may already have mapping they can provide.</p>

<p>16 (1) and (2)</p>	<p>Clause 16 (1) provides that development consent must not be granted to development in the coastal zone unless the consent authority is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land.</p> <p>Clause 16 (2) makes the above consideration null after 31 December 2021. LGNSW assumes that this sunset clause has been included as there is an assumption that all of the coastal zone will be covered by a local hazard study that assesses all seven coastal hazards as identified by the Coastal Management Act. This may be premature given the large volume of work in evaluating existing local hazard studies, updating or undertaking new studies that cover the seven coastal hazards and competing local government priorities especially in amalgamated councils. Nonetheless, even if there are local hazard studies in place, they do not in themselves prevent development from increasing coastal hazards. Therefore clause 16(1) should not cease to operate.</p> <p>Clause 16 (1) should also apply to development on the significant proportion of the NSW coast not managed by local government. This is of note as the Minister cannot require a state agency to prepare a coastal management program (as the Minister can with local government).</p>
<p>21</p>	<p>This clause provides an approval pathway for coastal protection works. LGNSW is generally supportive of the pathway, which allows works on private property with development consent from either council (if a coastal management program exists) or an expert joint regional planning panel. Similarly, LGNSW supports the pathway for public authorities to undertake coastal protection works identified in a coastal management program, beach nourishment and placing of sand bags without development consent.</p>
<p>21 (3)</p>	<p>This clause provides that if coastal protection works are identified in an Emergency Action Sub Plan, they there are exempt from a Part 5 Assessment. However, these works should not proceed without considering the environmental impacts of the works. LGNSW recommends that an environmental assessment step be incorporated into the Emergency Action Sub Plan process through the Coastal Management Manual.</p>

Conclusion

LGNSW recognises that the coastal reform process provides a significant step forward in the effective management of the NSW coastal zone. While the issues raised in this submission are few in number, it is critical that they are addressed in the final SEPP to ensure decisions by consent authorities are defensible. Local government in NSW is a willing collaborator to ensure that these reforms provide a framework that delivers beneficial on-ground and lasting outcomes.