ENVIRONMENTAL DEFENDERS OFFICE (SA) INC

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Ph: (08) **8359 2222** SA Country Freecall: 1800 337 566
Office: 1st Floor, 182 Victoria Square, Adelaide, SA. Post: GPO Box 170, Adelaide, SA, 5001
Web: http://www.edo.org.au/edosa/

EDO(SA) Comment upon the draft Native Vegetation Act Regulations 2016

The Environmental Defenders Office (SA) Inc. ("EDO(SA)") is a community legal centre with over twenty years of experience specialising in public interest environmental and planning law. EDO(SA) provides legal advice and representation, undertakes law reform and policy work and provides community legal education.

The *Native Vegetation Act 1991* ("NVA"), two clear objectives;

- "the conservation, protection and enhancement of the native vegetation of the State and, in particular, remnant native vegetation"; and
- "the limitation of the clearance of native vegetation to clearance in particular circumstances including circumstances in which the clearance will facilitate the management of other native vegetation or will facilitate the sustainable use of land for primary production".

These objectives set a clear benchmark against which the draft *Native Vegetation Regulations 2016 (draft NVR)* should be assessed.

Any changes to the permitted clearance regulations under the NVR or the clearance assessment methodology must be justified ecologically, rather than in terms of administrative streamlining. We support simplification but not if it results in weakening of environmental outcomes. Improving or maintaining environmental outcomes is consistent with maintaining the long-term sustainability and resilience of SA communities, the SA economy and the SA environment.

As stated in the Guide to the draft NVR the aim of the review was to simplify the current Regulations and as a result four pathways (including a risk assessment pathway) have been proposed in relation to clearance matters under the NVA. This hybrid proposal differs from the fully risk based approach

previously proposed. However it is our view that the draft NVR are fundamentally flawed for the following reasons;

1. Lack of appropriate checks and balances for certain activities under the first 3 pathways
2. Use of a risk based pathway for the assessment of certain activities
3. Lack of transparency and accountability

Some preliminary concerns;

1. Clause 7 –lacks force in relation to implementation of the mitigation hierarchy
4. Clause 19(1) – the "cumulative impacts" are not defined.
5. Clause 19(1)- not mandatory that NRM Board advice is sought before a management plan is approved.
6. Clause 19(2) – "The Council may, when considering an application under this Part for approval to clear vegetation, take into account the practicability and cost of any reasonable alternative to the proposed clearance." "Cost" remains a factor that the Council can consider. The "cost of any alternative" should not be a determining factor.
7. Clause 29- there has been no increase in the maximum penalty
8. There are no provisions that establish evidentiary presumptions and the use of evidentiary certificates. These are essential to ensure that prosecution action is successful, particularly when an online portal is used by proponents to provide information. Without them, it will be very difficult to prove the essential elements of the offence, such as the identity and intent of the provider of the false/misleading information If there is a failure by the applicant to monitor and evaluate NVC should step in and be able to recoup the monies spent.

It appears from the comments made by some of our clients that many exemptions have been exploited in the past eg safety of persons and property and firewood. Furthermore some of the proposed NVR exemptions do not have appropriate checks and balances which could result in an unacceptable loss of protection for native vegetation. For example in relation to plant and animal control there is no requirement to specify the extent of the pest present, what methods may be used to deal with the pest, how much clearance is likely to result and no requirement to comply with Guidelines as there is currently.

The EDO is greatly concerned by the introduction of a risk based pathway, particularly in light of the information (or lack of information) which has been provided in relation to the criteria and

assessment of minor clearance, low risk and medium to high risk applications (other than major developments, mining and petroleum developments).

The use of risk assessment was raised in the previous round of consultation where it was proposed that the entire system be set up in this way.The justification for using risk based assessment was that it was logical to consider risks to biodiversity conservation. In addition the Guide to the draft NVR states that data over five years shows that approximately 70% of such applications are "low risk" and therefore resources should be diverted away from these matters to more high risk matters. The activities in the risk based pathway include new infrastructure, sub divisions and buildings. It has been said previously by the Department that it is their belief that assessing activities in this way will provide incentive to reduce clearances because "low" risk pathways will be simpler and less costly for applicants to navigate. We dispute this belief.

We understand that the criteria, assessment process and SEB for minor clearance , low risk and medium/high risk are still under development. However we have recently been provided with a draft Table- Table 2: Criteria, assessment process and SEB for minor and low risk clearance . The draft criteria appear simplistic and arbitrary. Listed threatened species or communities are not the only significant biodiversity matters and furthermore tree and patch size is not an adequate measure of ecological value. Arguably there needs to be a more fuller consideration of " the likely impact to values of the native vegetation at the site" . This criteria was included in the assessment process in the Department's June 2015 paper (p4, final paragraph) but not the current Guide to the draft Regulations. We understand that the criteria and assessment processes will not be in the Regulations but in policy documents which can be modified without consultation.

Other key concerns include lack of expertise in the provision of information , lack of oversight,lack of resources , lack of reliable data and lack of transparency.

1. The onus is on applicants to carry out detection of threatened species and/ or communities. What education, support or assistance will they receive to properly identify possible threatened species or communities on their properties? Furtherrmore , the use of upfront accredited consultants where an SEB is required is not mandatory.
2. How will this assessment process be overseen by regulatory authorities and what resources will be allocated? Departmental resources are at critically low levels and there would appear to be insufficient resources to undertake assessment and enforcement
3. As pointed out in the Department's March 2015 paper a risk based approach comprises not just consideration of extent risk but also location risk. The paper states that " location risk

would need to be determined for all locations, and would consider the importance of the vegetation for biodiversity conservation based on available data. Although not currently developed, location risk would be mapped and made available." We query how applications can be adequately done in light of this lack of information and what resources will be applied to obtaining the necessary data.

4. There is no provision for public consultation on medium to high risk applications nor for third party appeal and enforcement rights.
5. It is not mandatory that the views of relevant Boards and the Minister are sought for high risk applications

Please contact the writer if you have any questions in relation to this submission.

Yours sincerely

Melissa Ballantyne

Coordinator/Solicitor

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