



Draft guidance and criteria to assist a decision maker to determine a serious and irreversible impact

This part of the submission comments on the *Draft guidance and criteria to assist a decision maker to determine a serious and irreversible impact (SAII Guidelines)*.

As discussed in our comments on the proposed Biodiversity Conservation Regulation, EDO NSW generally welcomes the concept and principles underpinning serious and irreversible impacts, but remain concerned at the level of discretion in identifying and responding to those impacts and the lack of detailed information on the proposed thresholds. For example, the BC Act provides that serious and irreversible impacts are a matter of ‘opinion’ for the consent authority; and State Significant Development, State Significant Infrastructure, Part 5 projects, and biocertification that will have serious and irreversible impacts can still be approved.

We recommend that the process, principles and environmental information underpinning serious and irreversible impacts be as objective as possible. For example, the consent authority’s ‘opinion’ must be objectively formed; and accredited assessors should be required to present objective evidence to the consent authority, rather than interpretation that favours the developer or suffers from ‘optimism bias’. This could be prescribed in the contents of assessment reports (Regulation cl. 6.8).

It is also unclear how the SAII Guidelines incorporate consideration of cumulative impacts on threatened species or communities, particularly when considering extinction risk. The SAII Guidelines should require consideration of projected future environmental changes (such as those arising from climate change) or anticipated land use changes (such as those enabled by the land clearing codes) that will increase future risk to ecological integrity.

This part of the submission comments and makes recommendations on the following sections of the SAI Guidelines in turn:

- 2.1 Principles for determining serious and irreversible impacts
- 2.2 What happens when a decision maker determines a proposal is likely to have a serious and irreversible impact on biodiversity values
- 3.1 Decision makers evaluate impacts on candidate SAII entities
- 3.3 Determining whether impacts are serious and irreversible

2.1 Principles for determining serious and irreversible impacts

The SAI Guidelines note:

The first three principles broadly align with the criteria prepared by the IUCN in 2016 to assess the extinction risk of species and ecological communities.

However, in our view references to extinction risk should be further clarified to refer to an appropriate scale and scope, which is currently ambiguous in the Regulation and associated guidance. Extinction risk should consider local extinction as per the existing 7 part test process or, at most, in relation to New South Wales (see 6.7(2)). We consider it would be unacceptable to define extinction risk at any larger scale (e.g. Australia).

In addition to the principles currently proposed, we **recommend** that the decision maker should be required to:

1. consider the precautionary principle and other specific principles of Ecologically Sustainable Development (**ESD**);
2. recognise that the inability to identify like-for-like offsets may be a prima facie indicator of serious and irreversible impact; and
3. prescribe additional serious and irreversible impact principles and guidance relating to water quality and soil quality (including acidification, erosion and salinity).

Ecologically Sustainable Development

The objects of the BC Act make it clear that decision makers should act consistently with the principles of ESD; and the very concept of 'serious and (or) irreversible' impacts derives from the precautionary principle. This recognises that serious and irreversible threats call for precautionary measures, particularly if outcomes are uncertain. We **recommend** the SAI Guidance (and Regulation) require decision-makers to apply ESD principles in considering serious and irreversible impacts, with guidance on:

- the precautionary principle (noting there is scientific uncertainty about the likely success of offsets and, by definition, a threat of serious or irreversible harm);
- ensuring biodiversity and ecological integrity as a fundamental consideration in decision-making;
- intergenerational and intra-generational equity (i.e., that present generations must ensure a healthy environment and life-support systems for future generations, and costs and benefits of decisions should be borne equitably in the present); and
- full environmental costs and the risk-weighted consequences of various actions.

Inability to identify like-for-like offsets

We **recommend** that the Regulation prescribe an additional serious and irreversible impact principle (with associated guidance) so that, where 'reasonable steps' are taken to verify if like-for-like offsets are available, and no such offsets are identified, this may be a prima facie indicator of serious and irreversible impacts that the consent authority should consider in detail.

Water quality and soil quality considerations

We **recommend** that the Regulation prescribe additional serious and irreversible impact principles and guidance relating to water quality and soil quality (including acidification, erosion and salinity). The Regulations already recognise the contribution of 'water

sustainability' to biodiversity values (clause 1.4). It is also evident that acidification, salinity, erosion are increasingly serious and often irreversible problems, as indicated by the *NSW State of the Environment Report 2015*.¹ These additions are of primary importance to large-scale clearing in rural areas where the Biodiversity Assessment Method (**BAM**) will apply; and would draw on and update the existing Environmental Outcomes Assessment Methodology (**EOAM**). This would ensure the connection between healthy biodiverse soils and productive landscapes continues to be recognised.

2.2 What happens when a decision maker determines a proposal is likely to have a serious and irreversible impact on biodiversity values

We note the *Submission Guide on Ecologically Sustainable Development* refers to a requirement for the Native Vegetation Panel to refuse to allow clearing under the Vegetation SEPP when clearing a proposal will trigger a serious and irreversible impact. This requirement is not currently discussed in the *Explanation of Intended Effect for the Vegetation SEPP* or included in the SAI Guidelines. EDO NSW supports this proposal and **recommends** it is made explicit in the relevant Regulations and guidance documents.

The table on p 3 notes that proposed clearing under s 60ZF of the LLS Act must be refused if it would cause serious and irreversible impacts. This refusal is appropriate. However, we are concerned that landholders could evade this rule by choosing the biocertification pathway. Biocertification further weakens like-for-like offset rules, and means that serious and irreversible impacts are only a 'consideration' (with a determination of whether other measures should apply to minimise impacts) instead a requirement to refuse. We **recommend** this loophole be closed, either by amending the BC Act or Regulation.

3.1 Decision makers evaluate impacts on candidate SAI entities

The SAI Guidance states (at p 4):

These criteria have been applied to all threatened species and threatened ecological communities listed under the BC Act.

However, this is contradicted by caveats in Appendices 2 and 3, which note that staff have not had sufficient time to properly assess the full list of threatened species and ecological communities for serious and irreversible impacts, but have instead had to adopt a triage approach. This is due to the rushed timeframe for developing and commencing the reforms, and raises a significant risk that serious and irreversible impacts will be overlooked or that guidance will be inadequate. This is a further reason we recommend the reforms commence when all the components are ready, rather than the premature and arbitrary date of 25 August 2017 as proposed.

The SAI Guidance (p 4) notes that decision makers will, at a minimum, need to evaluate the 'candidate entities' at risk of serious and irreversible impacts listed in Appendices 2 and 3. It goes on to say that a consent authority 'may' still consider if other threatened species and ecological communities will be seriously and irreversibly depleted using the SAI criteria. This does not sufficiently reflect the scope of the decision-maker's duty in the BC Act. We **recommend** the SAI Guidance state that decision-makers 'must' also consider potential SAI impacts on other biodiversity values.

¹ See NSW EPA, *State of the Environment Report 2015* (2016), Chapter 10.

We are also concerned by the additional limiting thresholds proposed for Appendix 2 and 3. Given that the species and communities being referred to are at imminent risk of extinction, it is inappropriate to limit the application of the serious and irreversible test based on features such as patch size or habitat thresholds. It is also highly concerning that these thresholds that will effectively provide exemptions to the serious and irreversible test have not been provided for public consultation.

3.3 Determining whether impacts are serious and irreversible

These comments refer to the definitions provided in both section 3.3 and the supporting material in Appendix 1.

Principle 1

We are concerned that the proposed definition of population decline (80% or greater in 10 years or 3 generations) is too high a bar to meaningfully protect a sufficient range of threatened entities, particularly given the severely limited data available on NSW biodiversity. We also consider this threshold is higher than the community would expect (for example, noting the level of public concern at the estimated decline of koala populations by 26% in 3 generations). We **recommend** a lower or more nuanced threshold for 'rapid decline', and as noted above, recommend applying the precautionary principle to such decisions to account for scientific uncertainty and data limitations.

Principle 2

We note the principle refers to ecological communities but this is not discussed in the relevant sections of the SAI Guidance. We **recommend** that it be clarified whether this principle is intended to apply to ecological communities.

We welcome the recognition of the problematic effects of time-lag from offsetting. Time-lag is not mentioned at all in the BC Act or Regulation.

The definition of very small population size fails to adequately incorporate research on minimum viable population, i.e., the number of individuals required to maintain a viable population in the wild over the long term. Research consistently shows that these population sizes number in the few thousands and are context-specific rather than the 50 or 250 mature individuals proposed here.²

Principle 3

We are concerned that the guidance related to *Very limited geographic distribution (species)* sets too high a bar for SAI impacts, particularly with regard to inhabiting less than three locations (i.e. one or two locations) in NSW. An example is the recently-discovered Mahony's Toadlet which has now been found in three locations, including locations threatened with imminent development (as many discovered locations are). Despite the fact that it does not exist anywhere else in the world, and despite imminent additional threats, Mahony's Toadlet would not qualify for protection under this sub-principle.

² See for example Traill, L., Bradshaw, C., and Brook, B. (2007) Minimum viable population size: A meta-analysis of 30 years of published estimates *Biological Conservation* 139(1–2): 159-166

Principle 4

We agree that for some species 'there is insufficient knowledge to be able to manage it at a stewardship site' (p 12), and therefore threats may be serious and irreversible. This guidance needs to clarify how this problem will be dealt with, given the offsetting options enable such species to be impacted in exchange for funding supplementary 'biodiversity actions'. We **recommend** that a precautionary approach guide species conservation where there is insufficient knowledge of a species, rather than allowing little-known biodiversity to be destroyed in exchange for research or survey funding

We strongly support the principle of protecting irreplaceable biodiversity. However, the proposed offset 'variation rules' contradict this principle by allowing hollow bearing trees to be offset with artificial hollows. As noted in our comments on the Regulation, we **recommend** this variation be deleted.

We also **recommend** that an additional consideration for ecological communities should include whether there is any evidence of successful rehabilitation or restoration that would justify allowing existing areas to be cleared.

The meaning of a 'component' of species habitat should be defined or illustrated with examples.

3.3.2 Evaluate nature of impact on candidate entity

The SAI Guidance (p 7) notes that the accredited BAM assessor is to provide information to the decision-maker (e.g. local council, regional planning authority, the relevant Minister etc) on the extent of any SAI impacts, and whether the SAI 'threshold' is likely to be exceeded.

The Government's current policy settings are that the proponent appoints and pays the assessor. This is an unacceptable conflict of interest/duty, given the serious consequences at stake for biodiversity, and the potential that such impacts may require the project to be refused (or reviewed in the case major projects and biocertification). As discussed in our comments on the proposed accreditation scheme, we **recommend** that accredited assessors be appointed independently of the proponent, with a duty to provide objective information to the decision-maker. The proponent would still pay for the cost of the assessment. If this recommendation is not accepted, we **recommend** evidence of SAI impacts must be peer reviewed by a separate, independently appointed assessor.

Finally, we submit that it inappropriate for the impact on threatened ecological communities to be considered across an IBRA sub region for strategic biodiversity certification.