NSW EDO

DEFENDING THE ENVIRONMENT
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Draft Biodiversity Conservation Regulation 2017

This part of the submission comments on the proposed *Biodiversity Conservation Regulation 2017* (**Regulation**) which prescribes supporting regulatory detail under the *Biodiversity Conservation Act 2016* (**BC Act**). We make recommendations in relation to each part of the proposed regulation in turn:

- Part 1 Preliminary
- Part 2 Protection of animals and plants
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Part 1 Preliminary

1.2 Commencement

This clause states that the Regulation commences on a date to be specified. The NSW Government has indicated a start date of 25 August 2017 for the biodiversity and land-clearing (**LLS Amendment Act**) reforms.

There are high risks in rushing commencement of the Biodiversity Offsets Scheme (**BOS**), and the new rural land-clearing system including the Native Vegetation Code (**Code**) by August 2017.

We strongly **recommend delaying commencement** of the BOS, the Code and other clearing via the Native Vegetation Panel (**NV Panel**), until the relevant institutions are fully established, regulatory maps and sensitive values maps are finalised and quality-assured,

sufficient qualified staff are recruited and trained, and biodiversity conservation strategies and priorities are developed.

1.4 Additional biodiversity values

This section prescribes relevant 'biodiversity values' in addition to those listed at s. 1.5 of BC Act (vegetation integrity and habitat suitability).

We **welcome** the inclusion of additional biodiversity values in clause 1.4, particularly threatened species abundance, vegetation abundance, habitat connectivity and water sustainability.

We **recommend** *all* biodiversity values prescribed in clause 1.4 should encompass both *protected* and *threatened* species. If this change is not made and 'flight path integrity' is to be prescribed as proposed (cl. 1.4(e)), we **recommend** this is limited to animals that are listed *threatened and migratory* rather than *protected animals* to align with the general approach of other listed values.

We **recommend** amending the Regulation to include further values relating to *soil quality and erosion control*, *salinity protection, carbon storage* and *the resilience, and rehabilitation potential of the land in its landscape context*. These values would draw on the Environmental Outcomes Assessment Methodology (**EOAM**) under the *Native Vegetation Act 2003* and recognised carbon accounting methods. The additional values would be of a similar character to 'water sustainability' but would extend beyond threatened species and ecological communities. This would recognise that healthy, biodiverse soils support productive landscapes and interconnect with other biodiversity values prescribed in the BC Act and Regulation.

Part 2 Protection of animals and plants

We support the proposed clauses in *Division 2.1 Protection of marine mammals***.**

In relation to clause *2.12 Harming snakes*, we do not support the shift in the onus of proof.

Regarding clause *2.17 Picking protected plants on private land,* it should be clarified that 'grown' refers to deliberately planted in a horticultural context. It should be clear that picking protected species in bushland on your own property still requires a permit.

As previously submitted, we believe the list in *2.21 Harm to swamphens, raven, crow, cockatoo or galah* is too broad.

Clause *2.22 Exclusion of certain animals from offence of dealing in animals* lists species of birds (e.g. various cockatoos, parrots, quails and doves) that are exempt from the offence of dealing in an animal under s. 2.5 of the BC Act. We **recommend** narrowing the exemption to persons authorised to deal in those birds/species.

Part 3 Areas of outstanding biodiversity value

Areas of Outstanding Biodiversity Values (**AOBVs**) carry over and replace the under-used concept of 'critical habitat' in the *Threatened Species Conservation Act 1995* (**TSC Act**). The regulations may provide for the declaration (etc) and protection of AOBVs (BC Act, s. 3.5).

AOBVs could be a significant positive in the new system provided that this mechanism is well used. That is, areas are identified and nominated frequently, declared in a timely way, and protect areas in ways befitting their outstanding significance (whether of state, national or global importance) in perpetuity.

Division 3.1 Criteria for declaration [of AOBVs]

We **support** the positive recognition of climate refuges, resilience during environmental stress and ('established') education and research, in addition to critical habitat.

We make recommendations below to improve and expand the criteria in the Regulation.

Other areas for improvement for AOBVs include: addressing the issue that there is no formal public nomination process or timeframes set out in the BC Act or Regulation; and that there is no automatic interim protection for areas identified but not yet declared as AOBVs.

We **recommend** expanding the 'education and scientific research' criterion (3.1(1)(iv) and 3.1(5)) to provide for areas significant to future important research in addition to 'established infrastructure or data…'. This will ensure that AOBVs can provide for new studies, areas of research, and newly discovered species.

We **recommend** that areas contributing to 'ecological processes or ecological integrity' (clause 3.1(1)(iii)) include recognition of 'ecosystem services' (i.e. the benefits that nature provides humans). Examples of ecosystem services an area may provide include pollination, water purification, salinity prevention or carbon storage in wetlands or forests. Definitions of key terms should also be considered.

We **recommend** that the Regulations:

- make explicit that any person can nominate an AOBV for consideration, and a process, receiving body or form to do so (see e.g. BC Act sections 4.10-12);
- Provide that the Threatened Species Scientific Committee can recommend AOBVs as part of or separate to a listing process;
- set out timeframes for relevant bodies, including the Environment Agency Head, to provide advice and recommendations to the Minister on an AOBV;
- set out timeframes for the Minister to decide whether to declare an AOBV; and
- provide that interim protection orders[1] automatically apply to potential AOBVs (i.e. once their nomination is accepted for consideration), so that the areas are mapped on the Sensitive Values Land Map, and excluded from rural Code-based clearing etc. This could be given effect in Part 3 or Part 11 of the Regulation.

These amendments will ensure effective use, appropriate consideration, timely declaration and protection of AOBVs, avoiding some inadequacies of the former critical habitat provisions.

Part 4 Threatened species and ecological communities—listing criteria

Part 4 of the Regulation sets out listing criteria for threatened species (Div 4.1), ecological communities (Div 4.2), interpretation of listing criteria (Div 4.3) and procedure for listing (Div 4.4).

[1] See BC Act, Part 11, Division 3 (ss. 11.8-11.13).

The BC Act s. 4.18 requires the Threatened Species Scientific Committee to keep these lists 'under review' and, at least every 5 years, determine whether any changes to the lists are necessary. This is to be done in accordance with the Regulations.

We **recommend** the Regulations clarify:

- that 'under review' includes ensuring the lists of threatened species and ecological communities are complete and up-to-date; and
- that determining if changes are necessary includes adjusting the threat category of species and ecological communities based on the precautionary principle and the best available scientific information - including but not limited to the Biodiversity Conservation Program (monitoring, reporting on and review under ss. 4.36-4.37 of the BC Act); and any Biodiversity Outlook Reports published 'from time to time' under the BC Act (see Regulations clause 14.2 below).

Part 5 Provisions relating to private land conservation agreements

Part 5 of the Regulation sets out a range of matters relating to private land conservation agreements including eligible land and fit and proper persons.

5.1 Eligibility for determining if land eligible to be designated as biodiversity stewardship site

We generally support the qualifications for eligible land listed in clause 5.1. We agree land should not be eligible where legal obligations already exist because biodiversity improvement (i.e. credits) would not be 'additional' to what would already occur.

However, regarding the exception to this at clause 5.1(1)(c)(i), there are questions around whether there is sufficient 'additionality' associated with sites where there is already a legal obligation to carry out ongoing 'biodiversity conservation measures' other than for 'biodiversity offset purposes'. We **recommend** deleting this exception. Alternatively the intent of the exception at clause 5.1(1)(c)(i) must be narrowed and clarified to apply to specific circumstances that ensure additionality and do not unduly entitle owners to dual benefits at the cost of biodiversity losses elsewhere. (We make further comment on this below).

5.3 Fit and proper person requirements for owners of biodiversity stewardship sites

We **welcome** the inclusion of fit and proper person requirements in the Regulation. However the proposed ministerial considerations need to be less discretionary and more certain.

We recommend amending clause 5.3 to:

- require the listed matters to be considered (replace 'may' with 'must');
- include matters that are known 'or ought reasonably to be known by' the Minister, such as through checking compliance databases of environmental and other agencies;
- require biodiversity stewardship applicants to declare and specify these matters on forms (BC Act s. 5.8(2)(a))
- define 'relevant legislation' more broadly at clause 5.3(3) (regarding past offences) to include planning, mining and pollution laws (i.e. the *Environmental Planning and Assessment Act 1979*; *Mining Act 1992*; *Petroleum (Onshore) Act 1991*; *Protection of the Environment Operations Act 1997* and equivalent interstate/overseas legislation).

5.4 Other grounds on which Minister may decline a request to enter into a biodiversity stewardship agreement

In addition to the fit and proper person test above, there may be situations where this test is satisfied but it is not in the public interest to enter a biodiversity stewardship agreement.

We **recommend** including an additional ground for the Minister to decline a biodiversity stewardship site agreement, where it is not in the public interest to enter a biodiversity stewardship agreement that generates biodiversity credits for sale because of a lack of additionality (for example where the land is already protected by legislation or a Crown land Plan of Management or a conservation agreement).

5.5 Determination that application to vary biodiversity stewardship agreement need not be accompanied by assessment report

Sub-clause 5.5(b) should be strengthened and clarified from a negative standard (i.e. the variation 'will not significantly impact' biodiversity values) to a positive standard. Also the draft clause does not state whether credits generated at the site can change without a further biodiversity stewardship site assessment report.

We **recommend** amending sub-clause 5.5(b) to state that the (non-minor) variation will result in biodiversity values being 'maintained or improved' in order to be exempt from a further assessment report; and to clarify that the exception prevents credit amounts being varied (especially increased) without further assessment.

5.9 Reimbursement provisions with respect to termination or variation of conservation agreements following grant of mining or petroleum authority (section 5.23 (10))

This clause establishes that where a [stewardship site can be destroyed by a mining or petroleum activity, the landowner and authorities *may* have their costs reimbursed. However, this doesn't reimburse the environmental loss. We therefore **recommend** that clause 5.9(3) should be expanded to require the mining or petroleum authority to pay the costs of sourcing an alternative offset site to replace that previously protected by the conservation agreement.

Part 6 Biodiversity offsets scheme

Part 6 of the Regulation sets out important details about the Biodiversity Offsets Scheme (**BOS**) that is established by the BC Act, and partly given effect via the new Biodiversity Assessment Method (**BAM**). The breadth of the offset and variation rules in the Regulation are a major concern, as they threaten the ecological integrity of, and public confidence in, the BOS. The BAM is discussed separately in detail below.

Despite relying on this market mechanism to protect biodiversity, as warned by the Government's expert peer reviewers of the draft BAM (Gibbons and Eyre 2015), weak offset rules – such as those proposed in the Regulation and enabled by the Offsets Payment Calculator – threaten to undermine the price signal in the offset market and create perverse outcomes that put valuable and biodiverse areas at risk. Under the theory of using the market to protect biodiversity, the price signal should prevent scarce and valuable local biodiversity from being traded away and lost via offsets and payments into the Biodiversity Conservation Fund (**BC Fund**). However, unless the offset rules are strengthened, they will heavily discount the 'price signal' in the offsets market. This is addressed under clauses 6.2 to 6.6 below.

6.1 Additional biodiversity impacts to which scheme applies

We **welcome** the list of additional impacts prescribed under sub-clause 6.1(1). However, there is very limited effect from this sub-clause when read with sub-clause (2).[2] We understand that measures to avoid and mitigate impacts on the additional matters may be required in the BAM (at 8.2 - and are included in the current BAM) but as stated in our comments on the BAM, there are no consequences for proponents failing to adequately avoid or mitigate impacts and there is no requirement to offset any residual impacts.

We **recommend** clarifying the intent of listing additional biodiversity values in 6.1(1)-(2); giving guidance to consent authorities and proponents about assessing, avoiding and minimising these impacts; and, prescribing additional credit requirements or weighting in relation to those impacts in the BAM where appropriate. Sub-clause 6.1(1)(f) should apply to all protected species.

6.2 Offset rules under the biodiversity offsets scheme

This and the following clauses build on section 6.4 of the BC Act. They set out the biodiversity conservation measures potentially available to offset or compensate for impacts (of development, clearing or biocertification proposals) after avoidance and minimisation measures.[3] We note that the biodiversity conservation measures referred to in sub-clause 6.2(4) are not currently available for consultation.

We remain extremely concerned that weak offset rules, such as those proposed, threaten the ability to maintain meaningful environmental protection in NSW, including by undermining the price signal in the offset market, thus creating perverse outcomes that put valuable biodiversity areas at risk.

Although we accept that like-for-like offsets have been legislated through the BC Act, we **strongly recommend** that the other alternatives in clause 6.2 be restricted (i.e., the supplementary conservation actions, payments to the BC Fund) or removed altogether (variation rules, mine rehabilitation credits). As noted in our comments on the BAM, we are extremely concerned by the proposal in 6.2(2)(d) that an obligation to rehabilitate the impacted site that has the same credit value as the retirement of like-for-like biodiversity credits. This is a significant retrograde step from the current situation (which we also consider unacceptable) where mine rehabilitation activities generate 25% of credits predicted by the Framework for Biodiversity Assessment (**FBA**).

We **strongly recommend** that the Regulation prescribe prerequisites and safeguards before the proponent is eligible to pay into the BC Fund in accordance with s. 6.30 of the BC Act. The 'Payment-to-Fund' option should not be available unless the proponent or the Biodiversity Conservation Trust (**BC Trust**) has verified like-for-like credits are available.

If like-for-like credits are not available, this is an indication that the proposal's impact is significant (and potentially serious and irreversible), particularly for species or ecological communities already at risk of extinction. Options still available to the proponent include:

[2] Sub-clause (2) essentially says impacts on these additional values (caves and other habitat of threatened species, habitat connectivity, threatened species movement, water quality, turbine strikes and vehicle impacts) are relevant to biodiversity assessments and reports; but these impacts will not increase the credits required for (and therefore the cost of) the development, clearing or biocertification proposal.

[3] Options under clause 6.2 of the Regulation include, in *any* combination:

a) Retire **like-for-like** biodiversity credits
b) Retire credits under **Variation rules**
c) Fund an action [listed in the BAM] to benefit species or ecological community impacted
d) Major mine site rehabilitation
e) Pay to the Biodiversity Conservation Fund instead [per BC Act s. 6.30].

This means a proponent can use option (e) without needing to confirm if offsetting is possible.

- further avoid or minimise the proposal's impact on biodiversity values;
- generate legitimate like-for-like credits on-site (not mine site rehabilitation);
- find and purchase like-for-like credits themselves;
- if a more stringent set of variation rules apply – follow those variation rules; or
- withdraw the project on the basis of significant impacts that cannot be offset.

The absence of like-for-like credits should also be a further trigger for considering whether impacts are serious and irreversible under clause 6.7.

We discuss like-for-like rules and Offset Variation rules at clauses 6.3 and 6.4 below.

Commonwealth Offsets Policy

We are further concerned that, unless weak variation rules and options are curtailed, the BOS will not meet federal standards in the Commonwealth Offsets Policy under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). For example, the Commonwealth Offsets Policy limits supplementary measures (indirect actions such as research rather than direct offsets) to 10 per cent of total offset requirements; and otherwise requires offsets to be like-for-like using the EPBC Act definition of like-for-like.

We do not support the use of supplementary measures but if they are to be used, we **strongly recommend** that supplementary conservation actions should be limited to 10 per cent of the value of offset credit requirements, with the remainder as like-for-like offsets (or satisfying obligations by avoiding and reducing impacts).

We **support** supplementary actions being restricted to measures (and species or ecological communities) listed in the BAM (clause 6.2(4)). However, such measures are not included in the draft BAM and we are unable to evaluate their adequacy.

Sub-clause 6.2(5) deals with 'biocertification' discussed under Part 8 below. To ensure that ecological integrity is a fundamental consideration in biocertification, we **recommend** that (ordinary) biocertification impacts may only be offset by like-for-like credits (i.e. delete from clause 6.2(5)(b): 'or, if authorised by the variation rules, other biodiversity credits').

If indirect offsets and alternatives continue to be available for biocertification (via cl. 6.2(5)), we strongly **recommend** the Minister can only prescribe conservation actions listed in the BAM (as for other proposals: 6.2(4)), and these be capped in line with the Commonwealth Offsets Policy. This could be achieved by deleting or amending clause 6.2(5)(a), along with other recommendations. We note our serious concerns with 'Strategic' biocertification below.

Again, we strongly **recommend** the alternative of paying money to the BC Fund must not be available (including for biocertification), without first verifying like-for-like offsets are available for the BC Trust (or other Fund manager) to purchase.

6.3 Like-for-like biodiversity credits

The like-for-like offset rules proposed provide a significant degree of flexibility, including in relation to spatial location of offsets;[4] and vegetation within the same *class* rather than the

[4] For example, allowing offsets in the same or adjoining IBRA sub-region or a sub-region within 100km of the site.

same *plant community type* (**PCT**).[5] This built-in flexibility reduces the need for variation rules and alternatives.[6]

The most concerning aspect of the draft rules in clause 6.3 is the lack of any location requirements for offsetting threatened plants and animals categorised as 'species credit' species such as koalas and squirrel gliders (i.e. whose presence cannot be reliably predicted by vegetation type).

While offset rules remain largely unknown to the general NSW population, local communities would be horrified at the potential for developers to destroy koala populations and habitat around Gunnedah and offset them with koala populations on the south coast of NSW, and for this to be part of the 'default' rules of offsetting.

We **recommend** clause 6.3(4) include proximity requirements for 'species credit' species so that like-for-like offsets must be in the same IBRA sub-region.

6.4 Variation rules under biodiversity offsets scheme (and ancillary rules under 6.5)

The BC Act enables the regulations to set out circumstances in which the 'ordinary rules' for determining biodiversity offset credits can be varied (s. 6.4(4)). However, such variations (if any) must be strictly limited for the BOS and the offsets market to maintain their integrity.

EDO NSW has consistently argued that a like-for-like standard is 'absolutely fundamental' to offsets integrity.[7] The central problem with variation rules is that they weaken rules which ensure offsets are ecologically equivalent, and that provide appropriate prices for scarce biodiversity credits. Indeed, the independent experts appointed to peer-review the draft BAM expressed concern that weak offset rules could undermine the price signal in offset market: '*That is, the true cost of impacts on biodiversity are less likely to be reflected in decision-making as the offsetting rules become more flexible*.'[8] This means the price of credits will be artificially lowered so that scarce biodiversity is undervalued. The proposed variation rules in clause 6.4 of the Regulation perpetuate this problem. (The undervaluing of increasingly rare credits is discussed further in our comments on the proposed Offsets Payment Calculator below).

We **strongly recommend** removing the variation rules from the Regulations.

However, if the Regulations continue to allow offset variations despite these concerns, we **recommend** limiting the circumstances when variation rules can apply, and strengthening the offset requirements where those variation rules do apply.

In particular, we recommend the following amendments:

- insert a concurrence requirement from OEH or the BC Trust where offset variations are proposed – either in addition to, or as part of, 'reasonable steps' before a variation is permitted (clause 6.4(1)(a) and clause 6.5(2)(f));
- remove the option to substitute hollow bearing trees for artificial hollows (6.4(1)(b)(iv)) given insufficient scientific evidence that they are effective and include

[5] NSW has 99 vegetation classes compared with ~1500 PCTs.
[6] If maintaining variation rules is prioritised, like-for-like rules should be tightened further with more of the system flexibility (location, vegetation class) incorporated into the variation rules.
[7] EDO NSW, *Submission on the Biodiversity Conservation Bill 2016* (June 2016), at: http://www.edonsw.org.au/nsw_biodiversity_reform_package_2016.
[8] Gibbons, P., and T. J. Eyre. 2015. Draft independent review of the Biodiversity Assessment Methodology. NSW Office of Environment and Heritage.

additional requirements to consider the type, size, age and number of hollows that form part of an offset;[9]
- remove the variation rules allowing offsets to move from class to formation.
- remove the option to substitute 'flora for flora' or 'fauna for fauna' (of same or higher threat status) under the variation rules for species credits (clause 6.4(1)(c)) – such offsets should always benefit the same species even if the potential to vary where in NSW the offsets are located is retained; and
- delete the option to meet offset obligations via mine rehabilitation (clause 6.2 (2)(e)).[10]

We **support** the power of the Environment Agency Head to exclude certain impacts on species and ecological communities from the variation rules (clause 6.4(2)) – for example, entities listed as endangered and critically endangered.

6.5 Ancillary rules of Environmental Agency Head for purposes of biodiversity offset and variation rules

We **support** the power of the Environment Agency Head to develop ancillary rules under clause 6.5 of the Regulation, including to exclude certain impacts from offset variation rules.

The ancillary rules themselves are not yet available for comment. However, clause 6.5(2)(f) notes that reasonable steps prior to exercising offset variation rules 'may' include: checking the 'credits available' register, following up potential Stewardship Sites from the register of interest, and listing 'Credits wanted'. This definition of reasonable steps is minimal and inadequate and creates a significant risk to the meaningful operation of the BC Trust. Reasonable steps must include an effort to locate like-for-like offsets beyond checking the register and expressing interest in credits on a website. Reasonable steps should include the requirement to approach landholders with potential like-for-like stewardship sites to negotiate potential offsets. A failure to include such requirements would have significant implications not only for the adequacy of offsets but also the effective functioning of the Offsets Payment Calculator. One of the three modules in the Offsets Payment Calculator is the cost of the operation of the BC Trust to find offsets. If all Proponents and the BC Trust are required to do is check a website, then the costs of identifying potential like-for-like offsets, as currently undertaken by the Nature Conservation Trust, will not be costed into the model and Proponents will not be required to pay for any reasonable landholder negotiations. We note that this component of the Offsets Payment Calculator is not currently available for consultation.

If offset variations continue to be permitted, we **recommend** inserting a concurrence requirement from OEH where offset variations are proposed, in addition to (or as part of) 'reasonable steps' (clauses 6.4(1)(a) and 6.5(2)(f)). We also **recommend** deleting 'artificial hollows' in 6.5(2)(g). As noted at clause 6.4, this variation should not be permitted as a substitute for hollow bearing trees.

6.6 Offset and other rules applying to Biodiversity Conservation Trust applying fund money towards securing biodiversity offsets

As noted above, we do not support the ability of proponents to purchase weak offsets, or pay direct into the BC Fund without verification that like-for-like credits are available.

[9] See D. Lindenmayer, M. Crane, M. Evans, M. Maron, P. Gibbons, S. Bekessy and W. Blanchard, 'The anatomy of a failed offset', *Biological Conservation* 210 (2017) 286–292, at: https://doi.org/10.1016/j.biocon.2017.04.022.
[10] We are also concerned that the wording of this section in the BAM appears to allow a much broader application of the type of works that would be done during mine rehabilitation, which is inappropriate. See our further comments on the BAM.

With such safeguards in place (subject to amendments recommended in this submission), we recognise that some flexibility for the BC Trust is necessary to exercise its obligations under the BC Fund effectively. However, the extent of the proposed variation rules is excessive and likely to lead to significant biodiversity declines in NSW. We reiterate our support for clear and specific governance and integrity arrangements to apply to the BC Trust (or other BC Fund manager).

6.7 Principles applicable to determination of "serious and irreversible impacts on biodiversity values"

EDO NSW provided detailed comments on the meaning and definition of serious and (or) irreversible impacts in our 2016 submission on the Biodiversity Conservation Bill.[11]

We generally **welcome** the concept and principles underpinning serious and irreversible impacts, but remain concerned at the level of discretion in identifying and responding to those impacts. For example, the BC Act provides that this is a matter of 'opinion' for the consent authority.

Also, the Act does not prohibit the approval of serious and irreversible impacts from State Significant Development (**SSD**) or Infrastructure (**SSI**), local 'Part 5' infrastructure or biocertification applications. Such projects can be approved if the consent authority takes those impacts into consideration, and determines whether additional measures are needed to minimise those impacts (BC Act s. 7.16 and 8.8).

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).

We also **recommend** that references to extinction risk be clarified to refer to an appropriate scale and scope. The scale of extinction risk is currently ambiguous in the Regulation and guidance. The regulation should define this to mean extinction in the relevant bioregion or, at most, New South Wales (see 6.7(2)). Furthermore, as noted in our comments on serious and irreversible impact below, extinction risk should also consider local extinction as per the existing 7 part test process. We consider it would be unacceptable to define extinction risk at any larger scale (e.g. Australia). Also, in the case of impacts on listed endangered populations, for example, the relevant scale would be at population level.

We also **recommend** that clause 6.7(2) explicitly require consent authorities to have regard to the *precautionary principle*[12] and *cumulative impacts* on the threatened species or community when assessing extinction risk. This should include a 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. The clause should also specify that a contribution to extinction risk includes a likely increase in threat status (e.g. from vulnerable to endangered).

We also **recommend** that the Regulation prescribe an additional serious and irreversible impact principle and guidance so that, where 'reasonable steps' are taken to verify if like-for-

[11] Available at: http://www.edonsw.org.au/biodiversity_legislation_review
[12] I.e. lack of full scientific certainty is not a reason to defer precautionary measures. The objectives of the BC Act refer to acting consistently with ESD principles (s. 1.3).

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.

Finally 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 (cl. 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*.[13] These additions are of primary importance to large-scale clearing in rural areas where the BAM applies; 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.

Specific comments on the *Draft guidance and criteria to assist a decision maker to determine serious and irreversible impacts* are dealt with below.

Division 6.2 Biodiversity assessment reports (clauses 6.8-6.10)

We **recommend** the Regulation specify that biodiversity development assessment reports (**BDARs**, cl. 6.8) and biodiversity certification assessment reports (**BCARs**, clause 6.9) must:

- demonstrate that *all reasonable steps have been taken to avoid and minimise impacts* before biodiversity offset options have been considered (this reflects the aims of the BOS and the requirements of the BAM) and where this is not done require the consent authority to refuse the development;
- report on any *uncertainty* as to the likely effectiveness of measures to avoid, minimise or offset impacts (consistent with the precautionary principle) and where uncertainty exists require upfront offsets for potential impacts;
- specify how *raw data used to prepare the report can be freely accessed* by regulators and the community (for the purposes of public transparency and audit functions); and
- include precautions to prevent 'consultant-shopping' for more favourable reports, i.e. by requiring:
    - the proponent to state whether the BAM has been applied to that site over the past five years, whether by the same or a different consultant;
    - any previous BAM reports to be provided to the consent authority for consideration; and
    - the accredited consultant to explain any changes in the results.

In relation to the accreditation of biodiversity assessors we **recommend** that this Regulation breaks the nexus between developer and proponent and establishes a system of OEH appointing consultants to a project from an accredited pool of consultants. (This is discussed further below).

We also **recommend** the Regulation specify that biodiversity stewardship site assessment reports (clause 6.10) be required to:

- estimate the likely *timeframe* for different numbers and classes of credits to be realised as on-site biodiversity gains (time-lag between impacts and improvements is

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

an important consideration in offsetting, and a specific requirement would inform consent authorities of these risks);
- report on any *uncertainty* as to the likely effectiveness and success of measures to improve biodiversity on the site; and
- specify whether credits generated from the site are to be used (i.e. sold or retired) as an offset for development, or are to be retired for altruistic or philanthropic purposes (if known; note this reflects Regulation clause 9.4(g)).

Division 6.4 Biodiversity Stewardship Payments Fund (clauses 6.14-6.25)

We are extremely concerned that if an individual site is in deficit then the BC Fund cannot pay the landholder, and if the entire fund "is insufficient to meet Fund Manager liabilities" the entire BC Fund can be wound up. Given the scheme is supposed to be providing in-perpetuity biodiversity protection, this is inappropriate. We **recommend** that the NSW Government act as guarantor for the BC Fund so that biodiversity outcomes will continue to be maintained even if the market system fails.

Part 7 Biodiversity assessment and approvals under Planning Act

We **welcome** the approach of setting the biodiversity offsets scheme threshold (**BOS threshold**) with reference to both area of clearing and sensitive values (clause 7.1) although we remain concerned about the specific thresholds proposed.[14] However, as noted in previous parts of this submission, we caution against relying on the BAM and offset rules in their current form to protect sensitive areas. Without clearer protection, sensitive areas can still be offset or exchanged for money via the offset rules, pay-to-Fund option, and offset calculations that do not adequately factor scarcity into pricing.

We **strongly support** the comprehensive and up-to-date mapping for inclusion in the Sensitive Biodiversity Values Land Map (**sensitive values map**) (clause 7.3). It is important that this map is operational and accurate upon commencement of the new system, to protect vulnerable or sensitive land. The risk that the sensitive values map is incomplete (for example, mapping of areas that are core koala habitat, that contain high conservation value grasslands, or that contains critically endangered species) is a further reason not to rush commencement of the new regime.

7.2 Clearing of area of land that exceeds threshold

This clause sets out how lot size and area of clearing are used to determine whether proposed clearing meets the biodiversity offsets scheme (**BOS**) threshold (i.e. will be assessed using the BAM). Similar detail is required to define 'treatment areas' in the Native Vegetation Code, as the size of the treatment area has a significant bearing on what can be cleared. Indeed the BAM threshold highlights the unprecedented scale of clearing that can be done in rural areas without detailed impact assessment via Equity/Farm Plan Codes.

A strong BOS threshold is an important component of the new assessment system, and a central mechanism to regulate cumulative impacts of smaller-scale clearing. It is therefore important that these thresholds are not weakened (i.e. clearing size increased).

We recommend that the BOS threshold should be a standard **0.25 ha** regardless of lot size, as lot sizes does not reflect potential biological impact. To achieve the desired biodiversity goals, the new system needs to capture smaller sites with sensitive values, including residential sites that border sensitive areas and may cause negative 'edge effects'.

[14] See below and our submission on the BAM for further information.

We also **recommend** that the new system assesses and tracks the cumulative impacts of clearing *non-threatened vegetation*. This clearing may result in more fauna and flora becoming newly threatened; may deplete land carbon storage and exacerbate urban heat island effects. However, not all of these impacts are assessed by the BAM. We are concerned, therefore, that consent authorities 'may (but are not required to)' further consider the impact of major projects on biodiversity values under the Planning Act beyond those addressed in the BAM. We are also very concerned that offset requirements for major projects appear to be widely discretionary (BC Act s. 7.14(2)-(3)).

7.3 Clearing within sensitive biodiversity values map exceeds threshold

We **strongly support** the list of matters proposed for inclusion in the sensitive values map (clause 7.3). Note we make further recommendations to extend this category in our comments on the native vegetation regulation and proposed code, for example to include TSRs, a minimum mapped riparian buffer of 20m around all watercourses, and the coastal zone.

It is vital these matters are comprehensively mapped by the time the new system commences to ensure they are properly assessed. As discussed above, further safeguards are also needed to protect them from insufficient offsetting requirements.

We **recommend** amending clause 7.3 to require the Environment Agency Head to keep the map accurate, comprehensive and up-to-date; and to require that the sensitive values map 'must' rather than 'may' include the matters listed in clause 7.3.

7.4 Amendments to list of vulnerable species or ecological communities

It is unclear why Part 5 activities should be exempt from having to consider newly-listed vulnerable species and ecological communities. We **recommend** this clause be deleted and that newly-listed species be considered in all assessment processes.

7.5 Modification of Part 5 activity

Subclause (4) appears to blur the line between avoidance, mitigation and offsetting when it says the retirement of credits should be considered as avoidance or mitigation when a Part 5 activity is later modified. We **recommend** this be deleted or clarified.

Part 8 Biodiversity certification of land

The biocertification scheme under the TSC Act allows large-scale, upfront assessment of biodiversity, such as to plan for greenfield development. For example, the Western Sydney Growth Centres were biocertified and offsets were required in exchange for the destruction of Cumberland Plain Woodland (now Critically Endangered). Biocertification removes the need for further project-by-project biodiversity assessment.[15] Proposals can be exhibited in tandem with a rezoning application.[16]

Part 8 of the BC Act will expand Biocertification to:

[15] TSC Act Part 7AA; BC Act s. 8.4.
[16] See for example BC Act s. 8.6(6) (Consultation and public notification requirements).

- adopt a lower environmental standard for approval (removing the requirement to 'maintain or improve' environmental outcomes, making it discretionary to require offsets in accordance with the BAM, along with other discretionary measures);[17]
- allow urban developers/rural landholders to apply (not just planning authorities); and
- allow planning authorities[18] to ask the Environment Minister to declare their proposal as 'strategic' biocertification (a new category allowing looser offset rules for planning authorities (BC Act s. 8.3)).

EDO NSW remains concern at the proposed 'strategic' biocertification category because it further compromises the environmental standards to which 'strategic' assessments should be held. It does this based on broad ministerial discretion which is not properly clarified or limited by the criteria proposed in the Regulation (clause 8.2).

As noted above, we **recommend** clause 6.2(5)(b) be amended to require that:

- (ordinary) biocertification impacts may only be offset by like-for-like credits (not offset variation rules); and
- strategic biocertification impacts may only be offset by like-for-like credits or more strictly limited variation rules (in accordance with our recommendations on Part 6).

8.1 Avoiding or minimising impacts of clearing and loss of habitat may be specified as related other approved conservation measures in order conferring biodiversity certification

The BC Act sets out 'approved conservation measures' to compensate for the negative impacts of biocertification (s. 8.3). The Act permits the regulations to specify additional approved conservation measures and related matters (s. 8.3(2)(e), (3)(c)).

However, clause 8.1 of the Regulation contradicts the intent of the BOS by blurring the line between avoidance, minimisation and offsets. The BOS claims to embed a hierarchy of actions, with avoidance and minimisation first.[19] Yet clause 8.1 states that: 'Measures to avoid or minimise the impacts on biodiversity values… may be specified as approved conservation measures in the order conferring biodiversity certification.' Avoidance and minimisation should be *prerequisites* to biocertification, not an 'offset' for the impacts.

We **recommend** deleting clause 8.1. The BC Act and Regulations should ensure that biocertification proposals must first avoid and minimise biodiversity impacts, rather than allow avoidance and minimisation actions (which the hierarchy states should occur anyway) to somehow 'offset' loss.

If this is not the intended effect of clause 8.1, then that needs to be clarified (in s. 8.3 of the BC Act and Part 8 of the Regulation), to avoid 'discounting' the true value of measures required to offset biocertification impacts. See related concerns regarding clause 8.8.

[17] The existing requirement to 'maintain or improve' environmental outcomes (TSC Act Part 7AA) is replaced with the requirement to apply the BAM (BC Act s. 6.13); consider whether the proposal will cause 'serious and irreversible impacts' on biodiversity (s. 8.8); and apply discretionary 'approved conservation measures' which may, but need not, include like-for-like offsets or reflect the BAM (ss. 8.3, 8.7, 8.14).
[18] Planning authorities include local councils, Local Land Services (LLS), determining agencies under Part 5 of the Planning Act, the Greater Sydney Commission, NSW Planning Minister or the Secretary of the Planning Department.
[19] See for example Regulation cl. 6.2(1) (Offset rules under biodiversity offsets scheme).

8.2 Criteria to be taken into account by Minister when declaring strategic application

Noting our concerns about weaker, discretionary environmental standards for 'strategic' biocertification, we consider the proposed criteria in clause 8.2 are vague and inadequate.[20] There are no specific environmental heads of consideration (such as the principles of ESD which underpin the Act[21]), and there is no requirement to seek advice from the Environment Agency Head, the Biodiversity Conservation Advisory Panel, or the Threatened Species Scientific Committee which lists species and communities and evaluates their extinction risks. These requirements should be inserted into the Regulation.

Furthermore, as noted above (clause 6.2), strategic biocertification impacts should only be offset by like-for-like credits (or limited variation rules in accordance with our recommendations on Part 6). The alternative of paying money direct to the BC Fund, without verifying if sufficient like-for-like offsets are even available for the BC Fund to conserve, must not be available without first ensuring like-for-like offsets do exist.

8.3 Consultation with local councils on biodiversity certification applications

We **welcome** the additional requirement to consult with local councils for at least 42 days before the public consultation period. The minimum period for *public* consultation (BC Act s. 8.6(3)(b)) is only 30 days – this should be extended.

To improve public transparency and participation we **recommend**:

- requiring the proponent or local council to publish the draft proposal online at the same time (and for the same period) as it is provided to the council;
- requiring the proponent to publish a summary of changes arising from council's submission when the proposal is exhibited for public comment;
- extending the minimum public consultation period to 42 days (instead of 30).

8.5 Additional grounds for suspension or revocation of biodiversity certification

We **welcome** this clause that permits suspension or revocation where the Minister considers that approved conservation measures no longer address the impacts.

8.8 Extension of period or modification of biodiversity certification

Clause 8.8(2) of the Regulation requires applications to modify biocertification to identify whether the land subject to the modification includes areas where biodiversity impacts were *avoided and minimised* under the original biocertification.

We have strong concerns that this clause does not go on to prohibit impacts on those areas previously avoided. It is unacceptable that proponents can renege on strategic commitments to protect and preserve biodiversity via later modifications.

[20] As proposed, cl. 8.2 essentially requires the minister to consider:
- the size of the area proposed to be certified;
- applicable regional or district plans;
- advice from the Planning Minister (who may in fact be the proponent); and
- the 'economic, social or environmental outcomes that the proposed biodiversity certification could facilitate'.

[21] Specifically the precautionary principle; conservation of biodiversity and ecological integrity as a fundamental consideration; intergenerational (and intra-generational) equity; and full environmental costs and risks in decision-making. See BC Act s. 1.3 and *Protection of the Environment Administration Act 1991* (NSW) s. 6.

We **recommend** clause 8.8 be amended to prohibit modifications that have adverse impacts on land where previous biocertification was required to avoid and minimise impacts, or where offsets (or related measures) from that biocertification are located.

Part 9 Public consultation and public registers

9.1 Exclusion of Christmas/New Year period

We **support** the exclusion of Christmas/New Year period from public consultation periods.

9.2 Public register of biodiversity conservation licences

It is unclear why this clause excludes existing biodiversity conservation licences from public registers under the BC Act. We **recommend** deleting clause 9.2 to ensure the licensing system is transparent, particularly while those licences are still in force.

9.3 Register of private land conservation agreements

We **recommend** ensuring that information in this register is at least equivalent to existing registers.

We **recommend** the creation of an additional public register to ensure that previous offset arrangements made by conditions of consent are also recorded and that relevant biological data from these sites is available to OEH and the public.

We **recommend** that the register of set asides under the LLS Amendment Act and its Regulation is required to contain information at least equivalent to clause 9.3. Note, we make further comment on this below.

We **support** legitimate IT safeguards to protect this information from people with unlawful intent (such as poachers). See, for example, Regulation clause 9.10.

9.5 Public register of accredited persons who apply BAM

We **recommend** this clause include any compliance outcomes or findings of misconduct in relation to an accredited person (unless that outcome or finding results in the person's accreditation being cancelled).

9.6 Public register of remediation orders

It is unclear why this clause excludes information relating to a remediation direction given under the *Native Vegetation Act 2003*. We **recommend** deleting clause 9.6, unless the LLS Amendment Act and Regulation include an equivalent requirement.

9.10 Additional authority for restriction of access to information in public registers

We note that the fact sheet refers to only restricting information if it is in the public interest. If this is the intent, then it should be explicit. It is not appropriate to withhold information on offset areas when they are part of a legislative mechanism to protect biodiversity.

Part 10 Biodiversity Conservation Trust

As noted in our comments on Part 6, we **recommend** the Regulations require that, before a payment can be made into the BC Fund under s. 6.30 of the BC Act, the BC Trust (or the proponent of development, clearing or biocertification) is required to verify that like-for-like credits are available.

If so, the proponent can acquit their offsetting obligation by paying into the BC Fund.[22] If not, the BC Trust must be prohibited from accepting payment to the BC Fund, and the proponent must consider other options to generate offsets, modify or withdraw the project.

On a separate matter, we **welcome** the linkage in clause 10.1(1)(c) between the BC Trust's business plan and the monitoring and evaluation data required for biodiversity information programs (BC Act s. 14.3). We **recommend** a similar requirement in the LLS Amendment Regulation with regard to land-clearing data.

Part 11 Regulatory compliance mechanisms

The BC Act provides that interim protection orders may contain terms of a kind set out in the regulations (s. 11.9(2)).

As noted under Part 3, we **recommend** the Regulation also provides that interim protection orders *automatically* apply to *potential* AOBVs (i.e. once their nomination is accepted for consideration). These areas must be protected from adverse impacts, mapped as sensitive lands and excluded from rural Code-based clearing while they are under consideration. This could be given effect under Part 3 or Part 11, and supported by timeframes for declaring an AOBV.

Part 13 Criminal and civil proceedings

We **recommend** that Part 13, or Schedule 1 to the Regulation (penalty notice offences) clarify that multiple penalty notices can be issued where a person's act or omission allegedly breaches multiple provisions of an Act or regulations.

Part 14 Miscellaneous

14.2 Biodiversity information programs

We **welcome** the requirement to establish programs to collect, monitor and assess biodiversity information under s. 14.3 of the BC Act. We also **welcome** the proposal that the data collection and reporting methods are subject to peer review (clause 14.2(5)).

We **recommend** an equivalent peer review requirement apply to the Native Vegetation Code under the LLS Amendment Act and Regulation.

Biodiversity Outlook reports

We **strongly support** the proposal for Biodiversity Outlook Reports (on status and trends) to be published frequently under the Regulation (clause 14.2).

[22] I.e. with clearing permitted once offsets are secured, and the BC Trust ensuring these offsets are delivered via biodiversity stewardship agreements, payments and management actions.

We **recommend** replacing 'from time to time' (clause 14.2(4)) with a set timeframe of every **2 years.** Biodiversity outcomes should continue to be reported in the State of the Environment Report every five years. However, SOE reports require a comprehensive data set and analysis to draw upon. Recent SOE reports note the '…paucity of data' (SoE 2012) and 'little new information…' (SoE 2015) is available on biodiversity status and trends. Annual Biodiversity Outlook reporting would address this gap, including going beyond threatened species and ecological communities.

We **recommend** clause 14.2 require Biodiversity Outlook reports to include comparative results from different regions of NSW over time. This would inform the review and improvement of land management and biodiversity laws and policies, and help identify data gaps by region, by type of biodiversity asset, or emerging threats.

We also **recommend** an independent panel prepare Biodiversity Outlook reports. This panel could comprise members of the Threatened Species Scientific Committee, members of the Biodiversity Conservation Advisory Panel, and other independent experts with requisite skills and qualifications.

We **recommend** clause 14.2 requires the Environment Minister to:

- table each Biodiversity Outlook report in Parliament within 1 month of receiving it; and
- table the Government's response to key threats, indicators and actions recommended in each Biodiversity Outlook report within 6 months of receiving it.

14.4 Additional persons to whom functions may be delegated by Minister or Agency Head

The BC Act allows the Minister to delegate his or her functions to the Environment Agency Head (or an OEH employee) or any person authorised by the regulations. A similar process applies to Environment Agency Head delegations (s. 14.4(2)).

We are concerned at the breadth of delegations under the Regulation (clause 14.3) given those already available under the BC Act. For example, functions of the Minister or Agency Head could be widely delegated to the BC Trust, LLS staff or board members, a local council or employee, a police officer, EPA staff or the EPA Chair, or a Department of Planning employee.

We **recommend** clause 14.4 be revised to limit each delegation to certain functions or Parts of the Act and regulations, and with clear justifications for each delegate.

Schedule 1 Penalty notice offences

The penalties available under the new regime need to provide a significant deterrent to illegal behaviour, particularly where a person stands to gain financially from that behaviour,[23] and may otherwise risk the chance of being detected and fined.

For example, a person who is caught dealing in (or harming/picking) a species vulnerable to extinction could deal with the offence by paying a penalty notice of $880 (or $220 if the species is not threatened). However, they may charge hundreds of dollars for those species on the black market and calculate that the fine (as proposed) is worth the risk.

[23] The BC Act provides for a court to issue orders regarding monetary benefits (s. 13.24), but this will not affect penalty notices unless the regulations specify further equivalent increases.

We recommend that OEH publish a clear and updated compliance and enforcement policy that details the various compliance tools and escalating use of tools scaled to unlawful actions. This will be necessary to ensure compliance with the new regime and to establish deterrence.

Schedule 2 Provisions relating to members and procedure of the Biodiversity Conservation Advisory Panel

The BC Act establishes a Biodiversity Conservation Advisory Panel to advise the Environment Minister on any biodiversity conservation management issue as requested by the Minister, and on AOBVs declarations (BC Act s. 14.2).

Clause 6 - *Removal from office of members* - allows the Environment Minister to remove a member of the Biodiversity Conservation Advisory Panel 'at any time for any reason and without notice'. This is problematic because it could allow the Panel membership to become unduly politicised and not sufficiently independent. It also contradicts the intention of the BC Act, that the content of the Panel's advice is not subject to ministerial direction or control (s. 14.2(3)).

We **recommend** deleting clause 6 or amending it to allow removal for misconduct only. Beyond this, clause 7 provides various appropriate grounds to fill a vacancy.