



Environmental
Defenders Office

Submission on the Biodiversity Assessment Method Review

11 August 2023

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

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Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonization.

INTRODUCTION

EDO welcomes the opportunity to make a submission to the 5-year review of the Biodiversity Assessment Method (**BAM**). The BAM is made under the NSW *Biodiversity Conservation Act 2016* (**BC Act**) as part of the NSW Biodiversity Offsets Scheme (**BOS**).

EDO has engaged as a key stakeholder in the development and implementation of the BC Act and BOS. We have long-standing views that the BOS does not align with best practice science-based biodiversity offsetting, permits an inappropriate level of variation, and does not contain the ecologically necessary limits to prevent extinctions. Many of our concerns, set out in previous submissions (see below), remain.

This submission outlines:

- **Overarching comments on the BOS and BAM**
- **Response to focus areas for the BAM Review**
- **Other issues**

Our submission should be considered together with our more detailed submission on the 5-year review of the BC Act.¹

OVERARCHING COMMENTS ON THE BOS AND BAM

As noted above, EDO has long-standing views that the BOS does not align with best practice science-based biodiversity offsetting, permits an inappropriate level of variation, and does not contain the ecologically necessary limits to prevent extinctions.

Our concerns are set out in more detail in the following EDO submissions and reports:

- *Submissions on the NSW Biodiversity Law Reform Packages, 2016-17;*²
- *Submission on proposed changes to Biodiversity Assessment Method, October 2019;*³
- *Submission to the inquiry into the integrity of the NSW Biodiversity Offsets Scheme, September 2021;*⁴
- *Defending the Unburnt: Offsetting our way to extinction, November 2022;*⁵
- *Submission to the Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013, 19 December 2022;*⁶ and
- *Submission to the Statutory Review of the Biodiversity Conservation Act 2016, 21 April 2023.*⁷

In particular, we have long argued that:

¹ See: <https://www.edo.org.au/wp-content/uploads/2023/04/230421-Biodiversity-Conservation-Act-Review-EDO-submission.pdf>

² See: <https://www.edo.org.au/publication/submissions-on-the-nsw-biodiversity-law-reform-package-2016/>

³ See: https://www.edo.org.au/wp-content/uploads/2019/11/191015_EDO_submission_to_draft_BAM_2019.pdf

⁴ See: <https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-integrity-of-the-nsw-biodiversity-offsets-scheme/>

⁵ See: <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>

⁶ See: <https://www.edo.org.au/wp-content/uploads/2022/12/221219-LLS-Act-Review-EDO-submission.pdf>

⁷ <https://www.edo.org.au/wp-content/uploads/2023/04/230421-Biodiversity-Conservation-Act-Review-EDO-submission.pdf>

- The BOS must adopt a clear and objective environmental standard to improve biodiversity outcomes (ie, preferably net gain).
- Legislation should adopt a scientifically-robust set of principles that govern the operation of the BOS.
- Areas of high conservation value must be off-limits to offsetting. Similarly, laws must recognise that certain critically endangered species simply cannot be offset, and that offsets may not exist for certain species.
- Legislation must require that genuine attempts to avoid and minimise impacts on threatened species and ecological communities can be demonstrated before the BOS can be applied. Clear guidance on the required steps and evidence of steps taken should be developed.
- Like-for-like offsetting requirements must be tightened. Variation rules and the use of indirect offsets must be strictly limited.
- There must be stricter parameters around the payment of money to the BCT in lieu offsets, including allowing/requiring the BCT to refuse to accept an offset liability for a proponent where it would not be possible for them to obtain like-for-like offset.
- Mine rehabilitation should not be allowed to generate offset credits.
- The ability to discount offsets should be removed. However, if a discounting mechanism is retained, it should be strictly limited – e.g. any discounts should only be allowed if based on ecological reasons, and if reasons are provided for decisions.
- Formulas used to determine credit pricing must incorporate an appropriate risk factor to ensure that like for like offsets can be sourced and managed in perpetuity and that increasing scarcity of biodiversity is embedded in the pricing mechanism in a non-linear fashion (to ensure that it becomes increasingly expensive to purchase credits for increasingly scarce species and ecosystems).

It is important that the review of the BAM has regard to these broader concerns about the BOS.

RESPONSE TO FOCUS AREAS FOR THE BAM REVIEW

We provide a brief response to each of the consultation focus areas identified in the *Biodiversity Assessment Method review - Public consultation* document.⁸ Numbers referenced in this part of our submission refer to section numbers in that document.

5.1 Consider opportunities to simplify the Biodiversity Assessment Method

5.1.1 Balancing practicality and rigour

Opportunities to simplify the BAM should not undermine the integrity of the BAM or its ability to deliver biodiversity outcomes in line with the BC Act. Timely and cost-effective assessments are not a reliable measure of the BAM's success in terms of delivering outcomes. More important is ensuring that the BAM delivers the environmental outcomes intended, including no net loss of biodiversity in New South Wales (or, as we recommend in our submission to the 5-year review of the BC Act, a more ambitious outcome of 'net gain' in biodiversity).

⁸ <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/biodiversity-assessment-method-review-consultation-230246.pdf>

5.2 Improve transparency and consistency of processes and outcomes

5.2.1 Promoting the avoid and minimise hierarchy

We agree that the BAM review provides an opportunity to strengthen the application of the avoid and minimise hierarchy. We suggest that the BAM and the broader framework must do more than simply promote the avoid and minimise hierarchy. The hierarchy should be clearly set out in legislation as a mandatory pre-condition before any offsetting option is considered, and be properly implemented and enforced. Appropriate guidance should be provided to proponents on how they can demonstrate their endeavours to genuinely ‘avoid’ and ‘mitigate’ aspects of the proposed development, including guidance on the steps and evidence required to apply the hierarchy.

5.2.2 Assuring appropriate assessment of serious and irreversible impacts

Provisions requiring the assessment and consideration of serious and irreversible impacts provide an important safeguard for biodiversity, including species and ecological communities at high risk of extinction. The provisions act as a strict ‘red flag’ for general Part 4 development (i.e. development assessed under Part 4 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**)) by requiring consent authorities to refuse proposals that will have serious and irreversible impacts on biodiversity values.⁹ However, decision-maker discretion is allowed in the case of state significant development and state significant infrastructure, and those projects may be approved despite having serious and irreversible impacts.¹⁰

The assessment of serious and irreversible impacts should be strengthened by requiring the precautionary principle to be applied and cumulative impacts to be considered. For example, we recommend that clause 6.7(2) of the *Biodiversity Conservation Regulation 2017* explicitly require consent authorities to have regard to the precautionary principle and cumulative impacts on the threatened species or community when assessing extinction risk.

The safeguard could be further strengthened by mandating the refusal of state significant development and infrastructure with serious and irreversible impacts – consistent with general Part 4 development.

5.3 Ensure the Biodiversity Assessment Method is fit for purpose

5.3.1 Achieving no net loss in the context of cumulative impact

- **No net loss**

Section 6.7(3)(b) of the BC Act requires that in establishing the BAM, the Minister must adopt a standard that, in the opinion of the Minister, will result in no net loss of biodiversity in NSW. EDO has a number of concerns with the way ‘no net loss’ is adopted in the BC Act and BAM:

⁹ *Biodiversity Conservation Act 2016*, s 7.16(2).

¹⁰ *Biodiversity Conservation Act 2016*, s 7.16(3).

- The no net loss standard (including the definition of no net loss in the BAM) is based on the subjectivity of the Minister. If retained, we recommend that application of no net loss is significantly strengthened to meet accepted definitions and application.¹¹
- However, we recommend that 'no net loss' is repealed and replaced, and the BC Act and BAM adopt a 'net gain' standard (or similar). Simply requiring 'no net loss' does not acknowledge current downward trajectories of biodiversity loss, and that positive action is required to halt and reverse this trend. Offset schemes must be designed to improve biodiversity values (e.g. to achieve 'no net loss or better', 'net gain', or 'maintain and improve' biodiversity values). This would be consistent with international and Australian commitments to 'nature positive' biodiversity conservation aimed at reversing biodiversity loss and halting extinctions.
- Failure to properly address cumulative impacts across the landscape hinders achievement of no net loss.

- **Cumulative impacts**

The BC Act, together with related land use frameworks, including the NSW planning framework and land clearing framework, does not adequately deal with cumulative impacts. For example:

- impacts are often assessed site-by-site, with few requirements to consider or appropriately address impacts more broadly within the landscape;
- various approval pathways allow 'low-impact' activities to be undertaken with little oversight, ignoring potential cumulative impacts of a myriad of 'low impact' activities; and,
- strategic planning processes provide an opportunity for cumulative impacts across a landscape to be identified and managed upfront, but often fail to deliver effective protections against those impacts in practice.

Unsurprisingly, the BAM, as part of this framework, follows this trend. It fails to provide any robust assessment and response to cumulative impacts on biodiversity. We provide three examples of where the BAM and BOS could be improved:

- Clearing that falls below the BOS threshold is not required to be assessed in accordance with the BAM. It is therefore important that the BOS threshold is strong, to capture cumulative impacts of small-scale clearing which can have disastrous effects on biodiversity, including in urban areas and environmental zones. For example, 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. It is important to capture smaller sites with sensitive values, including residential sites that border sensitive areas and may cause negative 'edge effects'.
- The framework fails to require consideration of cumulative impacts in relation to all prescribed biodiversity impacts. The framework should explicitly require cumulative impacts to be considered, particularly as part of mechanisms intended to provide environmental safeguards.
- Streamlined assessment modules in the BAM reduce important oversight, without providing mechanisms for considering and addressing cumulative impacts.

¹¹ See for example Bull, J., Gordon, A., Watson, J. and Maron, M. (2016) Seeking convergence on the key concepts in 'no net loss' policy *Journal of Applied Ecology* 53(6): 1686-1693 and Maskeyk, F., Barea, L., Stephens, R. Possingham, H., Duston, G. and Maron, M. (2016) A disaggregated biodiversity offset accounting model to improve estimation of ecological equivalency and no net loss *Biological Conservation* 204(Part B): 322- 332.

5.4 Ensure the Biodiversity Assessment Method is an appropriately flexible standardised assessment

5.4.1 Applying the BAM at different scales and in different conditions

We acknowledge the issues raised in the *Biodiversity Assessment Method review - Public consultation* document. While we don't provide a response to the specific questions posed, we make the following comments in relation to:

- streamlined assessment modules; and
- areas and scenarios not appropriate for offsetting, including extreme conditions.

- **Streamlined assessment modules**

EDO is generally cautious of 'streamlined' assessment processes or assessment pathways for activities that are notionally deemed 'low-risk'. In our experience, such processes and pathways remove important rigour and oversight, and are not usually limited to genuinely low-risk activities. The BAM includes a number of 'streamlined assessment modules' including for scattered trees, planted native vegetation and small areas. EDO has previously raised concerns about these modules, and their ability to undermine the BAM's ability to deliver effective biodiversity outcomes. The modules also fail to take into account cumulative impacts from incremental impacts.

Our key concerns are summarised as follows:

- *Appendix B: Streamlined assessment module – Scattered trees assessment:* This module significantly undervalues paddock trees and clumps of small, isolated trees in the landscape. These are particularly important for maintaining fauna species richness and diversity. This is just as true in urban and peri-urban areas as in rural landscapes. Urban trees provide important habitat and connectivity in cleared and populated areas. The removal of scattered trees is likely to remove habitat essential to fauna, creating barriers to dispersal and reduction in population genetics.
- *Appendix C: Streamlined assessment module – Small area:* Many of EDO's previous concerns in relation to this module remain. We previously opposed the expansion of this module to areas found within the Biodiversity Values Map (**BVM**). This significantly undermines the purpose of the BVM which is to identify "land with high biodiversity value that is particularly sensitive to impacts from development and clearing"¹² (emphasis added). On this basis alone, areas on the BVM are not suitable for streamlined assessment; comprehensive biodiversity impact assessment of areas found on the BVM should be required. While 2020 amendments to the BAM reduced the area limit to which the assessment module can be applied for minimum lot sizes of 1,000ha or more (from 10 ha to 5ha), we remain concerned that areas permitted for assessment under this module are still too large. We also remained concerned about the potential cumulative impacts that could arise from the use of this module.
- *Appendix D: Streamlined assessment module – Planted native vegetation:* The term planted native vegetation remains undefined.

¹² Biodiversity Values Map <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/biodiversity-offsets-scheme/entry-requirements/biodiversity-values-map>

- **Areas and scenarios not appropriate for offsetting, including extreme conditions**

EDO has long argued that some impacts and some areas are not appropriate for offsetting. The framework must set clear parameters for when offsets cannot be used. For example, the framework should identify ‘red flags’ or ‘no go’ areas or scenarios (with criteria set out in legislation) to make it clear that there are certain matters in relation to which offsetting is not an appropriate strategy. This is particularly relevant to critical habitat and threatened species or communities that cannot withstand further loss. This type of mechanism could also be used to restrict the use of offsets in circumstances of extreme condition. That is, where extreme conditions occur, biodiversity offsetting should not be available.

5.5 Evaluate the adequacy of metrics and models embedded within the Biodiversity Assessment Method

5.5.1 Ensuring appropriate gain and credits from management

As noted in the *Biodiversity Assessment Method review - Public consultation* document, the Parliamentary Inquiry into the Integrity of the Biodiversity Offsets Scheme recommended a review of the use of averted loss in gain calculations to account for decline associated with unmanaged sites, settings to limit credits for existing conservation obligations (additionality) and the value placed on landscape connectivity and preservation of high-quality habitat.

EDO has previously raised concerns about the use of averted loss as part of the measurement of gain at a stewardship site.¹³ The use of averted loss embeds a presumption that high quality vegetation that has been protected and appropriately managed by landholders in the past, can and will be cleared in the immediate future.

The BAM also includes unacceptable criteria for allowing an increased rate of decline due to the presence of high threat weeds, many of which would be required to be controlled under the *Biosecurity Act 2015* (NSW). This is another instance of double-dipping. Management actions that are already required by legislation (e.g. those actions required under the *Biosecurity Act 2015*) should not generate offset credits under the BAM.

Similarly, while EDO strongly supports appropriate monitoring, the need for monitoring is a prerequisite to appropriate management. It does not provide an improved environmental outcome in and of itself and should be seen as a compulsory feature of any stewardship agreement, not something that generates credits.

OTHER ISSUES

We also note our ongoing concerns in relation to:

- Strategic biodiversity certification
- The *Addendum to NSW Biodiversity Offsets Policy for Major Projects: upland swamps impacted by longwall mining subsidence (Swamp Offsets Policy)*.

¹³ See EDO, *Technical submission on the Biodiversity Assessment Method and Mapping Method 2016*, available at: https://www.edo.org.au/wp-content/uploads/2020/08/160628_EDO_NSW_Technical_submission_on_the_Biodiversity_Assessment_Method_and_Mapping_Method_2016-1.pdf

- Mine site ecological rehabilitation
- **Strategic biodiversity certification**

Although the offsets rules don't apply to a strategic application for biodiversity certification,¹⁴ the BAM attempts to provide greater clarity around how to value offsets under the strategic biodiversity certification process (see Appendix J of the BAM). EDO continues to have significant concerns about strategic biodiversity certification and in particular, the use of offsets and other approved conservation measures for strategic biodiversity certification proposals. Our specific concerns are outlined in our 2019 submission on proposed changes to the BAM.¹⁵

- **Swamp Offsets Policy**

Under clause 8.3.4 of the BAM, proposed impacts in relation to longwall mining are to be calculated as per the Swamp Offsets Policy.

It has been known since at least 2014 that there is no evidence that damage to upland swamps from longwall mining can be mitigated or remediated. A report prepared for the Australian Government evaluating mitigation and remediation techniques in respect of longwall mining beneath the Temperate Highland Peat Swamps on Sandstone¹⁶ concluded that:

- The only strategy that has been proven to effectively mitigate the impacts of longwall mining on swamps is to change the mine plan layout.
- There were no examples of upland peat swamps impacted by longwall mining that have been remediated. That is, it is not possible to remediate peat.
- Existing remediation techniques 'are unproven and appear insufficient without the destruction of the surface environment'.

Earlier versions of NSW offset systems explicitly excluded upland swamp communities because it was recognised that remediation of swamps cannot be demonstrated; impacts to upland swamps from activities such as longwall mining do not arise purely as a consequence of direct land clearing; and existing offset policies failed to adequately deal with these types of impacts. Despite this earlier recognition, the Swamp Offset Policy is now adopted by the BOS under the BAM.

- **Mine rehabilitation**

Ancillary rules can set out standards for the ecological rehabilitation of sites impacted by the carrying out of mining and the credit value of any such rehabilitation.¹⁷ The previous NSW Government proposed to introduce ancillary rules for mine site ecological rehabilitation. Allowing mine rehabilitation to generate credits under the BAM is highly problematic. Providing any offset credits for mine rehabilitation work creates a perverse incentive to allow or recommend poor rehabilitation outcomes during the approval stage, and for mining companies to undertake poor rehabilitation in the first instance and only undertake an adequate standard of rehabilitation

¹⁴ *Biodiversity Conservation Regulation 2017*, cl 6.2(5)(b)

¹⁵ https://www.edo.org.au/wp-content/uploads/2019/11/191015_EDO_submission_to_draft_BAM_2019.pdf

¹⁶ Commonwealth of Australia 2014, *Temperate Highland Peat Swamps on Sandstone: evaluation of mitigation and remediation techniques*, Knowledge report; prepared by the Water Research Laboratory, University of New South Wales, for the Department of Environment, Commonwealth of Australia, p. 7, available at <https://www.agriculture.gov.au/sites/default/files/documents/peat-swamp-mitigation.pdf>

¹⁷ *Biodiversity Conservation Regulation 2017*, cl 6.5(2).

where there will be a financial reward through the offsetting system. In our view, this approach constitutes double counting. We also note that, under previous rules,¹⁸ credits for mine rehabilitation were significantly discounted to recognise the high level of uncertainty in achieving positive biodiversity outcomes through mine rehabilitation but even this safeguard has been weakened. It is particularly concerning that the use of mine rehabilitation offset credits has been occurring despite the absence of a finalised policy on this issue. EDO recommends that mine rehabilitation should not be allowed to generate offset credits.

¹⁸ Under the former Framework for Biodiversity Assessment mine rehabilitation activities generated just 25% of credits.