Environmental Defenders Office

Submission on the Draft NSW Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Regulation 2026 and Consultation Paper

17 July 2026

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 40 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.

www.edo.org.au

Submitted to: bos.governance@environment.nsw.gov.au

For further information on this submission, please contact:

Cerin Loane
Special Counsel, Policy and Law Reform
E: cerin.loane@edo.org.au

Rachel Walmsley
Director, Law Reform and Government Engagement
E: rachel.walmsley@edo.org.au

Acknowledgement of Country

EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past and present and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations Cultural Heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since colonisation.

EDO recognises the right to self-determination of First Nations peoples, including their right to freely determine their own political status and freely pursue their economic, social and cultural development. This extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

Contents

Executive Summary

1. Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Draft Biodiversity Conservation Amendment (Biodiversity Offset Scheme) Regulation 2026 (**draft Regulation**) and accompanying Consultation Paper dated June 2026 (**Consultation Paper**).

2. EDO has a long history of engaging in the development, implementation and reform of the NSW Biodiversity Offsets Scheme (**BOS**). Our long-standing view is that the BOS introduced in 2016 by the BC Act does not reflect best practice or contain the ecologically necessary limits to reverse biodiversity decline and prevent extinctions.

3. Changes made by the *Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Act 2024* (**Amendment Act**) and proposed in the draft Regulation have, generally, sought to address concerns about the scheme, including in relation to its operation in practice, and its ability to deliver biodiversity offsets that deliver genuine outcomes for the environment. In general, EDO supports many of the changes that have been made or proposed.

4. However, despite the recent amendments, we have ongoing concerns about the overreliance on biodiversity offsets generally, particularly where there is a risk that biodiversity offsets will not adequately compensate for the impacts of development and drive further ecological decline. We will continue to highlight opportunities for the Government to better manage impacts on biodiversity, including through the BOS, as it continues to implement the *NSW Plan for Nature*.

5. Our submission discusses key areas of ongoing concern, indicates proposals we support and makes recommendations for the draft Regulation to further strengthen the BOS, in line with the Government's commitment to improve biodiversity outcomes from the BOS.

Summary of Recommendations

Recommendation 1: Amend proposed clause 6.13A as follows:

a) lower the credit retirement threshold to 75 to ensure the threshold is effective in reducing reliance on the fund; and
b) set out proposed acceptable measures in the BC Regulation itself to ensure they are not easily amended and to provide certainty and transparency to stakeholders (while retaining the ability for the Environment Agency Head to identify additional acceptable measures on the website).

See **Appendix A** for marked up amendments to clause 6.13A to this effect.

Recommendation 2: For the purpose of proposed clause 6.13A, the approved form should require documentary evidence of having undertaken acceptable measures, including for example, dated copies of all relevant correspondence.

Recommendation 3: Implement IPART Recommendation 10 by:

a) requiring the BCT to maintain a list of high offset risk entities that is annually updated and published on its website. The list should include entities for which credit obligations have been held by the BCT for longer than three years, any BCT offset obligations that have previously been offset using non like-for-like arrangements and entities identified as being a 'high offset risk' based on expert advice on whether the entity could be suitably offset (e.g. considering issues such as feasibility of offsets, irreplaceability etc).
b) inserting a definition of list of high offset risk entities into the BC Regulation

We have included a marked up definition of a list of high offset risk entities at **Appendix A** (as part of recommended amendments to clause 6.13A).

Recommendation 4: Amend proposed clause 6.7 and proposed clause 6.9 to give effect to IPART Recommendation 11, by requiring information about high risk offset entities to be included in a Biodiversity Assessment Development Report or Biodiversity Certification Assessment Report.

See **Appendix B** for marked up amendments to clause 6.7 and proposed clause 6.9 to this effect.

Recommendation 5: Amend proposed clause 6.13A to require that a person must not retire biodiversity credits by paying an amount into the Biodiversity Conservation Fund for entities listed on a list of high offset risk entities.

See **Appendix A** for marked up amendments to clause 6.13A to this effect.

Recommendation 6: Amend the BC Act to require that *all* projects with serious and irreversible impacts must be refused (except in limited circumstances).

Recommendation 7: Amend proposed clause 6.8(2) of the draft Regulation to require all measures to be relevant to the proposal in the report, to ensure there is a clear nexus between the measure and the proposal.

Recommendation 8: Provide clearer direction as to what constitutes "reliable information" and "evidence" for the purposes of clause 6.8(2)(b)(ii) and clause 6.10AA(1)(d) respectively.

See **Appendix C** for marked up amendments demonstrating how this recommendation could be implemented.

Recommendation 9: Insert additional provisions in the draft Regulation to set more detailed guidance as to how the mitigation hierarchy should be applied, for example, by identifying areas (setting standards) as to what types of areas are expected to be avoided or what types of mitigation measures would be expected for certain impacts.

Recommendation 10: Do not proceed with changes to the entry thresholds to the BOS (e.g. remove Item 45 from the draft Regulation).

Recommendation 11: Do not proceed with the proposal to allow desk top biodiversity assessment only. However, if this proposal is to be pursued, we recommend that clear criteria set out what types of projects have low biodiversity risks and what type of data is sufficient to qualify for a desktop assessment, including that data is up-to-date and robust.

Recommendation 12:

a) Redesign the process for landholders to request a review of the application of the Biodiversity Values Map to their property with clear criteria, public decisions and changes to the biodiversity map itself to reflect the decisions.
b) If, however, the current process is retained, the draft Regulation must be amended to:
   (i) establish clear criteria for allowing amendments to the operation of the biodiversity values map
   (ii) more clearly specify how a decision certificate can amend the operation biodiversity values map
   (iii) more clearly specify how stop-the clock provisions are to be used.
   (iv) publicly publish decision certificates
   (v) provide more clarification on the intent and operation of clause 7.12 and the effect of the decision in allowing a choice as to which version of a map can be acted upon, where this creates vague and uncertain regulation.

Recommendation 13: Commit to reviewing the credit transaction fee structure (e.g. after one year and again after five years) to allow further adjustments to be made as needed.

Recommendation 14: Review the terminology in proposed Division 6.5A, including the definition of conservation broker, to ensure definitions are clear and there is no uncertainty about how certain definitions are intended to operate.

Recommendation 15: Clarify what is meant by "location" in proposed clauses 9.5A(e), 9.5B(e) and 9.5C(e) (e.g. is this intended to mean street address?)

Recommendation 16: Amend proposed clause 9.6A to explicitly require the public register to include information about:

- the number, location and type of biodiversity cleared under the original offset obligation;
- the location and type of biodiversity of the delivered offset; and
- whether the offset was delivered under like-for-like rules, variation rules or conservation actions, including the outcomes delivered by any conservation actions.

Introduction

6. Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the Draft Biodiversity Conservation Amendment (Biodiversity Offset Scheme) Regulation 2026 (**draft Regulation**) and accompanying Consultation Paper dated June 2026 (**Consultation Paper**). The proposed changes to the *Biodiversity Conservation Regulation 2017* (**BC Regulation**) are intended to support amendments made to the *Biodiversity Conservation Act 2016* (**BC Act**) by the *Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Act 2024* (**Amendment Act**). This includes measures to strengthen avoidance and minimisation of impacts on biodiversity values and reduce reliance on the Biodiversity Conservation Fund (**BCF**).

7. EDO has a long history of engaging in the development, implementation and reform of the NSW Biodiversity Offsets Scheme (**BOS**). Our long-standing view is that the BOS introduced in 2016 by the BC Act does not reflect best practice or contain the ecologically necessary limits to reverse biodiversity decline and prevent extinctions.

8. Changes made by the 2024 Amendment Act and proposed in the draft Regulation have, generally, sought to address concerns about the scheme, including in relation to its operation in practice, and its ability to deliver biodiversity offsets that deliver genuine outcomes for the environment. In general, EDO supports many of the changes that have been made or proposed. Where we have outstanding concerns (such as changing BOS entry thresholds), these are discussed in our submission.

9. Despite the recent amendments, we have ongoing concerns about the overreliance on biodiversity offsets generally, particularly where there is a risk that biodiversity offsets will not adequately compensate for the impacts of development and drive further ecological decline. We will continue to highlight opportunities for the Government to better manage impacts on biodiversity, including through the BOS, as it continues to implement the *NSW Plan for Nature*.[1]

10. Our submission provides feedback on the following elements of the draft Regulation and Consultation Paper:
    - Reducing reliance on Biodiversity Conservation Fund
    - Avoiding and minimising impacts on biodiversity
    - Excluding low-impact development from the BOS
    - Amendment of operation of biodiversity values map
    - Other proposed amendments
        - Fairer, more efficient credit transaction fees
        - Accreditation scheme for conservation brokers
        - Information in public registers
        - Additional biodiversity values to which the scheme applies
        - Ecological mine site rehabilitation
        - Offence for an unaccredited person who applies the Biodiversity Assessment Method

[1] NSW Government, 'NSW Plan for Nature', July 2024, available at https://www.nsw.gov.au/departments-and-agencies/cabinet-office/resources/nsw-plan-for-nature

- Provision of information on additional matters for which offence of false and misleading information applies
- Environment agency head concurrence

11. Our submission makes recommendations for the draft Regulation to further strengthen the BOS, in line with the Government's commitment to "improve biodiversity outcomes from the Biodiversity Offsets Scheme".[2]

Feedback on the draft Regulation and Consultation Paper

Reducing reliance on Biodiversity Conservation Fund

12. Following changes made by the Amendment Act, section 6.30 of the BC Act allows the Regulations to prescribe circumstances in which a person must not satisfy a requirement to retire biodiversity credits by payments into the Fund. This can be used to limit the use of the BCF, however the only measure proposed to be prescribed by the draft Regulation is for proponents to show that they have taken acceptable measures to purchase credits in the market before they can make a payment into the fund. If the BCF is going to continue to be used in NSW, then further guardrails must be introduced to address ongoing concerns about allowing payment into the BCF in lieu of direct offsets.
13. In general, we support efforts to reduce reliance on the BCF. Lessons have been learnt from jurisdictions, particularly New South Wales and Queensland, where payment into a fund is available to discharge offset obligations. Without appropriate guardrails, the use of an offsets fund can:
    - increase the risk that ecologically equivalent offsets will not be delivered, because there is not guarantee when payment into the fund is made that a suitable offset will be found;
    - exacerbate time-lags between ecological impact and compensation, because once proponents discharge their offsetting obligation by paying into the fund they can proceed with development, however offsets may not be secured or delivered by the fund until a later time;
    - can result in 'shortfalls' where there are underestimates in the amount of money needed to deliver offsets; and
    - weakens the price signals intended to deter impacts on valuable biodiversity assets, particularly where offsets markets are in use.
14. Notably, the New South Wales Independent Pricing and Regulatory Tribunal (**IPART**) found that there is evidence that payments into the BCF have "allowed development to occur at the expense of establishing a well-functioning credits market and realising biodiversity

[2] NSW Plan for Nature, 2024, p 13.

outcomes".[3] In 2023, it recommended that that the option to pay into the BCF be phased out.[4] In 2024, IPART acknowledged changes made by the Amendment Act and described these as "useful interim measures" in reducing reliance on the fund.[5] This year IPART made further recommendations for managing the risks associated with continuing to use the fund in NSW.[6]

15. Below we address the following:
    - Measures proposed by the draft Regulations
    - IPART's 2026 recommendations for managing the risks associated with using the BCF
    - Additional opportunities to establish further guardrails on the use of the BCF and offsets generally

Measures proposed by the Draft Regulations

16. We generally support the proposal for proponents to show that they have taken acceptable measures to purchase credits in the market before they can make a payment into the fund above the credit retirement threshold. This will be enacted by Item 22 of the draft Regulation which will insert new section 6.13A into BC Act. Proposed clause 6.13A provides that:

    A person required to retire biodiversity credits must not satisfy the requirement by paying an amount into the Biodiversity Conservation Fund above the credit retirement threshold unless the person gives the Environment Agency Head a declaration in the approved form that the person has taken an acceptable measure to attempt to comply with the requirement.

---

[3] Independent Pricing and Regulatory Tribunal, (IPART) 'Biodiversity Market Monitoring Annual Report 2022–23' December 2023, p 4, available at https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Annual-Report-2022-23-Biodiversity-Market-Monitoring-December-2023.PDF

[4] IPART, 2023, p 4.

[5] Independent Pricing and Regulatory Tribunal, (IPART) 'Biodiversity Market Monitoring Annual Report 2023–24' December 2024, available at https://www.ipart.nsw.gov.au/documents/annual-report/annual-report-2023-24-biodiversity-credits-market-monitoring-december-2024?timeline_id=15688

[6] Independent Pricing and Regulatory Tribunal, (IPART) 'Biodiversity Market Monitoring Annual Report 2024–25' July 2026, available at https://www.ipart.nsw.gov.au/documents/final-report/annual-report-2024-25-biodiversity-credits-market-monitoring-july-2026?timeline_id=20071.

Key recommendations include:

- Recommendation 10. The Biodiversity Conservation Trust should annually publish a point-in-time list of 'high offset risk entities', comprising of:
  a. credits obligations that it has held for longer than three years
  b. credits obligations that it has previously offset using non like-for-like rules.
- Recommendation 11. The Department should require Accredited Assessors, as part of a Biodiversity Assessment Development Report or Biodiversity Certification Assessment Report, to note any offset requirements of a proposed development that are on the Trust's list of 'high offset risk entities'.
- Recommendation 12. The Department should annually report on the impacts to biodiversity from development and the outcomes delivered by corresponding offsets. The reporting should include
  a. The number, location and type of biodiversity cleared under the original offset obligation
  b. The location and type of biodiversity of the delivered offset
  c. Whether the offset was delivered under like-for-like rules, variation rules or conservation actions, including the outcomes delivered by any conservation actions.

17. Notably, it is proposed that:

- ***acceptable measure*** means a measure—
  - (a) approved by the Environment Agency Head, and
  - (b) set out in a document published on a website maintained by the Environment Agency Head.
- ***credit retirement threshold*** is 100 biodiversity credits from the same class of biodiversity credit.

18. No explanation has been given as to how a threshold of 100 or more biodiversity credits was arrived at. On its face it appears to be an arbitrary number. We note that IPART's *Biodiversity Market Monitoring Annual Report 2024–25* indicates that the average number of credit obligations transferred to the Fund per developer is 89,[7] meaning that a substantial proportion of developers will likely fall under the proposed 100 biodiversity credit threshold. Given the policy intent is to reduce reliance on the fund, we suggest that the threshold should perhaps be lowered (e.g. to 75, or 50, or more biodiversity credits).

19. Regarding the definition of "acceptable measure", the Consultation Paper provides examples of what might be included in a list of acceptable measures maintained by the Environment Agency Head.[8] We suggest that for improved transparency and accountability, the core measures already proposed could be included in the Regulation itself, rather than a website. This is because matters listed on a website can be changed on a whim with no scrutiny or oversight. In addition to the Regulatory list, there could be a power introduced to retain the ability to identify additional measures via the website.

20. In terms of demonstrating that an acceptable measure has been taken, we generally support the proposal for the proponent to provide a declaration in the approved form. We recommend that this include providing documentary evidence of having undertaken these acceptable measures, for example, dated copies of all relevant correspondence.

21. For completeness we note the separate proposal to remove fees for transferring credits and adjust fees for retiring credits. This will also help reduce reliance on the BCF by making it easier for proponents to source credits in the market. See our more detailed comments on this proposal below.

Recommendation 1: Amend proposed clause 6.13A as follows:

a) lower the credit retirement threshold to 75 to ensure the threshold is effective in reducing reliance on the fund; and

---

[7] IPART, 2026, p 28

[8] Consultation Paper, p 3. This list includes:

- submitting a demand expression of interest with the Credits Supply Fund and participating in a reverse auction process to seek the required credits
- listing the credits they are seeking on the department's credits wanted register for at least 3 months
- engaging a conservation broker to source credits
- using another measure approved by the department.

b) set out proposed acceptable measures in the BC Regulation itself to ensure they are not easily amended and to provide certainty and transparency to stakeholders (while retaining the ability for the Environment Agency Head to identify additional acceptable measures on the website).

See **Appendix A** for marked up amendments to clause 6.13A to this effect.

Recommendation 2: For the purpose of proposed clause 6.13A, the approved form should require documentary evidence of having undertaken acceptable measures, including for example, dated copies of all relevant correspondence.

IPART's 2026 recommendations for managing the risks associated with using the BCF

22. IPART has made recommendations for managing the risks associated with using the BCF, including:
    - Recommendation 10: The Biodiversity Conservation Trust should annually publish a point-in-time list of 'high offset risk entities', comprising of:
        a. credits obligations that it has held for longer than three years
        b. credits obligations that it has previously offset using non like-for-like rules.
    - Recommendation 11: The Department should require Accredited Assessors, as part of a Biodiversity Assessment Development Report or Biodiversity Certification Assessment Report, to note any offset requirements of a proposed development that are on the Trust's list of 'high offset risk entities'.
23. As currently drafted, the draft Regulation does not implement IPART's recommendations. EDO recommends that IPART's recommendations be implemented as additional measures for managing the risks associated with using the BCF, through the draft Regulation.
24. We strongly agree that it is important to identify 'high offset risk entities'. As recommended by IPART, this could include entities for which credit obligations have been held by the BCT for longer than three years, and any obligations that have previously been offset using non like-for-like arrangements. It could also include entities identified as being a 'high offset risk' based on expert advice on whether the entity could be suitably offset (e.g. considering issues such as feasibility of offsets, irreplaceability etc.). Having assessors include this information about high risk offset entities in a Biodiversity Assessment Development Report (**BDAR**) or Biodiversity Certification Assessment Report (**BCAR**) would ensure this information is considered in decision-making.
25. Ultimately however, IPART's recommendations will not necessarily prevent payment into the BCF for high risk offset entities. This is because decision makers only need to consider the information in the BDAR or BCAR, and there is nothing in the framework that would actually prevent the use of payments into the BCF for entities on the list. Below we make recommendations for including additional provisions in the BC Regulation that specify that a person must not retire biodiversity credits by paying an amount into the Biodiversity Conservation Fund for entities listed on a list of high offset risk entities

Recommendation 3: Implement IPART Recommendation 10 by:

a) requiring the BCT to maintain a list of high offset risk entities that is annually updated and published on its website. The list should include entities for which credit obligations have been held by the BCT for longer than three years, any BCT offset obligations that have previously been offset using non like-for-like arrangements and entities identified as being a 'high offset risk' based on expert advice on whether the entity could be suitably offset (e.g. considering issues such as feasibility of offsets, irreplaceability etc).

b) inserting a definition of list of high offset risk entities into the BC Regulation

We have included a marked up definition of a list of high offset risk entities at **Appendix A** (as part of recommended amendments to clause 6.13A).

Recommendation 4: Amend proposed clause 6.7 and proposed clause 6.9 to give effect to IPART Recommendation 11, by requiring information about high risk offset entities to be included in a Biodiversity Assessment Development Report or Biodiversity Certification Assessment Report.

See **Appendix B** for marked up amendments to clause 6.7 and proposed clause 6.9 to this effect.

Additional opportunities to establish further guardrails on the use of the BCF and offsets generally

26. We suggest that further changes could be made to prevent use of the BCF for "high offset risk entities", building on IPART's Recommendations 10 and 11. This could be done through additional provisions in the BC Regulation that specify that a person must not retire biodiversity credits by paying an amount into the Biodiversity Conservation Fund for entities listed on a list of high offset risk entities.

27. This would align with recent changes to the *Environment Protection and Biodiversity Conversation Act 1999* (Cth) (**EPBC Act**) that allow protection statements to include information about whether payment of a restoration contribution charge should be available in relation to a residual significant impacts for certain entities and allow (or require) the Minister to make declarations specifying that certain entities are not eligible to be offset via payments into a fund).[9] The premise behind these amendments is to prevent the use of the offset payments for high-risk entities.

28. We also note that the EPBC Act reforms introduce new provisions that restrict the use of offsets entirely where there are unacceptable impacts (as defined in the EPBC Act). That is, offsets cannot be used to overcome unacceptable impacts, and where there are unacceptable impacts, an action must be refused (except where the action is in the national interest). While outside the scope of draft Regulation changes, further consideration should be given to how safeguards against serious and irreversible impacts operate in NSW, and whether further

[9] The *Environment Protection Reform Act 2025* (Cth) introduces a new section 134AA into the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

amendment is needed to the BC Act to align with the EPBC Act in requiring that *all* projects with serious and irreversible impacts must be refused (except in limited circumstances).[10]

> **Recommendation 5:** Amend proposed clause 6.13A to require that a person must not retire biodiversity credits by paying an amount into the Biodiversity Conservation Fund for entities listed on a list of high offset risk entities.
>
> See **Appendix A** for marked up amendments to clause 6.13A to this effect.
>
> **Recommendation 6:** Amend the BC Act to require that *all* projects with serious and irreversible impacts must be refused (except in limited circumstances).

Avoiding and minimising impacts on biodiversity

Comments on the draft Regulations

29. The Amendment Act introduced requirements for proponents to demonstrate how they have genuinely avoided and minimised impacts to biodiversity. As part of the changes, section 6.16(1A) of the BC Act allows the Regulations to:
    - make standards (assessment standards) against which genuine measures must be assessed; and
    - set out requirements for biodiversity assessment reports to include information demonstrating how proposed genuine measures meet the standards.
30. The Consultation Paper explains that Items 16 and 18 of the draft regulation require certain information about the genuine measures a proponent has taken or proposes to take to avoid or minimise impacts to be included in the relevant biodiversity assessment report.
31. The Consultation Paper does not clearly explain how the draft Regulations set assessment standards, if at all. However, it does explain that the draft Regulation defines a measure as genuine if it is:
    - responsive to identified biodiversity values on the relevant site; and

[10] Currently:
- Section 7.16(2) of the BC Act provides that a consent authority must refuse to grant consent under the *Environmental Planning and Assessment Act 1979* (EP&A Act), Part 4 for an application for development if, in the consent authority's opinion, a proposed development is likely to have serious and irreversible impacts on biodiversity values.
- Section 7.16(3) of the BC Act provides that if the relevant authority is of the opinion that proposed State significant development or State significant infrastructure is likely to have serious and irreversible impacts on biodiversity values, the relevant authority is required to take those impacts into consideration, and is required to determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted.
- Section 7.16 4) of the BC Act provides that if the determining authority is of the opinion that a proposed activity (e.g. under Part 5 of the EP&A Act) is likely to have serious and irreversible impacts on biodiversity values, the determining authority is required to take those impacts into consideration, and is required to determine whether there are any additional and appropriate measures that will minimise those impacts if the activity is to be carried out or approved.

- demonstrated to reduce predicted or actual impacts on biodiversity compared with a base case of no avoidance or minimisation; and
- supported by evidence and can be independently verified.

This is done via proposed new clause 6.10AA at Item 20 of the draft Regulation, and may intended to be the assessment standards (but this is unclear).

32. We **generally support** the changes proposed at Items 16, 18 and 20 with respect to genuine measures to avoid and mitigate impacts on biodiversity. However, we suggest the draft Regulation could be strengthened as follows:
    - In proposed clause 6.8(2), we suggest that all measures identified in that clause should be required to be relevant to the proposal in the report (and not just measures taken more than 5 years before the submission of the report). This is because the report, and the decision maker, are required to consider the impacts of a particular proposal, and so there must be a clear nexus between the measure and the proposal. This could be achieve by moving the words "the measure is relevant to the proposal in the report" to the chapeau of proposed clause 6.8(2).
    - The Regulations could provide clearer direction as to what constitutes:
        - "reliable information" for the purpose of proposed clause 6.8(2)(b)(ii); and
        - "evidence" for the purpose of proposed clause 6.10AA(1)(d).

      For example, the term "reliable evidence" could be used in both subclauses and defined in the Regulation. A possible definition could be:

      Reliable evidence means data, information and analysis that is unbiased, accurate, verifiable, relevant, current, and of sufficient quality and completeness to be relied on by a decision maker.

Recommendation 7: Amend proposed clause 6.8(2) of the draft Regulation to require all measures to be relevant to the proposal in the report, to ensure there is a clear nexus between the measure and the proposal.

Recommendation 8: Provide clearer direction as to what constitutes "reliable information" and "evidence" for the purposes of clause 6.8(2)(b)(ii) and clause 6.10AA(1)(d) respectively.

See **Appendix C** for marked up amendments demonstrating how this recommendation could be implemented.

Additional opportunities to set assessment standards

33. As noted above, it is unclear if Item 20 of the draft Regulation is intended to set "assessment standards" for the purpose of section 6.16(1A)(1) of the BC Act (yet to commence). We suggest that 6.16(1A)(1) could be used to provide more guidance as to how the mitigation hierarchy should be applied, for example, by identifying areas (setting standards) as to what types of areas are expected to be avoided (e.g. areas of outstanding biodiversity value or areas listed on the avoid and mitigate register), or what types of mitigation measures would be expected

for certain impacts (e.g. wildlife crossing structures for wildlife such as koalas, gliders and quolls).

Recommendation 9: Insert additional provisions in the draft Regulation to set more detailed guidance as to how the mitigation hierarchy should be applied, for example, by identifying areas (setting standards) as to what types of areas are expected to be avoided or what types of mitigation measures would be expected for certain impacts.

Excluding low impact development from the BOS

34. As set out in the Consultation Paper, the *NSW Plan for Nature* commits to amending the entry thresholds to the BOS, to remove small, low-impact local development and clearing proposals. This will be achieved through Item 45 of the draft Regulation which proposes to exempt development or clearing proposals with a small incursion of 100 square metres or less on the Biodiversity Values Map from entering the scheme via the Biodiversity Values Map pathway.

35. EDO has is concerned that this proposal potentially undermines the BOS and puts biodiversity at risk. The purpose of the BOS is to ensure that where proposals will have impacts on biodiversity, these impacts are appropriately avoided, mitigated and offset. It also requires that where there are serious and irreversible impacts, these are also refused (in the case of Part 4 development), or otherwise considered by decision makers.

36. The Biodiversity Values Map has the specific purpose of identifying sensitive and high value biodiversity areas. Overriding the Biodiversity Values Map, by allowing small incursions undermines its role. Even a small incursion into these areas could have substantial impacts (for example, where the value mapped is an area of outstanding biodiversity value or habitat of a critically endangered species). Further, there is no suitable mechanism for dealing with potential cumulative impacts of multiple exclusions. If there are genuine concerns about the accuracy of the map and its inadvertent capturing of projects, then the draft Regulation is also introducing a process for amending the operation of the map. However, where there are genuine biodiversity values as identified by the biodiversity values map, there must be robust environmental assessment, no matter how small the incursion.

37. The Consultation Paper also indicates that “the NSW Government will also, as part of a future remake of the Biodiversity Assessment Method, enable local development projects to undertake a desktop, rather than site-based, biodiversity assessment where data quality is high and biodiversity risks are low”.

38. EDO has concerns about this proposal. Not all biodiversity values and impacts of a proposal may be apparent from a desktop assessment. We consider that it may also be challenging to identify biodiversity risks without inspecting the site where the proposed impacts would take place. We recommend that site assessment continue to be required for biodiversity assessment. If this proposal is to be pursued, we recommend that clear criteria set out what types of projects have low biodiversity risks and what type of data is sufficient to qualify for a desktop assessment, including that data is up-to-date and robust.

Recommendation 10: Do not proceed with changes to the entry thresholds to the BOS (e.g. remove Item 45 from the draft Regulation).

Recommendation 11: Do not proceed with the proposal to allow desk top biodiversity assessment only. However, if this proposal is to be pursued, we recommend that clear criteria set out what types of projects have low biodiversity risks and what type of data is sufficient to qualify for a desktop assessment, including that data is up-to-date and robust.

Amendment of operation of biodiversity values map

39. We have several concerns about the provisions in the draft Regulation that would allow amendment of the operation of the biodiversity values map. We are not necessarily opposed to legislating a process for landholders to request a review of the application of the Biodiversity Values Map to their property. However, the process set out in the draft Regulation (which we understand is intended to legislate an existing process)[11] is confusing and opaque.

40. In particular:

- It is unclear what is meant by "amend the operation of the map". On its face, it doesn't appear to mean that the map boundaries will be adjusted and the map republished to reflect those changes. Is it intended that the decision certificate will explain that the map does not apply to a particular section of land, or that certain provisions don't apply to sections of the land identified in the certificate? The draft Regulation must set out more clearly:
  - what is meant by "amend the operation of the map", and
  - what exactly a "decision certificate" is allowed to specify in terms of amending the operation of the map.
- As drafted, in considering an amendment application, the Environment Agency Head:
  - must consider the information submitted in the application form.
  - may consider additional information the Environment Agency Head considers relevant.

  There are no clear criteria or limits on making a decision to amend operation of the biodiversity values map. At this stage it is not known what information will need to be submitted in the approved form. Presumably the policy intent behind allowing landholders to seek an amendment of the operation of biodiversity values map in circumstances where the map may incorrectly map the land (for example, the land doesn't meet the relevant criteria for being mapped on the biodiversity values map), but this is not clear on the face of the draft Regulation and the Environment Agency is not prevented from issuing a "decision certificate" for other reasons. The draft

[11] Consultation Paper, p 18

Regulation must include more detailed criteria to guide decisions relating to decision certificates under these provisions.

- It is unclear what the "stop-the-clock" provisions are intended to be used for, or what needs to happen during that time (e.g. the application must provide more information, or the Department needs to undertake on-ground surveys). In contrast, stop-the-clock provisions in Part 4, Division 4 of the *Environmental Planning and Assessment Regulation 2021* are clearly to be used to request a written response to submissions from the applicant or request written information from an applicant. The draft Regulation must more clearly specify how stop-the clock provisions are to be used.
- There do not appear to be any requirements to publicly publish decision certificates. This means there is no transparency around changes to the way the biodiversity values map operates. This will make it difficult for the public to determine whether clearing being undertaken on a parcel of land is authorised or not. Decision certificates must be publicly published. This lack of clarity is exacerbated by clause 7.12 as detailed below.
- The policy intent behind and operation of proposed clause 7.12 is unclear. Clause 7.12 of the draft Regulation provides that a landholder who receives a decision certificate may, within 90 days after the certificate is given to the landholder, elect to undertake development in accordance with—

  (a) the Map, or

  (b) the operation of the Map as amended in accordance with the certificate.

  Does this mean a decision certificate is only valid for 90 days? What happens if the landholder doesn't undertake development within that 90 days? Do they no longer have the option to elect how to undertake development? Must future development be undertaken in the accordance with the map? This seems to suggest the intention is for a temporary suspension of the map, which does not align with the assumed policy intent for the draft provisions, that the reason for allowing map reviews is to correct incorrect mapping (which should ideally be specified in the Regulation for certainty). This also creates regulatory uncertainty as to what rules apply to a parcel of land at a given time.

41. More broadly, it is unclear why this process has been adopted for biodiversity value map reviews rather than a process similar to that set out in the *Local Land Services Act 2013* (**LLS Act**) for reviews of the Native Vegetation Regulatory Map. Under the LLS Act:

    - a landholder can request the Environment Agency Head to review a decision relating to the categorisation or re-categorisation of land on a native vegetation regulatory map (section 60L).
    - re-categorisation leads to changes to the published map (section 60K(1)
    - there are clear criteria for re-categorisation of land to inform decision (section 60L(2) and section 60K (3))

- the public is aware of re-categorisation via the published map

42. The BC Regulation already allows the Environment Agency Head to amend or replace the biodiversity values map, so tying a landholder-initiated review process to the published map, with clear criteria for seeking amendments to the map, could be a less complicated and more transparent process than introducing new, seemingly open-ended and opaque powers to issue decision certificates that amend the operation of the biodiversity values map.

Recommendation 12:

a) Redesign the process for landholders to request a review of the application of the Biodiversity Values Map to their property with clear criteria, public decisions and changes to the biodiversity map itself to reflect the decisions.
b) If, however, the current process is retained, the draft Regulation must be amended to:
   (i) establish clear criteria for allowing amendments to the operation of the biodiversity values map
   (ii) more clearly specify how a decision certificate can amend the operation biodiversity values map
   (iii) more clearly specify how stop-the clock provisions are to be used.
   (iv) publicly publish decision certificates
   (v) provide more clarification on the intent and operation of clause 7.12 and the effect of the decision in allowing a choice as to which version of a map can be acted upon, where this creates vague and uncertain regulation.

Other proposed amendments

Fairer, more efficient credit transaction fees

43. We acknowledge that proposals in the Consultation Paper to make changes to credit transaction fees, including the proposal to remove fees for transferring credits and adjust fees for retiring credits, will help reduce reliance on the BCF by making it easier for proponents to source credits in the market. However, it is important that the changes, particularly to the proposed fee cap for proponents retiring more than 10,000 credits per project, do not undermine the ability of the BCT to recover costs associated with administering the scheme, which could have perverse impacts on how the market operates. We recommend committed reviews of the revised fee structure (e.g. after one year and again after five years) to allow further adjustments to be made as needed.

Recommendation 13: Commit to reviewing the credit transaction fee structure (e.g. after one year and again after five years) to allow further adjustments to be made as needed.

Accreditation scheme for conservation brokers

44. We generally **support** an accreditation scheme for conservation brokers. This is a key measure aimed at improving integrity, transparency and accountability. In particular:

- we **suppor**t requirements for the Environment Agency Head to consider the applicant's skills and experience, and whether they are a "fit and proper person" to be a conservation broker;
- we **support** the proposal to introduce an offence for providing services without accreditation;
- we **support** the proposal to establish a register of conservation brokers; and
- we **recommend** reviewing the terminology used in proposed Division 6.5A. For example, the definition “conservation broker” does not specify whether this is someone who also meets the definition of “accredited”. As drafted “conservation broker” could mean someone who is providing unauthorised services – which might not be how it is intended to be used for the purpose of Register in proposed clause 6.29L, but could be how it is intended to be used for the purpose of the heading at proposed clause 6.29B.

> **Recommendation 14:** Review the terminology in proposed Division 6.5A, including the definition of conservation broker, to ensure definitions are clear and there is no uncertainty about how certain definitions are intended to operate.

Information in public registers

45. EDO generally supports proposed Items 60 to 62 of the draft Regulation that set out the information that is to be included in registers required to be maintained under the BC Act. To strengthen the provisions, we recommend:
    - providing further clarity om what is meant by “location” – e.g. is this intended to be a street address?
    - implementing IPART’s 2026 Recommendation 12, that reporting should include
        - the number, location and type of biodiversity cleared under the original offset obligation
        - the location and type of biodiversity of the delivered offset
        - whether the offset was delivered under like-for-like rules, variation rules or conservation actions, including the outcomes delivered by any conservation actions.

    This could be implemented by amendments to proposed clause 9.6A.

> **Recommendation 15:** Clarify what is meant by “location” in proposed clauses 9.5A(e), 9.5B(e) and 9.5C(e) (e.g. is this intended to mean street address?)
>
> **Recommendation 16:** Amend proposed clause 9.6A to explicitly require the public register to include information about:
>
> - the number, location and type of biodiversity cleared under the original offset obligation;
> - the location and type of biodiversity of the delivered offset; and

- whether the offset was delivered under like-for-like rules, variation rules or conservation actions, including the outcomes delivered by any conservation actions.

Additional biodiversity values to which the scheme applies

46. We **support** the proposed changes to clause 6.1 of the BC Regulations which clarify and expand the additional biodiversity values to which the BOS applies. In particular:

    - We support the proposal to omit the term "of significance" from the clause 6.1(1)(a)(i) of the BC Regulation. That subclause currently reads: "karst, caves, crevices, cliffs and other geological features of significance". It is unclear what it is meant by "of significance" in this context, and this amendment acknowledges the important biodiversity values of karst, caves, crevices, cliffs and other geological features.
    - We support the proposal to insert "or rock outcrops" after "rocks" in clause 6.1(1)(a)(ii) of the BC Regulation. This amendment acknowledges the important landscape scale biodiversity values of rock outcrops.
    - We support the proposal to insert "water availability" after "quality" in clause 6.1(1)(d) of the BC Regulation. Water availability is important for biodiversity it effects the survival, distribution, abundance of and ecological interactions between species.

47. We also **support** recognition, through the proposed insertion of clause 6.1(1)(g), of the impacts of vibration and blasting associated with development on threatened species and threatened ecological communities as an impact that must be assessed under the BOS.

Ecological mine site rehabilitation

48. We **strongly support** the proposal to remove clause 6.2(2)(d) from the BC Regulation. This subclause allows ecological mine site rehabilitation to be used to meet offset obligations. EDO has long opposed this component of the BOS on the basis that there is no evidence that mine site rehabilitation can replicate the biodiversity values that are lost through mining, and the strong community expectation mining activities should be accompanied by requirements to rehabilitate the land to a pre-mining equivalent condition separate to the need to compensate for the loss of biodiversity caused by the mining activity. We note that this amendment implements the Government's commitment, set out in the *NSW Plan for Nature*, to remove the option for mining proponents to meet a credit obligation through a commitment to ecological mine site rehabilitation.[12]

Offence for an unaccredited person who applies the Biodiversity Assessment Method

49. We **support** Item 19 which creates an offence for an unaccredited person who applies the Biodiversity Assessment Method.

[12] NSW Government, 'NSW Plan for Nature', July 2024, p 13, available at https://www.nsw.gov.au/departments-and-agencies/cabinet-office/resources/nsw-plan-for-nature

Provision of information on additional matters for which offence of false and misleading information applies

50. We **support** Item 63 which inserts **"**giving the Environment Agency Head a declaration under clause 6.13A(1)" into the offense for false and misleading information (being a declaration in the that the person has taken an acceptable measure to attempt to comply with the requirement to retire credits before paying into the BCF).

Environment agency head concurrence

51. We **support** Item 55 which clarifies that a local council needs to obtain the Environment Agency Head's concurrence if proposing to change a biodiversity credit obligation when granting a modification application.

Thank you for the opportunity to make this submission.
Please do not hesitate to contact our office should you have further enquiries.

Appendix A - Recommended amendments to proposed clause 6.13A

6.13A Circumstances when payment must not substitute for retirement of biodiversity credit—the Act s 6.30(2)

(1) A person required to retire biodiversity credits must not satisfy the requirement by paying an amount into the Biodiversity Conservation Fund:

(a) ~~above the credit retirement threshold~~ unless the person, if above the credit retirement threshold, gives the Environment Agency Head a declaration in the approved form that the person has taken an acceptable measure to attempt to comply with the requirement~~.~~;

(b) if the biodiversity credits relate to an entity identified on the list of high offset risk entities

(2) Unless the requirement to retire biodiversity credits provides that the credits must be retired in stages, a single credit retirement threshold applies to the entire requirement.

(3) If a requirement to retire biodiversity credits provides that the credits must be retired in stages, a new credit retirement threshold applies for each stage.

(4) In this section—

- ***acceptable measure*** means ~~a measure—~~

  (a) submitting a demand expression of interest with the Credits Supply Fund and participating in a reverse auction process to seek the required credits; or

  (b) listing the credits they are seeking on the department's credits wanted register for at least 3 months; or

  (c) engaging a conservation broker to source credits; or

  (d) any other measure approved by the Environment Agency Head, and set out in a document published on a website maintained by the Environment Agency Head.

- ***credit retirement threshold*** is ~~100~~ 75 biodiversity credits from the same class of biodiversity credit.

list of high offset risk entities means a list –

(a) approved by the Biodiversity Conservation Trust, and

(b) set out in a document published on a website maintained by the Biodiversity Conservation Trust

Appendix B - Recommended amendments to proposed clauses 6.7A and 6.9

6.7A Mandatory content of biodiversity development assessment reports—the Act, section 6.16

(1) A biodiversity development assessment report must include the following—

(a) mapping of the biodiversity values of the site,
(b) documentation of feasible alternative impact footprints and evidence of avoidance of direct, indirect and prescribed impacts to biodiversity values,
(c) relevant mapping of site-assessed entities at risk of serious and irreversible impacts and alternative impact footprints demonstrating avoidance of those impacts,
(d) the number and classes of biodiversity credits required to be retired in accordance with the like-for-like requirements of the offset rules,
(e) information about whether any biodiversity credit requirements apply to entities on the list of high offset risk entities
(f) if funding a biodiversity conservation action in accordance with the offset rules is proposed—details of the proposal,
(g) the date of the report and the certification under the Act, section 6.15,
(h) details of—
  (i) the accreditation of the person preparing the report, and
  (ii) the qualifications and experience of other persons commissioned to conduct research or investigations for the report,
(i) if the relevant impacts on biodiversity values of a proposed development, activity or clearing cannot be reasonably avoided by site selection and design—information justifying the decision to proceedwith the development, activity or clearing,
(j) information about measures that will be taken after approval of the application to avoid or minimise impacts on biodiversity values as a result of—
  (i) construction, operation, cessation of operation ordecommissioning of the proposed development or activity, or
  (ii) undertaking the proposed clearing,
(k) other information the biodiversity assessment method or ancillary rules require to be included in the report.

(2) Information provided for subclause (1)(i) must include management plans that—

(a) are clear, evidence-based, implementable and enforceable, and

(b) apply the principles of adaptive management.

(3) In this clause—

relevant impacts on biodiversity values means the impacts of actions on biodiversity values that are subject to assessment and offset under the biodiversity offsets scheme as provided for in the Act, section 6.3.

list of high offset risk entities has the same meaning as in subclause 6.13A(4).

6.9 Mandatory content of biodiversity certification assessment reports—the Act, section 6.16

(1) A biodiversity certification assessment report must include the following—

(a) mapping of the biodiversity values of the site,
(b) documentation of feasible alternative impact footprints and evidence of avoidance of direct, indirect and prescribed impacts to biodiversity values,
(c) relevant mapping of site-assessed entities at risk of serious and irreversible impacts and alternative impact footprints demonstrating avoidance of those impacts,
(d) for an application that is not a strategic biodiversity certification application—the number and classes of biodiversity credits required to be retired in accordance with the like-for-like requirements of the offset rules,
(e) for an application that is a strategic biodiversity certification application—
(i) the number and classes of biodiversity credits that would be required to be retired if the like-for-like requirements of the offset rules applied, and
(ii) the number and classes of biodiversity credits proposed to be retired, and
(iii) details of other approved conservation measures that will be taken, and
(f) information about whether any biodiversity credit requirements apply to entities on the list of high offset risk entities
(g) information about measures the applicant for biodiversity certification has taken to avoid or minimise impacts on biodiversity values of the actions to which the biodiversity offsets scheme applies on the land proposed for certification,
(h) information about measures that will be taken after biodiversity certification to avoid or minimise impacts on biodiversity values from the actions to which the biodiversity offsets scheme applies on the land proposed for certification,
(i) the date of the report and the certification under the Act, section 6.15,
(j) details of—
(i) the accreditation of the person preparing the report, and
(ii) the qualifications and experience of other persons commissioned to conduct research or investigations relied on for the report,
(k) other information the biodiversity assessment method or ancillary rules require to be included in the report.

(2) Information provided for subclause (1)(g) must include management plans that—

(a) are clear, evidence-based, implementable and enforceable, and
(b) apply the principles of adaptive management.

(3) In this clause—

relevant impacts on biodiversity values means the impacts of actions on biodiversity values that are subject to assessment and offset under the biodiversity offsets scheme as provided for in the Act, section 6.3.

list of high offset risk entities has the same meaning as in subclause 6.13A(4).

Appendix C - Recommended amendments to proposed clauses 6.8 and 6.10.AA

6.8 Optional content of biodiversity development assessment reports—the Act, section 6.16

(1) A biodiversity development assessment report may include identification of measures previously taken, or areas previously utilised, as part of the following to avoid or minimise the impact of proposed development, activity or clearing on the biodiversity values of the land—

- (a) strategic planning in accordance with the *Environmental Planning and Assessment Act 1979*, Part 3, including rezoning,
- (b) biodiversity certification,
- (c) development, activity or clearing.

(2) A measure may only be included in a biodiversity development assessment report under this clause if the measure is relevant to the proposal in the report and —

- (a) the measure was taken within 5 years before submission of the report, or
- (b) for a measure taken more than 5 years before submission of the report—the accredited person certifying the report also certifies~~—~~
  - ~~(i) the measure is relevant to the proposal in the report~~, and
  - ~~(ii)~~ the measure is based on ~~reliable information~~ ***reliable evidence***, or
- (c) the measure was recorded on the register kept under the Act, section 9.7(1)(h2) before the submission of the report, or
- (d) the measure is secured in perpetuity under a legally binding arrangement.

6.10AA Genuine measures to avoid and minimise impacts on biodiversity—the Act, section 6.16(1A)

(1) A person assessing a measure taken or proposed to be taken to avoid or minimise the impact of an activity on biodiversity values may assess the measure as a genuine measure if the measure—

- (a) was not legally required to be taken when the measure was identified, and
- (b) responds to identified biodiversity values on the site where the activity will take place in accordance with the biodiversity assessment method, and
- (c) can be demonstrated to reduce the predicted or actual impact of the activity on biodiversity values on the site where the activity will take place when compared to—
  - (i) taking no measures to avoid or minimise the impact of the activity on biodiversity values, and
  - (ii) taking all practicable measures to avoid or minimise the impact of the activity on biodiversity values, and
- (d) is supported by ***reliable evidence*** ~~evidence~~, and
- (e) is independently verifiable.

Insert also (e.g. at clause 1.3) a definition of reliable evidence, as follows:

Reliable evidence means data, information and analysis that is accurate, verifiable, relevant, current, and of sufficient quality and completeness to be relied on by a decision maker.