



# **Submission responding to the NSW Coastal Management Reforms**

prepared by

**EDO NSW  
29 February 2016**

## About EDO NSW

EDO NSW 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 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

**Broad environmental expertise.** EDO NSW 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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### Submitted to:

Coastal Reforms Team  
Office of Environment and Heritage  
PO Box A290  
Sydney South  
NSW 1232

Sent by email : [coastal.reforms@environment.nsw.gov.au](mailto:coastal.reforms@environment.nsw.gov.au)

### For further information on this submission, please contact:

Rachel Walmsley, Policy and Law Reform Director, EDO NSW

[REDACTED]  
[REDACTED]

### EDO NSW

[REDACTED]  
[REDACTED]  
Sydney NSW 2000 AUSTRALIA  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

## Introduction

EDO NSW welcomes the opportunity to comment on the NSW Coastal Management Reforms.

EDO NSW has extensive experience advising on all aspects of coastal and planning law and policy, particularly in relation to the *Coastal Protection Act 1979 (CP Act)*, SEPPs 14, 26 and 71 and the *Environmental Planning and Assessment Act 1979 (EPA Act)*. We also engage on an on-going basis with coastal, marine, biodiversity and planning reform processes in NSW, writing submissions in response to proposed legislative and policy amendments. In response to frequent requests for legal advice and assistance from concerned coastal residents and communities, EDO NSW regularly runs community workshops and provides legal advice regarding local coastal development and management issues.

EDO NSW is supportive of law reform that will improve environmental outcomes within the coastal zone. Since the CP Act was passed in 1979, development has continued to have a significant impact on sensitive coastal ecosystems including littoral rainforests, coastal wetlands, coastal lakes and sand dunes. According to the NSW Government's own data:

- In coastal NSW, 60% of wetlands have been lost or degraded over the past 200 years.<sup>1</sup>
- Urban development and sand mining have considerably reduced the naturally fragmented distribution of littoral rainforests along the coast.<sup>2</sup> Furthermore, 114 species found in the 'littoral rainforest class' are listed as vulnerable, endangered, or critically endangered, or as an endangered ecological population or community.<sup>3</sup>
- Coastal lakes are the most sensitive of all estuaries to human intervention.<sup>4</sup> Only 16 out of 90 coastal lakes in NSW are in natural or near natural condition, with the extent of impacts directly related to the extent of development and rural uses in their catchments.<sup>5</sup> Continuing population growth and urban development are expected to intensify pressures on estuaries and coastal lakes.<sup>6</sup>
- Land clearing is most significant threat to native vegetation in NSW. Coastal development is one of the two main causes of native vegetation clearing in this State.<sup>7</sup>

In addition to development, climate change poses a significant threat to coastal environments, in particular sensitive ecosystems such as littoral rainforests.<sup>8</sup> The

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<sup>1</sup> See: <http://www.environment.nsw.gov.au/wetlands/ThreatsToWetlands.htm> (Accessed 23 February 2016).

<sup>2</sup> See :

<http://www.environment.nsw.gov.au/threatenedspeciesapp/VegClass.aspx?vegClassName=Littoral%20Rainforests> (Accessed 23 February 2016).

<sup>3</sup> See:

<http://www.environment.nsw.gov.au/threatenedspeciesapp/VegSpecies.aspx?vegName=Littoral+Rainforests&habitat=C> (Accessed 23 February 2016).

<sup>4</sup> NSW Healthy Rivers Commission, *NSW Independent Inquiry into Coastal Lakes*, 2002, p. 17.

<sup>5</sup> NSW Healthy Rivers Commission, *NSW Independent Inquiry into Coastal Lakes*, 2002, pp. 72-4.

<sup>6</sup> NSW Government, *NSW State of the Environment*, 2012, p. 190.

<sup>7</sup> NSW Government, *NSW State of the Environment*, 2012, pp. 224, 230.

projected impacts of sea level rise are also well documented,<sup>9</sup> with the most recent NSW State of the Environment Report noting that ‘rising sea levels are likely to have a significant effect on human settlements in NSW.’<sup>10</sup>

It is against this backdrop that we suggest robust reforms that will *conserve* sensitive coastal environments, *build resilience* to the impacts of climate change and ensure that all development in the coastal zone is *consistent with the principles of ecologically sustainable development (ESD)*.

EDO NSW submits that this will necessitate **7 Key Actions**:

1. A catchment-based approach to coastal management, supported by appropriate mapping
2. An emphasis on strategic planning and proper assessment of cumulative impacts
3. The creation of ‘red flag areas’ to protect sensitive coastal environments
4. The acquisition of sensitive coastal areas by the NSW Government
5. Development controls that are in all instances consistent with ESD
6. A new approach to managing sea level rise in NSW
7. Appropriate resourcing to facilitate compliance and enforcement

Based on our analysis, we recommend that the draft *Coastal Management Bill 2015* and accompanying Coastal Management SEPP be strengthened to ensure delivery of the 7 Key Actions. Our recommendations are therefore intended to align the proposed reforms with these Actions.

This submission will address the following issues:

- a) Title and purpose
- b) Objects
- c) Coastal zone and management areas
- d) Assessment and approval criteria
  - (i) EP&A Act – s79C
  - (ii) Proposed Coastal Management SEPP
  - (iii) LEPs
  - (iv) Concurrence provisions
- e) NSW Coastal Council
- f) Coastal Management Programs
- g) Mapping
- h) Planning for sea level rise
- i) Resourcing, compliance and enforcement

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<sup>8</sup> See for example: Australian Government, *Environment Protection and Biodiversity Conservation Act 1999*, Littoral Rainforest and Coastal Vine Thickets of Eastern Australia – a nationally threatened ecological community (Policy Statement 3.9), p. 14. Available online at : <http://www.environment.gov.au/system/files/resources/19747170-3fd3-4930-9ca5-6ca89508b571/files/littoral-rainforest.pdf>

<sup>9</sup> See for example: Lipman, Zada and Stokes, Robert, That sinking feeling : A legal assessment of the coastal planning system in New South Wales (2011) 28 *EPLJ* 182.

<sup>10</sup> NSW Government, *NSW State of the Environment*, 2012, p. 199.

## a) Title and purpose

As noted above, the NSW coast has unique environmental, social, cultural and economic values; it is under increasing development pressure; and the existing regulatory regime has not afforded an adequate level of protection to the NSW coast. Nonetheless, it is significant that the title of the current Act clearly expresses an intention and purpose to *protect* rather than simply manage the coastal zone. EDO NSW is concerned that the title of the *Coastal Management Bill 2015 (Coastal Bill)* inverts this hierarchy. Consistent with the 7 Key Actions and recommendations made throughout this submission, we recommend retaining the current title.

**Recommendation 1:** The title of the Bill should be changed to the *Coastal Protection Bill 2016*.

## b) Objects

EDO NSW has consistently argued that all environmental and planning legislation must include a clear, overarching object which seeks to *implement* the principles of ESD. In the absence of an overarching objective, there is no requirement to privilege one object over any other.<sup>11</sup> As noted by Justice Preston,

*Increasingly, the principles of ESD are referred to as one of the objects of a statute or the objectives of an agency established under a statute. But there is no legislative guidance as to the weight or priority to be afforded ESD.*<sup>12</sup>

Furthermore, in order to be implemented, ESD must be *operationalised* in substantive provisions within the Bill. In other words, all decisions, powers and functions must be exercised consistent with ESD.<sup>13</sup>

We note that the chapeau of the objects provision is to ‘manage the coastal environment consistent with the principles of ecologically sustainable development for the social, cultural and economic well-being of the State, and in particular...’<sup>14</sup> While this constitutes an overarching objective, we note that the emphasis on social, cultural and economic factors gives rise to some uncertainty regarding its overall meaning. That is, the wording places particular weight on (and in fact double counts) the non-environmental aspects of ESD.

Object 3(d) may also undermine the overarching reference to ESD insofar as it refers to ‘sustainable coastal economies’ rather than ‘ecologically sustainable coastal economies’. While there is ample jurisprudence in NSW regarding the meaning of ‘ecologically sustainable’ and ESD,<sup>15</sup> the same cannot be said of the term

<sup>11</sup> This was evidenced in *Minister for Planning v Walker* [2008] NSWCA 224.

<sup>12</sup> Chief Justice Preston, *Jurisprudence on Ecologically Sustainable Development: Paul Stein’s Contribution*, 10 December 2009, p. 17.

<sup>13</sup> The operationalisation of ESD will be addressed in greater detail below.

<sup>14</sup> Coastal Bill, s. 3.

<sup>15</sup> See, for example, *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270, *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 93 LGERA 249, *Carstens v Pittwater Council* (1999) 111 LGERA 1,

'sustainable'. To that end, it is not clear that it would be interpreted by the courts in the same manner.

**Recommendation 2:** the chapeau to the objects provision should be replaced with the following:

*The principal object of this Act is to protect the coastal environment of New South Wales so as to implement the principles of ecologically sustainable development. This includes...*

**Recommendation 3:** object 3(d) should be replaced with the following:

*to recognise the coast as a vital economic zone and support ecologically sustainable coastal economies...*

### **c) Coastal zone and management areas**

We note that the Coastal Bill proposes to redefine the coastal zone<sup>16</sup> and divide it into four coastal management areas with separate management objectives, namely: the coastal wetlands and littoral rainforests area; the coastal vulnerability area; the coastal environment area; and the coastal use area.

EDO NSW wishes to raise the following concerns in relation the reconfiguration of the coastal zone.

First, while we do not necessarily oppose the creation of management areas, it is essential that the division and overall conservancy of these areas be consistent with the 7 Key Actions. Based on our analysis, this is unlikely to be the case, and amendments are needed as recommended below.

Second, while we support the management objectives for the 'coastal wetlands and littoral rainforest area', it is unclear why the Bill has created a separate 'coastal environment area' that may also contain sensitive coastal environments that require a significant level of protection. We appreciate the genesis of the first category is from SEPPs 14 and 26 and strongly support strengthened protections for these areas. However, consideration should be given to combining the two categories to establish a coastal conservation zone (ie, establishing 3 zones instead of 4).

Third, it is concerning that the mapping of the new coastal zone was not released as part of the Coastal Management Reforms. A number of our clients have indicated that they cannot properly comment on the appropriateness of the proposed areas in the absence of such vital information. We welcome the recent announcement by the Government to put these maps on public exhibition in the coming months, however would urge that this occurs well before the Bill is tabled in Parliament. Further comments regarding the mapping process are outlined below.

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*BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; *Minister for Planning v Walker* [2008] NSWCA 224.

<sup>16</sup> Under the *Coastal Protection Act 1979*, the coastal zone is defined as a single area: s. 4 (definitions).

Fourth, it is also concerning that the proposed Coastal Management SEPP has not been released, particularly given the link between management objectives for each of the proposed areas and development controls. While the *Coastal Management SEPP – Explanation of Intended Effect* (**Explanation of Intended Effect**) contains certain details regarding the development controls that will be contained in the SEPP, the information in this document is both general and non-binding. We welcome the recent announcement by the NSW Government to release the Draft SEPP in the next few months, and would similarly request that this occurs well before the Bill is tabled in Parliament.

Fifth, we note that the management objectives for the ‘coastal use area’ are focussed on development rather than implementing (or maintaining consistency with) ESD. This is inconsistent with a catchment-based approach to planning, ignoring (for example) the possible impact of development in this zone on environmentally sensitive areas within the catchment.<sup>17</sup> It also actively discourages conservation efforts with the area. The objectives for this zone should include “environmental values” in addition to “scenic, social and cultural values” in clause 9(2)(a).

Sixth, the proposed hierarchy of coastal management areas places the ‘coastal vulnerability area’ above the ‘environmental use area’ in the event of a conflict. While we acknowledge the legitimate management objectives for public safety, we submit that the focus should be on minimising coastal hazards and risks within the context of a framework that seeks to identify and protect sensitive coastal environments. Our recommendation regarding the creation of a single ‘coastal conservation area’ (which has precedence over ‘vulnerable coastal areas’) would address this issue.

Seventh, we note that management objectives must be *operationalised* in substantive provisions (notably development controls in the proposed Coastal Management SEPP). In the absence of these specifications, such objectives remain aspirational and to that extent unenforceable. This issue is addressed in greater detail below in the section entitled ‘Assessment and approval processes’.

Finally, we note that the Bill does not provide for the acquisition and protection in perpetuity of littoral rainforests, coastal wetlands and other sensitive coastal environments. This is one of the most effective means of giving effect to management objectives for these areas.

**Recommendation 4:** Amend the Bill to create a single ‘coastal conservation area’ that merges the ‘coastal wetlands and littoral rainforests area’ with the ‘coastal environment area’. The proposed ‘coastal conservation area’ would include *all* sensitive coastal environments. It would also maintain the management objectives for the ‘coastal wetlands and littoral rainforests area’ and be subject to the highest level of protection under the Bill and proposed Coastal Management SEPP (see Assessment and Approval Recommendations, below).

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<sup>17</sup> We further note that Explanation of Intended Effect does not indicate that the proposed Coastal Management SEPP will require development in the coastal use area to avoid adversely impacting on littoral rainforests or coastal lakes.

**Recommendation 5:** Amend the Bill to include a definition of ‘sensitive coastal environments’. The definition should be drafted on the basis of advice provided by the NSW Coastal Council. We recommend that the Council consider identifying and including important wetland restoration sites in this definition.<sup>18</sup>

**Recommendation 6:** Amend the Bill to create an explicit link between coastal management areas and relevant catchments. To that end, mapping must include catchment-level overlays. This is to ensure that assessment and approval processes consider impacts on environmental processes across the entire catchment.

**Recommendation 7:** Amend the Bill to designate red flag areas in the proposed ‘coastal conservation area’. That is, no development is permissible in the coastal wetlands and littoral rainforests area, as well as in sensitive coastal environments.

**Recommendation 8:** Amend the Bill to ensure that the management objectives for the ‘coastal use area’ are consistent with the principles of ESD, including explicit reference to environmental values.

**Recommendation 9:** Amend the Bill so that the proposed ‘coastal conservation area’ is given precedence over the ‘coastal vulnerability area’ and ‘coastal use area’ in the proposed hierarchy.

**Recommendation 10:** Amend the Bill to provide for the acquisition of littoral rainforests, coastal wetlands and other sensitive coastal environments.

#### **d) Assessment and approval criteria**

EDO NSW is concerned that the proposed assessment and approval framework for development in the coastal zone will not result in implementation of the 7 Key Actions.

We note that development that is permissible in any of the management areas will still need to be assessed against the criteria set out in s. 79C of the EPA Act as well as the development controls in the proposed Coastal Management SEPP and any relevant LEP. However, this is unlikely to be sufficient to ensure that development is in all cases consistent with ESD or implements the Key Actions. Our reasons are set out below.

##### **(i) EPA Act – s. 79C**

The criteria set out in s. 79C are general in nature, omit a range of important factors (such as cumulative impacts and catchment-scale impacts) and only impose a requirement that the decision-maker *consider* those criteria that are relevant. To that end, the Court of Appeal has held that ESD is not a mandatory consideration under

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<sup>18</sup> This recommendation is based on the advice of Dr William Glamore, Principal Research Fellow, Water Research Laboratory, University of NSW.



s. 79C.<sup>19</sup> In summary, this means that s. 79C of the EPA Act is unlikely to offer any additional, meaningful protection to sensitive coastal environments.

### **(ii) Proposed Coastal Management SEPP**

The Explanation of Intended Effect discusses some of the development controls that will be contained in the Proposed Coastal Management SEPP. It notes, for example, that clause 5.5 of the Standard Instrument<sup>20</sup> will be transferred to SEPP.<sup>21</sup> However, clause 5.5 only includes 'matters for consideration'<sup>22</sup> rather a requirement to implement ESD (for example).

We further note that the Statement of Intended Effect includes three different formulations of a 'matter for consideration' regarding the biophysical, hydrological and ecological integrity of littoral rainforests and coastal wetlands. Specifically:

- Development consent must not be granted on land that is identified as a coastal wetland or littoral rainforest unless the consent authority is satisfied that there are sufficient measures proposed to protect the biophysical, hydrological and ecological integrity of the rainforest or wetland (**Formula 1**).
- Development consent must not be granted to development on land within the 100m perimeter area of a littoral rainforest unless the consent authority has considered the extent to which the development will impact on the biophysical, hydrological and ecological integrity of the adjacent littoral rainforest, or the quantity and quality of surface and ground water flows to the littoral rainforest if the development is on land within the catchment of a littoral rainforest (**Formula 2**).
- Development consent must not be granted on land within the 100m perimeter area of a coastal wetland unless the consent authority is satisfied that the development will not significantly impact on the biophysical, hydrological and ecological integrity of the coastal wetlands, or the quantity and quality of surface and ground water flows to the coastal wetland if the development is on land within the catchment of the coastal wetland (**Formula 3**).

There is no evidence presented in the Statement of Intended Effect to support the assumption that it is *possible* to implement measures that would satisfy the requirements of Formula 1. As previously indicated, we support the creation of red-flag areas for these sites. We also submit that littoral rainforests, coastal wetlands and sensitive coastal environments should be afforded the highest level of protection possible from all development – regardless of its location.

Of particular concern is the fact that Formula 2 does not require the consent authority to do more than simply 'consider' the impacts that development within the

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<sup>19</sup> *Minister for Planning v Walker* [2008] NSWCA 224.

<sup>20</sup> Standard Instrument – Principal Local Environment Plan

<sup>21</sup> Explanation of Intended Effect, p. 12.

<sup>22</sup> There are various cases examining the notion of 'consideration' and its analogue 'have regard to'. A strong line of authority indicates that these terms require the decision maker to 'merely consider' the relevant factor or factors. See *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 389.

100m perimeter area may have on littoral rainforests.<sup>23</sup> The efficacy of Formulae 1, 2 and 3 is also limited insofar as they do not apply to:

- residential development on land that is within a 100m area of a littoral rainforest;<sup>24</sup>
- residential development that is within a 100m area of a coastal wetland;
- development on other sensitive coastal environments;
- land in any other management area within the relevant catchment that may have an adverse impact on a littoral rainforest, coastal wetland or other sensitive coastal environments.

We further note that the proposed SEPP includes a requirement to obtain development consent to erect a building, to undertake earthworks or to destroy or remove native vegetation within the 100m perimeter of a littoral rainforest. However, this *will not apply* to land that is zoned residential.<sup>25</sup> Similarly, the SEPP will not include a requirement to obtain development consent to undertake development within a 100m area of a coastal wetland.<sup>26</sup> This is particularly concerning given the potential for residential development to degrade sensitive coastal environments such as rainforests and wetlands.

The Coastal Management SEPP must also be considered within the context of the proposal to amend the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Exempt and Complying Development SEPP**).<sup>27</sup> Specifically, the NSW Government is proposing to expand the General Housing Code to include 3 forms of medium density housing. If passed, this will mean that:

- up to 10 dwellings per 600m<sup>2</sup> lot could be constructed just outside of the 100m perimeter of a littoral rainforest without any need to obtain development consent.
- up to 10 dwellings per 600m<sup>2</sup> lot could be constructed just outside the 100m perimeter of a coastal wetland without any need to obtain development consent.<sup>28</sup>

EDO NSW is particularly concerned about the impacts of sites adjacent to littoral rainforests or coastal wetlands being subdivided into multiple, 600m<sup>2</sup> lots with up to 10 code-assessed dwellings on each lot. As noted in our submission responding to the Government's proposal,<sup>29</sup> we do not think a 100m buffer is sufficient to protect these sensitive coastal environments from the possible impacts of residential development, in particular development that has not been assessed or approved by local council (or subject to the proposed 'biophysical, hydrological and ecological integrity' matters for consideration).

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<sup>23</sup> Ibid.

<sup>24</sup> The consent authority need only 'consider the extent to which the development will impact on the biophysical, hydrological and ecological integrity of the adjacent littoral rainforest, or the quantity and quality of surface and ground water flows to the littoral rainforest if the development is on land within the catchment of a littoral rainforest.' In other words, there is no requirement to limit impacts on these processes.

<sup>25</sup> Statement of Intended Effect, p. 15.

<sup>26</sup> Statement of Intended Effect, p. 16.

<sup>27</sup> See : [http://planspolicies.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=7407](http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=7407).

<sup>28</sup> We note that mandatory cl. 3.3. of the Standard Instrument – Principal Local Environment Plan prohibits exempt and complying development within 100m of a littoral rainforest or coastal wetland.

<sup>29</sup> Available at: [http://www.edonsw.org.au/planning\\_development\\_heritage\\_policy](http://www.edonsw.org.au/planning_development_heritage_policy)

In summary, the proposed development controls outlined in the Statement of Intended Effect are not drafted so as to offer littoral rainforests and coastal wetlands the highest level of protection (Formula 1) from all forms of development, regardless of their location. We also note that Formula 1 does not apply to other sensitive coastal environments, while land that is zoned residential is exempted from some of the proposed controls. Finally, the proposed amendments to the Exempt and Complying Development SEPP may result in large areas of medium density housing just beyond the 100m perimeter of littoral rainforests or coastal wetlands being exempt from development assessment and approval under the EPA Act and relevant LEP.

### ***(iii)LEPs***

LEPs may not include development controls that impose additional environmental safeguards. We further note that councils may seek to rezone areas to facilitate residential development, thereby weakening environmental protections.<sup>30</sup>

These concerns are reinforced by recent changes (known as 'Final Recommendations') which weaken the ability of Ballina, Byron, Kyogle, Lismore and Tweed Shire Councils to zone land for environmental conservation (E2) and environmental management (**E3**) under their LEPs.<sup>31</sup> The Final Recommendations can also be adopted by councils that are reviewing the application of E zones under their LEPs,<sup>32</sup> while the Department of Planning and Environment has announced that is consulting with other councils about how these Recommendations can work across NSW. This means that these limitations may eventually apply State-wide.<sup>33</sup>

In summary, local planning controls may or may not result in an additional layer of environmental protection to littoral rainforests, coastal wetlands and other sensitive coastal environments. This reinforces the need for the proposed Coastal Management SEPP to contain rigorous controls for development within the coastal zone. Specific recommendations regarding such controls are included in Part 2 of this submission.

### ***(iv)Concurrence provisions***

We note that the proposal to remove the existing concurrence provisions<sup>34</sup> is based on the fact that:

- development undertaken on littoral rainforests or coastal wetlands is classified as 'designated development' (which requires the preparation of an environmental impact statement (**EIS**) and allows for third party merits appeal rights); and

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<sup>30</sup> In 2009 Kempsey Shire Council was successful in rezoning the land from Zone 1(c) Rural Small Holdings and Zone 1(d) Rural Investigation to Zone No 2 (a) (Residential "A" Zone) (and other parts Zone No 7 (a) (Wetlands Protection Zone) and Zone No 7 (b) (Environmental Protection (Habitat) Zone)).

<sup>31</sup> The Minister is to issue a s. 117 direction to these councils to implement the changes.

<sup>32</sup> See: <http://www.planning.nsw.gov.au/~media/70C33DB9E53B41738B7591A8EEEEAA238.ashx>. See also EDO NSW briefing note: [http://www.edonsw.org.au/a\\_new\\_approach\\_to\\_north\\_coast\\_environmental\\_zones](http://www.edonsw.org.au/a_new_approach_to_north_coast_environmental_zones)

<sup>33</sup> See: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Environment-and-Heritage/Environmental-Zones>

<sup>34</sup> Coastal Protection Act 1979.

- the concurrence provisions have rarely been used.

We agree that the drafting of the existing concurrence provisions do not guarantee a greater level of protection to coastal environments. However, we are not convinced that the antidote to this deficiency is simply classifying development on littoral rainforests and coastal wetlands as 'designated development'. Our reasons are set out below.

First, based on our extensive experience as environmental lawyers, we do not believe that designated development necessarily results in an adequate level of environmental protection, particularly as it is still subject to the same matters of consideration as other forms of development.<sup>35</sup> This is evidenced by decisions in the Land and Environment Court (**LEC**) to uphold appeals against a range of designated developments.<sup>36</sup> However and as noted below, it cannot be assumed that all poor decision-making can or will be corrected in the LEC.

Second, while we support the preparation of an EIS for any development on sites including (but not limited to) littoral rainforests or coastal wetlands, existing provisions regarding the preparation and application of EISs are flawed. We have commented extensively on this subject and provided Government with recommendations designed to improve the efficacy of the EIS process in previous submissions.<sup>37</sup>

Third, while we fully support third party merits appeal rights for development on littoral rainforests, coastal wetlands and sensitive coastal environments, it cannot be assumed that the community will have the resources to seek merits appeal of a particular approval, or if they do that the court will find in their favour or impose stricter environmental conditions.<sup>38</sup> To that end, it is vital that the law include strong provisions designed to protect these environments in the first instance.

Fourth, we also note that development outside of littoral rainforests and coastal wetlands will not be classified as designated development and to that extent will not be subject to merits appeals (even if it is likely to have a significant impact on one of these areas).

As previously indicated, EDO NSW does not support development on littoral rainforests, coastal wetlands or other sensitive coastal environments. However, if such development is permitted on these areas we support its classification as designated development so as to ensure third party merits appeal rights. However, we submit that additional measures are also necessary if the 7 Key Actions are to be implemented in the coastal zone. These are outlined below in our recommendations.

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<sup>35</sup> As outlined in s. 79C of the EPA Act.

<sup>36</sup> See for example: *Hub Action Group Incorporated v Minister for Planning and Another* [2008] NSWLEC 116; *Vogel v Gasparin and Anor* [2008] NSWLEC 11.

<sup>37</sup> Notably our submission responding to *A New Planning System for NSW – Green Paper* (at p. 50). Available online at:

[http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/189/attachments/original/1380534807/120914A\\_New\\_Planning\\_System\\_for\\_NSW.pdf?1380534807](http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/189/attachments/original/1380534807/120914A_New_Planning_System_for_NSW.pdf?1380534807)

<sup>38</sup> It is important to remember that the court is still bound by s.79C (which does not include a mandatory requirement to act consistently with ESD).

**Recommendation 11:** Amend the Bill to require decision-makers to act consistently with the principles of ESD when assessing and determining development in the 4 (or preferably 3) proposed areas in the coastal zone.

**Recommendation 12:** Amend the Bill to require decision-makers to consider the cumulative impacts of development on processes within the coastal zone.

**Recommendation 12:** The proposed Coastal Management SEPP must include a provision which requires decision-makers to be satisfied that development – within or where relevant outside of the coastal zone – will not compromise:

- the biophysical, hydrological and ecological integrity of a littoral rainforest, coastal wetland or sensitive coastal environment; or
- the quantity and quality of surface and ground water flows to a littoral rainforest, coastal wetland or sensitive coastal environment if the development is on land within the catchment of a littoral rainforest, coastal wetland or sensitive coastal environment.

**Recommendation 13:** The Proposed Coastal Management SEPP must not exempt land that is zoned residential from the requirement to obtain development consent to erect a building, to undertake earthworks or to destroy or remove native vegetation within the 100m perimeter of a littoral rainforest.

**Recommendation 14:** The Proposed Coastal Management SEPP must include a requirement to obtain development consent to undertake development within a 100m area of a coastal wetland.

**Recommendation 15:** The Proposed Coastal Management SEPP must include a provision *prohibiting exempt and complying development* in any area of the coastal zone where that development is likely to compromise:

- the biophysical, hydrological and ecological integrity of a littoral rainforest, coastal wetland or sensitive coastal environment; or
- the quantity and quality of surface and ground water flows to a littoral rainforest, coastal wetland or sensitive coastal environment if the development is on land within the catchment of a littoral rainforest, coastal wetland or sensitive coastal environment.

**Recommendation 16:** All development within the 100m perimeter area of a littoral rainforest, coastal wetland or sensitive coastal environment must be classified as designated development.

**Recommendation 17:** Concurrence requirements should be reinstated for development in a littoral rainforest, coastal wetland or sensitive coastal environment.

### **e) NSW Coastal Council**

EDO NSW supports the establishment of the NSW Coastal Council, subject to our recommendations outlined below.

**Recommendation 18:** The Bill should be amended to expand the number of mandatory experts on the Coastal Committee to 5.

**Recommendation 19:** The Bill should be amended to require at least 1 of the mandatory 3 experts appointed to the Coastal Council to have expertise in either coastal physical sciences or coastal ecology. In addition, the categories of relevant expertise should be expanded to include: Aboriginal cultural heritage, climate adaptation and ecosystem resilience.

**Recommendation 20:** The Bill should be amended to provide for community group representation on the Coastal Council.

**Recommendation 21:** The Bill should be amended so that the Coastal Council's functions are clearly outlined and include advising Ministers, planning decision-making bodies and local Councils on overarching strategic coastal policy, legislation, planning and management across the Environment, Heritage, Natural Resources, Planning and Local Government portfolios.

**Recommendation 22:** If our recommendation regarding the creation of red-flag areas is not implemented, the Bill should be amended to provide an option for a relevant decision-maker to seek (and act consistently with) the Coastal Council's advice in respect of any high profile or controversial development:

- on a littoral rainforest, coastal wetland or sensitive coastal environment;
- within the 100m perimeter area of a littoral rainforest, coastal wetland or sensitive coastal environment; or
- otherwise likely to have a significant impact on a littoral rainforest, coastal wetland or sensitive coastal environment.

**Recommendation 23:** The Coastal Council should have a role in catchment scale/strategic regional planning for coastal areas (as discussed below).

### **f) Coastal Management Programs**

EDO NSW notes that the purpose of Coastal Management Programs (**CM Programs**) is to 'set the long-term strategy for the co-ordinated management of land within the coastal zone with a focus on achieving the objects of this Act'.<sup>39</sup> EDO NSW strongly supports this purpose, in particular the focus on strategic management within the coastal zone. However, we are concerned that the substantive provisions concerning CM programs are not sufficiently rigorous to realise this goal. Specifically:

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<sup>39</sup> Coastal Bill, s. 12.

- The Bill does not provide for the mandatory creation of CM Programs.<sup>40</sup> (Although we acknowledge there are significant resource implications for this and additional resourcing from the NSW government would be needed for local councils to comply).
- On the one hand, the Bill requires local councils to ‘give effect’ to their CM Program in the preparation of planning proposals (that is, LEPs or amendments to LEPs) and development control plans.<sup>41</sup> On the other hand, the Bill includes a provision which explicitly states that a failure to consider CM Programs when developing LEPs etc. does not amount to a breach.<sup>42</sup>
- The Bill does not provide for catchment-scale strategic assessment or co-operation between councils where a catchment falls within more than one local government area.

EDO NSW submits that the recent addition of regional strategic planning provisions in the EPA Act<sup>43</sup> could be used to great effect in the coastal zone. Specifically, the Minister could declare a catchment to be a ‘region’<sup>44</sup> and require the preparation of a ‘regional plan’ for that catchment.<sup>45</sup>

**Recommendation 24:** The Minister should use Part 3B of the EPA Act to create catchment-scale regional plans which provide for strategic assessment across each catchment in the coastal zone. This process should be used to:

- determine the capacity of each catchment to support with development without further compromising its biophysical, hydrological and ecological integrity (and in particular that of littoral rainforests, coastal wetlands and sensitive coastal environments);
- identify coastal hazards and actions for managing those hazards, including sea-level rise caused by climate change;
- consider cumulative impacts; and
- recommend amendments to planning controls to ensure consistency between the strategic vision outlined in the plan and on-the-ground management of development and its impacts.

The NSW Coastal Council should have a role in this process.

## g) Mapping

The Explanation of Intended Effect states that the mapping for the coastal zone will be based on a mixture of existing and new maps.<sup>46</sup> We understand that mapping in many parts of the current coastal zone is out-of-date. This feedback was received at recent EDO NSW workshops in the reforms, for example, in relation to mapping for

<sup>40</sup> Coastal Bill, s. 13.

<sup>41</sup> Coastal Bill, s. 22. The equivalent provision for other agencies is s. 23.

<sup>42</sup> Coastal Bill, s. 29. This section also states that other agencies are not in breach if they fail to give effect to CM Programs under s. 23.

<sup>43</sup> EPA Act, Part 3B.

<sup>44</sup> EPA Act, s. 75AB(a).

<sup>45</sup> EPA Act, s. 75AC.

<sup>46</sup> Explanation of Intended Effect, pp. 10-11.

the Tweed coast. The reform process is therefore an opportunity to ensure that the new maps are based on the best-available information. Furthermore, mapping should include catchment-scale overlays which help to facilitate proper strategic planning and decision-making, and identify important wetland restoration sites. Workshop participants were also concerned that mapping needed to be ground-truthed.

We note that clause 31 of the Bill provides that mapping may be provided for in the regulations. The regulations should make it clear that the new regime cannot commence until mapping has been completed and provide clear rules in relation to whether maps can be challenged and the public and expert consultation processes required for map changes. This will be crucial in situations where local councils may want to increase coastal use areas.

**Recommendation 25:** Mapping of the coastal zone must be based on best-available science, include catchment-scale overlays and identify important wetland restoration sites.

**Recommendation 26:** Regulations must set out consultation processes in relation to any map changes proposed by local councils.

## **h) Managing Sea Level Rise**

The proposed reform package, while noting climate change in the objective 3(f), should be strengthened to provide a clear legislative regime for assessing and managing climate change impacts, specifically including sea level rise.

EDO NSW supported the previous *2009 NSW Sea Level Rise Policy Statement*,<sup>47</sup> and did not support its repeal. We note that the Explanation of Intended Effect recognises that the *NSW Coastal Planning Guideline: Adapting to Sea Level Rise* is an important 'support document' but that it will be revoked once certain components are included in the manual.<sup>48</sup>

Leadership and standard setting by the state government is essential regarding sea level rise (and climate change adaptation more broadly).<sup>49</sup> The absence of standards in relation to planning for sea level rise has created inconsistent approaches along the coast. This has led to a situation whereby local Councils may rely on scientifically questionable reports instead of IPCC projections,<sup>50</sup> and the degree to which this can be challenged is debateable.<sup>51</sup>

<sup>47</sup> See: Submission to the NSW Department of Planning on the Draft NSW Coastal Planning Guideline: Adapting to Sea Level Rise, 11 December 2009 - [Download PDF](#), and Submission to the NSW Department of Environment and Climate Change on the Draft Sea Level Rise Policy Statement, 9 April 2009 - [Download PDF](#) available at: [http://www.edonsw.org.au/coastal\\_marine\\_fisheries\\_management\\_policy](http://www.edonsw.org.au/coastal_marine_fisheries_management_policy).

<sup>48</sup> See Explanation of Intended Effect p 7 .

<sup>49</sup> See also Submission on draft planning circular: Coastal hazard notations on s 149 planning certificates, 3 March 2014 - [Download PDF](#), available at: [http://www.edonsw.org.au/coastal\\_marine\\_fisheries\\_management\\_policy](http://www.edonsw.org.au/coastal_marine_fisheries_management_policy).

<sup>50</sup> For example, we have been made aware of a Council relying on projections of the Nongovernmental International Panel on Climate Change, instead of the IPCC. The NIPCC is funded by the Heartland Institute, an American conservative and libertarian public policy organisation and would appear to have an interest in



**Recommendation 27:** The coastal reforms should establish a regulatory regime requiring mandatory assessment of likely sea-level rise, identification of associated risk and corresponding management strategies based on best-available science. Again, this is an overarching policy and regulatory issue where advice from the NSW Coastal Council should be required.

### **g) Resourcing, compliance and enforcement**

The reform package places responsibility on local Councils as primary managers of coastal areas. Requirements to establish and give effect to coastal management programs are supported, however we note that Councils may need further guidance and resourcing from the NSW Government to help achieve this. Concerns were raised at recent EDO NSW workshops on the reforms regarding the capacity of large amalgamated Councils to implement new laws if potentially less staff are covering greater areas of coast. In addition to significant resourcing, a clear and practical updated Coastal Manual is supported.

The reforms should also make clear that enforcement provisions under the EP&A Act will apply. Alternatively, enforcement provisions should be expressly included in the new legislation.

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preventing policies that place limitations on the free market. See:  
<http://communityreport.shoalhaven.nsw.gov.au/Corporate-Governance/Partnerships>

<sup>51</sup> See: Section 733 Local Government Act 'good faith' provisions provide exemptions against liability.