

NSW Office of Environment and Heritage

BAM Assessor Update Number 8

November 21, 2018

1. Topics Covered:

Western Sydney interim designated areas - extended for 12 months
Biodiversity offsets scheme commencing for local development for former IDA areas

Western Sydney interim designated areas to be extended for 12 months

The following western Sydney local government areas have been declared as Interim Designated Areas (IDAs) for a further 12 months: Camden, City of Campbelltown, City of Fairfield, City of Hawkesbury, City of Liverpool, City of Penrith and Wollondilly. An amendment to the *Biodiversity Conservation (Savings and Transitional) Regulation 2017* is being progressed to defer commencement of the biodiversity offsets scheme for local development in these local government areas until 25 November 2019.

The relevant Councils have been advised and provided with some information addressing common questions around assessment and offsetting processes for development applications in an IDA. This information is attached for your reference. (see below)

Please advise your clients as appropriate.

Biodiversity offsets scheme commencing for local development for former IDA areas

On 25 November 2018, the biodiversity offsets scheme will commence for local development in the Cessnock, Newcastle, Port Stephens, Lake Macquarie, Maitland, Central Coast and Coffs Harbour local government areas, and in the West Dapto Urban Release Area in the Wollongong local government area.

The biodiversity impacts of new development applications (or modifications) submitted from 25 November 2018 in these areas will be assessed in accordance with the *Biodiversity Conservation Act 2017*.

Guidance for local government: Arrangements in interim designated areas in Western Sydney – November 2018

Western Sydney councils of Camden, City of Campbelltown, City of Fairfield, City of Hawkesbury, City of Liverpool, City of Penrith, Wollondilly

A regulation amendment is underway to extend the interim designated areas (IDAs) declared for Western Sydney for 12 months. The former planning provisions will continue to apply in these IDAs for applications submitted for development consent, or modifications to an approved development, under Part 4 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) (not including State Significant Development) until 24 November 2019 (but only if a species impact statement to be submitted in connection with the application is submitted before 25 May 2020). The biodiversity offsets scheme will commence on the 25 November 2019.

Information is provided below on frequently asked questions in relation to biodiversity assessment and offsetting arrangements in IDAs under the former planning provisions.

Can a consent authority require the retirement of credits as offsets for development assessments under former planning provisions?

Yes. A consent authority could, following an evaluation of environmental impact under section 4.15 of the EP&A Act, use the general conditioning power at section 4.17 to impose a condition requiring the retirement of biodiversity credits in accordance with the mechanisms of the *Biodiversity Conservation Act 2016* (BC Act) (subject to complying with the common law). In the absence of a specific requirement in the legislation to provide a biodiversity offset, the consent authority would need to determine that a condition of this nature is reasonable and lawful.

Can a consent authority require that a development application apply the Biodiversity Assessment Method (BAM) and prepare a Biodiversity Development Assessment Report (BDAR)?

A BDAR records the impacts on biodiversity at a development site and is based on the BAM, established by the BC Act to underpin the biodiversity offsets scheme. A BDAR sets out steps the proponent proposes to take to avoid and minimise biodiversity impacts, any potential serious and irreversible impacts, and the offset obligation required to offset likely impacts of the development expressed in biodiversity credits.

Under Part 7 of the BC Act, proponents must submit a BDAR with a development application for proposed development that is likely to significantly affect threatened species. In IDAs, this part of the BC Act is not in force. However, proponents can voluntarily choose to provide a BDAR with a development application as additional information for council.

A condition of consent could require the calculation of credits through the preparation of a BDAR in accordance with section 6.12 of the BC Act. 2

Can a consent authority accept a BDAR submitted in an IDA?

If a development is not likely to have a significant impact (as per the test of significance in the now repealed section 5A of the EP&A Act), the consent authority may determine that a BDAR is a satisfactory way of assessing biodiversity impact for the purposes of evaluating environmental impacts under section 4.15 of the EP&A Act. The consent authority would need to determine that the report met all relevant requirements in the EP&A Act and Regulation. It would need to be accompanied by a test of significance prepared in accordance with the now repealed section 5A of the EP&A Act.

If a development is likely to have a significant impact (as per the test of significance in the now repealed section 5A of the EP&A Act), the applicant must prepare a Species Impact Statement and the consent authority must seek concurrence from the Chief Executive of the Office of Environment and Heritage (OEH). In IDAs, the Chief Executive of OEH will accept a BDAR prepared using the BAM under the BC Act when giving concurrence for a Species Impact Statement.

What is required for Species Impact Statements in IDAs?

When issuing requirements and giving concurrence for Species Impact Statements in IDAs, the Chief Executive of OEH will require the use of the BAM under the BC Act. This will identify an offset obligation in BC Act credits. This will allow the consent authority to outline an offset obligation as a condition of consent in units used by the biodiversity offsets scheme.

OEH is progressing a regulation amendment to extend the deadline for Species Impact Statements in IDAs. It is intended that if a Species Impact Statement is required for a development in an IDA, it must be submitted within six months of the relevant council's IDA end date. For Western Sydney IDAs, this is within six months of 25 November 2019.

Should the Biodiversity Banking Assessment Methodology (BBAM) be used to assess biodiversity impacts and calculate offsets in IDAs?

The EP&A Act governs what type of assessment and information should accompany a development application. For transitional projects, this might include a biodiversity assessment using OEH's methods if council determines that is appropriate and lawful. OEH does not recommend using the BBAM and calculator for this purpose.

Offsetting under the *Threatened Species Conservation Act 1995* (TSC Act) is not available for pending or interim planning applications which are local development applications in IDAs. As such, councils cannot require proponents to retire credits in accordance with the TSC Act or apply the BBAM to calculate an offset obligation.

For transitional projects, the development application must be determined in accordance with former planning provisions. The process of determining whether a project is likely to have a significant impact, which may lead to preparing a Species Impact Statement and seeking concurrence, will still need to be followed. 3

Can a developer with a credit obligation issued under former planning provisions pay into the Biodiversity Conservation Fund?

Yes. Payments into the Biodiversity Conservation Fund, as an alternative to retiring credits, is permitted under section 6.30 of the BC Act where a person is required to retire biodiversity credits under the BC Act or any other Act (such as the EP&A Act), including under an instrument, approval or agreement. Should a consent authority condition the retirement of credits in its consent, then a payment to the fund to discharge this obligation would be possible. Note that if the credit obligation has been calculated using the BBAM and calculator, a process of establishing the reasonable equivalence of biodiversity credits would be required. Further information is available at <https://www.environment.nsw.gov.au/biodiversity/reasonable-equivalence-assessment.htm/>.

Can a developer with an obligation to secure land as an offset issued under former planning provisions establish a Biodiversity Stewardship Agreement?

Yes. Part 6 of the BC Act is operational. Should a consent authority condition that a parcel of land be secured in perpetuity, it would be possible to enter into a Biodiversity Stewardship Agreement (BSA) assuming that requirements relating to eligibility of the land are met.

Note that where a BSA is entered into to meet a condition of consent, the credits generated from the offset site must be retired and cannot be used to meet an offset obligation for any other development (clause 5.1(1(c)) of the BC Regulation). Note that while there are no size limits relating to BSAs, in some cases smaller parcels of land will be more expensive to manage than larger parcels of land due to edge effects. The smallest Biobanking site is 1.5 hectares.