“Confirm Before You Clear”
Legislation Update: State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017

Introduction

State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 ("Vegetation SEPP") commenced on 25 August 2017. The Vegetation SEPP is part of a package of land management reforms introduced in a bid by the NSW Government to create a framework to regulate the clearing and removal of vegetation on rural and non-rural land in NSW. It provides for two approval pathways depending on whether the land is above or below the “biodiversity offset scheme threshold”.

The Vegetation SEPP:

- repeals clauses 5.9 and 5.9AA of the Standard Instrument;
- does not affect the provisions of any other State Environmental Planning Policy (including the Codes SEPP); and
- prevails to the extent of any inconsistency with any provisions of a local environmental plan that are not mandatory provisions under the Standard Instrument (Local Environmental Plans) Order 2006.

Land and Clearing to which the Vegetation SEPP Applies

The Vegetation SEPP only applies to “non-rural areas of the State”, as described in clause 5 of the Vegetation SEPP. Those areas are described in clause 5 as all land located within certain zones and within certain Local Government Areas specified in the clause.

The LGAs to which the Vegetation SEPP applies are:

- Bayside
- City of Blacktown
- Burwood
- Camden
- City of Campbelltown
- Canterbury-Bankstown
- Canada Bay
Cumberland
City of Fairfield
Georges River
City of Hawkesbury
Hornsby
Hunter’s Hill
Georges River
Inner West
Ku-ring-gai
Lane Cove
City of Liverpool
Mosman
Newcastle
North Sydney
Northern Beaches
City of Parramatta
City of Penrith
City of Randwick
Rockdale
City of Ryde
Strathfield
Sutherland Shire
City of Sydney
The Hills Shire
Waverley
City of Willoughby
Woollahra

The Standard Instrument zones to which the Vegetation SEPP applies are:

RU5 Village
R1 General Residential
R2 Low Density Residential
R3 Medium Density Residential
R4 High Density Residential
R5 Large Lot Residential
B1 Neighbourhood Centre
B2 Local Centre
B3 Commercial Core
B4 Mixed Use
B5 Business Development
B6 Enterprise Corridor
B7 Business Park
B8 Metropolitan Centre
IN1 General Industrial
IN2 Light Industrial
IN3 Heavy Industrial,
IN4 Working Waterfront
SP1 Special Activities
SP2 Infrastructure
SP3 Tourist
RE1 Public Recreation
RE2 Private Recreation
E2 Environmental Conservation
E3 Environmental Management
E4 Environmental Living or Zone W3 Working Waterways

The clearing of vegetation within the zones and LGAs listed above is either exempt from approval, or may be cleared with an “approval” or a “permit”. The category that any particular clearing falls within will depend on the nature and extend of the clearing. There are three possible alternative pathways:

1. a “permit” is required from the relevant council for the LGA to clear any “vegetation” that is declared by a development control plan to be vegetation for which a permit is required; or

2. an “approval” is required from the Native Vegetation Panel to clear “native vegetation” if the clearing, by reason of its nature and extent, exceeds the “biodiversity offsets scheme”; or

3. no authority is required to clear vegetation:
   - of a kind that is authorised under section 600 of the Local Land Services Act 2013; or
   - that the council for the LGA or Native Vegetation Panel is satisfied is dying or dead and is not required as the habitat of native animals; or
   - that the council is satisfied is a risk to human life or property.

In order to fall within the no authority required category, it is necessary to obtain an approval (in the form of an opinion from the Council or Native Vegetation Panel) that the clearing is exempt from approval - in effect a preapproval exemption. There are no formal procedures for obtaining such an approval.

The following additional interpretive provisions apply to the requirement to obtain a permit or approval:

- The requirement for a permit and approval are mutually exclusive, a permit cannot be issued in circumstances where an approval is also required.
- A permit cannot be issued where the vegetation is or forms part of a heritage item or aboriginal object, is on land within a heritage conservation area, or within an aboriginal place of heritage significance unless the Council forms an opinion that the clearing satisfies certain circumstances.

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1 Clause 7 and Part 3 VSEPP
2 Clause 7 and Part 4 VSEPP
3 Clause 8 VSEPP
4 Clause 10(2) & 14(3) VSEPP
5 Clause 10(3) VSEPP
Meaning of “vegetation”, “native vegetation” and “biodiversity offsets scheme threshold”

The expressions “vegetation”, “native vegetation” and “biodiversity offsets scheme threshold” are defined in clause 4 of the Vegetation SEPP as follows:

**vegetation** means a tree or other vegetation, whether or not it is native vegetation.

**native vegetation** has the same meaning as in Part 5A of the *Local Land Services Act 2013*, namely:

*any trees (including any sapling or shrub or any scrub), understorey plants, groundcover (being any type of herbaceous vegetation) or plants occurring in a wetland, that was established in NSW before European settlement, and which:

- **includes** a plant that is dead or that is not native to New South Wales if:
  - the plant is situated on land that is shown on the “native vegetation regulatory map” adopted under the Local Land Services Act 2013 as “category 2-vulnerable regulated land”, and
  - it would be native vegetation for the purposes of this Part if it were native to New South Wales;

- **excludes** marine vegetation (being mangroves, seagrasses or any other species of plant that at any time in its life cycle must inhabit water other than fresh water).

**biodiversity offsets scheme threshold** in effect means either:

(a) clearing of an area of land greater than:

- 0.25 ha if the minimum lot size is less than 1 ha
- 0.5 ha if the minimum lot size is less than 40 ha but not less than 1 ha
- 1 ha if the minimum lot size is less than 1000 ha, but not less than 40 ha
- 2 ha if the minimum lot size is 1000 ha or more

Where:

- the “minimum lot size” means either:
  - the minimum lot size specified in a local environment plan or state environmental planning policy applying to the land; or
  - if no such sizes specified, the actual size of the allotment to be cleared.

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6 The expression as defined in the VSEPP means “the biodiversity offsets scheme threshold referred to in section 7.4 of the *Biodiversity Conservation Act 2016*, except that, for the purposes of the Vegetation SEPP, the threshold is to be determined without regard to clause 7.3 (4) of the *Biodiversity Conservation Regulation 2017*.”

7 Clause 7.1(1)(a) and 7.2(1) *Biodiversity Conservation Regulation 2017*
(b) clearing of land included on the biodiversity values map published under clause 7.3 of the Biodiversity Conservation Regulation 2017 but not including:

- development (other than subdivision) to be carried out on a lot registered before the commencement of the biodiversity conservation Act 2017 and the lot is within land zoned R1 to R4, RU5, B1 to B8 or IN1 to IN3 under an environmental planning instrument.

- development that was the subject of a development application that was not finally determined at the time of publication of the map or within 90 days of its publication.

Clearing of native vegetation is “deemed” to be clearing of land for the purposes of the biodiversity offset scheme threshold if, in the case of the subdivision of land, the clearing is “required or likely to be required” for the purposes for which the land is to be subdivided.

Procedure for Obtaining a Council Permit

Part 3 of the Vegetation SEPP provides that a permit is required from the council of the LGA in which the land is located for clearing of vegetation that is identified in a development control plan, and is below the biodiversity offsets threshold. A permit may be granted subject to conditions.

An application for a permit is not a development application under the Environmental Planning and Assessment Act 1979 ("EP&A Act"), and a permit is not a development consent under that Act. The clearing of vegetation is development as defined in that Act, being an “act, matter or thing referred to in section 26 that is controlled by an environmental planning instrument.” However, the scheme in Part 4 of the EP & A Act for obtaining development consent does not apply to an application for a permit under the Vegetation SEPP, because the Vegetation SEPP does not trigger section 76A of the EP & A Act.

This means that development consent is no longer an option for clearing of vegetation below the biodiversity offsets threshold. Development consent is still required for clearing of vegetation that is, or is located on land containing a heritage item, or is located on land within in a heritage conservation area.

There is no mechanism for modification of a permit once issued. The only option for a land owner seeking to modify a permit is to lodge a new application incorporating the modifications.

If vegetation is not identified in a development control plan for the purposes of the Vegetation SEPP, that vegetation is simply not protected under Part 3 of the Vegetation SEPP.

Current development control plans that identify vegetation for the purpose of local environmental plans that adopted the former clause 5.9 of the Standard Instrument will remain in force until they are amended to account for the Vegetation SEPP. Nonetheless, provisions that require development consent for clearing will no longer have any effect other than those applying to heritage connected vegetation.

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8 Clause 7.1(1)(b) Biodiversity Conservation Regulation 2017
9 clause 7.3(4) Biodiversity Conservation Regulation 2017
10 clause 7.3(5) Biodiversity Conservation Regulation 2017
11 clause 7.1(3) Biodiversity Conservation Regulation 2017
12 Clause 10(3) VSEPP
13 Clause 26(1) VSEPP
The Department of Planning has indicated that it proposes to publish a model development control plan. It will be prudent for Council’s to ensure that their development control plan includes a list of vegetation for the purpose of the Vegetation SEPP. Otherwise vegetation may be left unprotected.

**Procedure for Obtaining an Approval**

Part 4 of the Vegetation SEPP provides that an application may be made by or on behalf of a landholder to the Native Vegetation Panel for approval to clear native vegetation in any non-rural area of the State.

The Native Vegetation Panel is a body established by the Minister responsible for administering the *Local Land Services Act 2013*. Its principal function is to determine applications for approval to clear native vegetation under Part 4 of the Vegetation SEPP. The panel may delegate the exercise of its functions under the Vegetation SEPP to the Council for a LGA. It appears that one panel will cover the whole of NSW.

The Panel does not have the power to grant an approval unless the purpose of the clearing is specified in the application and that purpose may be carried out without development consent under Part 4 of the EP&A Act. The clear objective of that limitation is to force landholders to apply for land clearing as part of an application for the subsequent use of the land. This will enable the impacts of the clearing to be assessed as part of a wholistic assessment of impacts at the subsequent development application stage. This will prevent landowners de-constraining land by obtaining an approval for clearing ahead of an application for subsequent development of a site.

Given the generally limited range of purposes that are permitted without development consent on urban land under most LEPs, there are likely to be very few applications for approval to clear land under Part 4 of the Vegetation SEPP.

An approval may only be granted under Part 4 of the Vegetation SEPP if a biodiversity development assessment report in respect of the proposed clearing has been obtained by the applicant for that approval and provided to the Native Vegetation Panel.

The Vegetation SEPP establishes matters for consideration in the determination of an application for approval under Part 4 of the Vegetation SEPP. Those matters include the environmental, social and economic impacts of the proposed clearing, having regard to the purpose for which the land will be used after it is cleared. The viability of the end use would be a relevant matter for consideration. The Panel is also to consider “any future clearing of native vegetation on the land that has been duly authorised or notified but not yet carried out”.

An approval may be granted subject to conditions, except a condition relating to the use of the land after it has been cleared. An approval may be modified on application by a landholder, and will lapse 5 years after the date on which it operates, unless the clearing is commenced before that date.

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14 Clause 14(4) VSEPP
15 Clause 23 VSEPP
Exemptions

There are various categories of clearing specified in section 60O of the *Local Land Services Act 2013* that are excluded from the requirement to obtain approval under the Vegetation SEPP. Some of the more relevant exceptions are:

- clearing of vegetation that is ancillary to other development the subject of a development consent under Part 4 of the EP & A Act, an activity within the meaning of Part 5 of the EP&A Act, or an approval under Part 5.1 of the EP&A Act;

- clearing classified as an emergency firefighting act, emergency bushfire hazard reduction work, bushfire hazard reduction work under section 100C(4) or vegetation clearing under section 110R of the *Rural Fires Act 1997*;

- clearing for the purposes of a survey under the *Surveying and Spatial Information Act 2002*.

Clearing of vegetation that is not ancillary to another form of development and which does not require a permit or approval under Parts 3 or 4 of the Vegetable SEPP may be carried out without development consent.16

Appeals

The Vegetation SEPP creates its own appeal scheme. An applicant for a permit or approval may appeal to the Land and Environment Court against the refusal or deemed refusal of the application. An application for a permit or approval is deemed to be refused for the purposes of appeal rights if the Council or Native Vegetation Panel has failed to determine the application after 28 and 90 days respectively. Time periods are to be calculated excluding time between a request for additional information and the provision of that information.

An appeal must be filed:

- in respect of a permit – within 3 months after the date of the refusal or deemed refusal; and

- in respect of an approval – within 6 months after the date of the refusal or deemed refusal.

An additional appeal right exists against the imposition of a condition imposed an approval under Part 4 and against a decision to modify an approval under Part 4. There is no appeal right in respect of the imposition of a condition on a permit issued under Part 3.

Enforcement

Clearing of vegetation governed under the Vegetation SEPP without a relevant permit or approval, or contrary to a permit or approval, is a breach of the EP&A Act. Any person, including a council, may commence proceedings in the Land and Environment Court under section 123 of the Act to remedy or restrain a breach.

Clearing of vegetation governed by the Vegetation SEPP without a relevant permit or approval, or contrary to a permit or approval, is also an offence under section 125 of the EP&A Act. Additionally,

16 Clause 25 VSEPP
failure to comply with any conditions of a permit or approval is also an offence under section 125 of the EP&A Act. A person found guilty of this offence may be liable to any penalties applicable to the offence. The maximum penalty applicable to the offence will depend on the tier of the offence specified in the EP&A Act and whether proceedings are commenced in the Local or Land and Environment Court.

Clearing of vegetation in breach of the Vegetation SEPP is not an offence for which a penalty notice may be issued, nor a matter that authorises a council to issue and order under section 121B of the EP&A Act.

This article is not intended to be legal advice. For further information about this case note or any planning law advice or representation in the Land and Environment Court, please contact Planning Law Solutions.

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