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28th April 2021

**NSW Nature Conversation Council and the Total Environment Centre
submission on the Explanation of Intended Effects for the proposed Design
and Place SEPP**

The Nature Conservation Council of NSW (NCC) is the state's peak environment organisation, representing over 160 environment groups across the state. Together we are dedicated to protecting and conserving the wildlife, landscapes and natural resources of NSW.

Since 1972, the Total Environment Centre (TEC) has worked with Australian communities on more than 100 victorious campaigns - defending parks and bushland in rural and urban areas, driving debate, advocating for pure air and water, supporting positive change in business and industry, and encouraging better environmental policy.

We welcome the opportunity to provide comment on the Design and Place State Environmental Planning Policy (DP SEPP) Explanation of Intended Effects (EIE).

Planning frameworks such as the DP SEPP determine the characteristics of our urban places. They touch the lives of millions of people and lock in water use, energy efficiency, urban heat futures and biodiversity outcomes for decades to come.

Environmental and liveability challenges in our cities and towns are significant and urgent. Policy decisions about the built environment are particularly critical to an effective response to climate change. The built environment creates 25% of emissions. The form and quality of our buildings, infrastructure and urban places will determine our resilience as extreme weather events and sea level rise intensify.

Given the stakes, the long-term public interest, and certainty of best practice outcomes across the board, need to be firmly at the centre of all planning reform.

These realities are recognised and embraced at a superficial level in guiding principles four and five of the DP SEPP. However, we have serious concerns regarding if and how these principles, intended to produce sustainability and wellbeing outcomes, will be implemented in practice.

The DP SEPP establishes expectations across a wide range of factors aligned with its principles. These include resilience, green infrastructure, emissions and resource efficiency and tree canopy. They become 'mandatory matters for consideration' that



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developers and decision makers have to consider in the assessment and approval process. In other words, they are completely discretionary.

This approach is problematic because 'flexibility', 'trade-offs' and 'moving away from prescriptive controls' gives rise to a fundamental conflict of interest; developers seeking to profit maximise should not be deciding their own sustainability requirements. The NSW community needs the standards for environmental performance to rise across the board - with backstop rules that apply to everyone. Regulations should be designed to lift up all developers, not just work with the best few.

The attached submission provides further feedback on the EIE. It is difficult to make specific comments about the proposed new DP SEPP because of the very general nature of the EIE on exhibition.

In summary:

- A move to 'principles-based' regulation, is likely to reduce the rigour of decision-making and put significant pressure on consent authorities. This risks attracting community dissatisfaction as the "principles" fail to become real.
- More discretionary decision making will likely lead to inconsistent decisions and an increase in disputes of planning decisions.
- Emphasis on reports rather than rules creates a barrier to community understanding and civic engagement in planning decisions.
- Negotiable tree retention requirements will mean the Government's own 40% canopy cover target will not be met, and urban heat will worsen.
- Creating alternative pathways which avoid the BASIX requirements is complicating, inconsistent and undermines achieving standards across the board.
- Ambitious climate change mitigation and adaptation reforms should be non-negotiable and at the heart of all land use planning and development control.

The proposed DP SEPP appears to ignore the lessons from past major best practice developments, where high environmental performance has been achieved through clear standard-setting and benchmarking. For example, detailed star rating systems such as from the Green Building Council.

The development of Sydney Olympic Park, as part of the 'green games', also demonstrates what clear sustainability requirements can achieve. The BASIX SEPP was a direct outcome of this experience, inspired by resource efficiency standards delivered on the site.



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The proposed DP SEPP sidelines the community and local councils. It surrenders environmental standards and liveability to private sector developers. It opens the door for many more developer court cases appealing council decisions. It's an abrogation of responsibility by the state government to present and future generations.

Yours sincerely,

Chris Gambian
Chief Executive
Nature Conservation Council

Jeff Angel
Director
Total Environment Centre



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Nature Conservation Council and Total Environment Centre feedback on the Explanation of Intended Effects for the Design and Place State Environmental Planning Policy (DP SEPP).

A move to ‘principles-based’ regulation is likely to reduce the rigour of decision-making and put significant pressure on consent authorities.

The EIE for the DP SEPP asserts that the DP SEPP will contribute to “reducing complexity without reducing rigour”. However, a move from ‘rule-based’ to ‘principles-based’ regulation, particularly in the absence of clear benchmarks and without increased resourcing, guidance and support for consent authorities, is likely to reduce the rigour of decision-making and put significant pressure on consent authorities.

There may be many circumstances where a consent authority is either not appropriately resourced (on a financial, staffing, or expertise basis) to assess development applications through a more subjective, less prescriptive, principles-based prism, or where there is not the organisational support to make decisions that will impact developers.

More discretionary decision making will likely lead to inconsistent decisions and an increase in disputes of planning decisions.

A lack of policy certainty will lead to a rise in litigation from proponents dissatisfied with the outcome of a development decision. Policy ambiguity may provide more scope for a proponent to receive a different outcome following litigation, which is an incentive to undertaking such litigation.

Conversely, the risk of litigation can lead to consent authorities - without the backing of clear standards - being overly deferential to well-resourced developer interpretations of the SEPP and its requirements.

The NSW Independent Commission against Corruption (ICAC) has previously warned that discretionary decision-making in the planning system is a corruption risk.¹

The DP SEPP should be drafted to reduce these risks, provide certainty, and limit the scope for increased legal disputes.

Emphasis on reports rather than rules creates barriers to community understanding and civic engagement in planning decisions.

The proposed SEPP implements objectives through ‘matters for consideration’, which ultimately means decision makers have to accommodate a lot of developer discretion and environmental performance cannot be guaranteed.



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Instead of projects being benchmarked against clear best practice targets, decision makers and local communities will be submerged in a blizzard of studies (paid for by developers) 'considering' environmental impacts and liveability. The community (and many councils) will have little capacity to fully assess all this documentation and argue for better, alternative outcomes.

The NSW Government needs best practice environmental performance requirements that will create certainty for industry and the community.

Negotiable tree retention requirements will mean the Government's own 40% canopy cover target may not be met.

The proposed SEPP allows removal of existing tree canopy to be offset by green roofs, walls and softscape, or two small new trees. Enabling removal of mature trees will impact human health, urban water quality and biodiversity.

The NSW Government needs policies that will ensure retention of existing high quality tree canopy. Open space targets should be mandatory and not offset by weak and non-equivalent alternatives.

Creating alternative pathways which avoid key BASIX requirements is complicating, inconsistent and undermines achieving standards across the board.

The proposed SEPP will replace key parts of the BASIX SEPP, which sets mandatory requirements for energy, water use and thermal comfort for all new residential buildings and major renovations. The proposed SEPP seeks to create more 'flexibility' in meeting these requirements.

The NSW Government needs to maintain, improve and enforce BASIX. The principles outlined in the DP SEPP EIE should be translated into mandatory requirements and standards in an expanded regulatory framework under BASIX.

Ambitious climate change mitigation and adaptation reforms should be non-negotiable and at the heart of all land use planning and development control.

The new DP SEPP includes emissions reduction and resilience in its 'mandatory matters for consideration'. This is a weak lever for an urgent and pressing problem.

The NSW Government needs to recognise that dramatically reducing emissions and increasing resilience to natural hazards is vital, not just a consideration.

The Design and Place SEPP is an opportunity to embed high standards for climate change adaptation and emissions reduction in our built environment. The exhibited EIE misses this opportunity.



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¹ See, for example, Independent Commission Against Corruption, *Corruption risks in NSW development approval processes*, 2007, available at

<https://www.icac.nsw.gov.au/ArticleDocuments/232/Corruption%20risks%20in%20NSW%20development%20approval%20processes%20-%20Position%20paper.pdf.aspx>; see also, Independent Commission Against Corruption, *Anti-Corruption Safeguards and the NSW Planning System*, 2013, available at https://www.icac.nsw.gov.au/ArticleDocuments/625/Anti-corruption_safeguards_and_the_NSW_planning_system_2012_c.pdf.aspx