21 June 2017

Land Management and Biodiversity Conservation Reforms
Office of Environment and Heritage
PO Box A290
Sydney South NSW 1232

The Director,

PIA SUBMISSION ON BIODIVERSITY CONSERVATION REGULATIONS AND SUPPORTING REFORMS

The Planning Institute of Australia (PIA) appreciate the opportunity to offer a submission on the Regulations and supporting documents.

The Institute is the peak body representing professionals involved in planning Australian cities, towns and regions. We have over 5,000 members nationally and 1,200 in NSW. This submission focuses on biodiversity matters principally as they impact on urban and regional planning decisions – it does not discuss the Local Land Services administered rural lands / agricultural aspects of the reforms in detail.

1. OVERVIEW

In June 2016, PIA made a submission on the Draft Biodiversity Conservation Bill in which we commended the potential for the Bill to lead to a consistent approach to biodiversity management in NSW and especially:

- the potential for a single biodiversity assessment methodology;
- support in principle for the use of strategic biodiversity certification; and
- mechanisms for the purchase and management of significant environmental lands.

However, PIA requested that the reform be placed on hold until issues that conflict with the intent of broader planning reforms and good planning practice were addressed in greater detail. The extent to which these issues are addressed in the draft Regulations is considered in the table below.

The Regulations and supporting documents now on exhibition expand on the process, assessment methodology and interaction of offsets with the planning system. The material reveals the high complexity of the proposed reforms and exposes the system to a high risk of regulatory failure. In addition, some important conflicts remain in the approaches proposed and in the capacity of property owners, State Authorities and local government to implement the reforms.

2. CONSIDERATION OF ISSUES RAISED BY PIA ON BILL

The issues raised in our submission on the Draft Bill are assessed with respect to the proposed Regulations and supporting documentation in the table below. PIA responses are colour coded to
highlight the extent to which the Regulation and supporting material address the issue raised. Issues of concern are discussed in greater detail below the table.

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<th>Concern raised on Bill in PIA 2016 Submission</th>
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| 1. Environmental outcomes compromised by removal of requirement to ‘maintain and improve’ biodiversity | • The Regulations do not expand on this point (Act s1.3 purpose: conserve / maintain (not improve) biodiversity)  
• Additional biodiversity values are recognised in cl1.4 of the Regulations) are noted.  
• The requirement to ‘improve or maintain biodiversity values’ is a key component of the existing Native Vegetation Act 2003 and Biodiversity Certification under the Threatened Species Conservation Act 1995, yet will not be retained under the Biodiversity Conservation Act/Regulation. The removal of the ‘improve or maintain’ requirement was not recommended by the Independent Panel and is seen as underlying weakness. |
| 2. Expanded ‘self-assessable’ codes allowing landowner tree clearing with insufficient oversight | • Addressed under the Land Management (Native Vegetation) Code in Category 2 regulated land.  
• Land owners must comply with the code. |
| 3. Reduced role of Environment Minister (now key regulatory role with Local Land Services and Minister for Primary Industries) will skew outcomes in favour of primary production. | • The exhibited processes for the operation of the offsetting reforms should be sufficiently robust to operate under any portfolio.  
• A critical concern arises in the execution of discretion under variation rules – which PIA recommend should be the subject of further consultation.  
• PIA remains concerned over the validity of the offsets formula to result in a satisfactory biodiversity outcome – and creates an environment where discretion in the application of variation rules may be so wide as to compromise the reforms. |
| 4. Ministerial discretion ultimately impacts the operation of offsets for which the absence of environmental baselines and basis for offset calculations is not sufficiently robust. | • This depends on the extent to which Sensitive Biodiversity Values Land Mapping includes high value conservation areas identified by local government (these are not yet complete).  
• The extent to which disturbance of these identified lands is regarded as a serious or irreversible impact (important not for SSI/SSD for which there is Ministerial discretion) |
| 5. Limits safeguards (red flags) for identified environmentally sensitive areas | • For the offset process to act as a genuine market tool – the degree of similarity must be high - between what is cleared and what is provided as an offset credit. The ability for the Trust to acquire and conserve suitable land is not clear from the exhibited material.  
• If the scheme is to proceed a rigorous and independent review and monitoring program should be incorporated to assess net biodiversity outcomes. |
| 6. Enabling variations to ‘like-for-like’ offsetting by paying into fund would diminish biodiversity outcomes | • Substantial funds have been set aside for the implementation of the system – however it is unclear whether the scheme would be self-sustaining and remain a priority. |
| 7. Absence of guaranteed funding and a coherent funding framework | • The BAM assessment methodology offers a consistent approach for councils to apply.  
• However, it does not assist councils in applying their own adopted biodiversity policies and in some cases may lead to confusion in the preparation of conditions of consent.  
• In any case, council officers will be on the front line in handling inquiries from the public and will be in a position of having to refer inquiries to the Trust/OEH/LLS.  
• The short time frame (6 weeks) for exhibition of the Regulations and supporting policy and the feedback from councils indicates that further education and capacity building is necessary prior to implementation. |
| 8. Increased responsibilities for council staff would not be met with sufficient capacity building resources | • Many councils have adopted biodiversity policies in consultation with property owners and their communities – these councils will be justified in applying the policies, DCP standards and consent conditions that relate to their adopted biodiversity policies.  
• Where these may be at odds with outcomes of a BAM, this can create serious confusion and lead to delays in planning outcomes. |
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<td>10. No appeal rights for refusal under ‘serious and irreversible’ impact finding</td>
<td>• There is no appeal right – this assessment occurs in advance of consideration under the EP&amp;A Act.</td>
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| 11. ‘Serious and irreversible’ impact should be defined | • This is defined in the Regulation (cl 6.7) and interpretation material is provided.  
• The Regulation provides for assessors to identify and report in BAM/BDAR on whether ‘Serious and Irreversible impacts would occur and the offsets process should not apply. |
| 12. Thresholds for the biodiversity assessment process to operate are crude and based on area of vegetation loss not impact on biodiversity values | • The thresholds are based on area of vegetation loss in relation to lot size.  
• PIA members have suggested that lot size is an artificial construct and the scheme threshold should only relate to the amount of vegetation (ha) cleared.  
• A project clearing less than 0.5 hectares (and thereby under the lowest proposed area clearing threshold) may be extremely significant in a suburb where very little native vegetation remains. For example, the highly urbanised Waverley Council local government area contains multiple sites considered to be of high environmental value, including Endangered Ecological Communities, which would not trigger this area threshold. |
| 13. Strategic biodiversity certification should be open to non-government interested parties (owners) | • Certification can be progressed by landowners according to the exhibited process.  
• Councils are no longer required to sponsor proposals. However, this will require councils to remain informed of certification processes and will impact their ability to integrate adopted council biodiversity policies in the certification process. This means Councils should be consulted, however the decision made by OEH. |
| 14. Assessor accreditation should be via an independent body | • Assessed by OEH under their draft scheme. |
| 15. Mapping should be based on more rigour and be extensively ground truthed and updated | • Sensitive Biodiversity Values Land Mapping is critical for defining the BAM pathway and to identifying the potential for serious and irreversible impacts. As mapping is incomplete assessments will necessarily be more ad hoc and the ability for accurate Like-for-Like appraisal of offsets would be compromised.  
• Mapping should be exhibited and be the subject of consultation prior to the operation of the scheme. |
| 16. Consolidation of offences should be in one place and expressed as penalty units (not $) | • Addressed in Regulation. |
| 17. No information on how protected land – steep slopes – some riparian land is dealt with outside the LLS framework in urban areas | • The Land Management (Native Vegetation) Code includes reference to riparian buffers.  
• The Vegetation SEPP addresses vegetation clearing not otherwise requiring development consent in urban areas.  
• However, only the Explanation of Intended Effects is available on exhibition not the full SEPP. |
| 18. Concern that biodiversity credit market will fail and not send appropriate price signals (eg too high) – especially where credits may be in high demand eg Hunter, Western Sydney. | • With the range and quantum of development projects in the peri-urban area of Sydney increasing, there is an increasing demand for biodiversity offset credits. There is concern that the offsets market will not operate successfully. Already the demand for credits in Western Sydney has increased dramatically with the market price for certain credits increasing from around $9,000 to $16,000 in the preceding 3 years. The exhibited material does not offer adequate explanation of how the market price for credits would be stabilised or whether the application of variation rules would result in a positive outcome.  
• The manner for pricing and the offset ratios should be clear alternatively rezonings or development applications may be delayed for lengthy periods.  
• The variation ancillary rules should be exhibited and be subject to further consultation. |
| 19. Clarity was sought on business rules for Biodiversity Trust on how credit values will be set in a way that improves biodiversity outcomes and ensures that land development can occur in orderly fashion. | |
| 20. Definition of areas of outstanding biodiversity value should be appropriate – that current agriculturally productive land is not included | • Areas of outstanding biodiversity value are narrowly defined.  
• In general, definitions need to be clearer.  
• A definition of mapping criteria is included – however as mapping remains incomplete – site assessment of mapping criteria will need to be applied. |
### 21. The need for early and substantial consultation on the maps, Regulations, BAM, Land Management Codes and an Urban Tree Removal SEPP.

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<td>The Regulation and supporting policy documentation is complex and extensive and has been on exhibition for an insufficient period for PIA members to fully appreciate the nature of the scheme – nor develop the capability to respond and potentially implement it in the near term.</td>
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<td>With the integration of biodiversity so linked to growth and development, and planning for the future of our environment, it is considered critical that further explanation and seminars be held to provide clarity to the industry.</td>
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### 3. FURTHER ISSUES RE DRAFT REGULATION AND SUPPORTING REFORMS

**Like-for-like offsetting**

Clauses 6.3, 6.4 and 6.5 of the Draft Regulation address the matter of offsetting environmental impact with “Like-for-Like” Biodiversity credits.

PIA recognises in principle the value of the “Like-for-Like” approach attached to biodiversity impact offsetting where the offsets are sufficiently comparable to result in a positive biodiversity outcome. Like-for-Like credits are supported first in the same local area and then in the same subregion.

The draft Biodiversity Conservation Regulation (6.4) variation rules require only that “reasonable steps are taken to obtain requisite like-for-like credits”. The requirement as to what is “reasonable” is unclear and needs guidance. Given that it may take 2 – 5 years to create credits, this is an unworkable time period. The default position will be to pay money to the Biodiversity Conservation Trust. If this is the case, it is unlikely to result in the key objective for a biodiversity outcome.

In relation to the generation of offset credits, PIA considers that the prevailing level of environment protection from clearing / development under a planning scheme should be taken into account (eg E2 Environment Protection Zone). Not taking zoning into account (at least partially) would artificially inflate the value of a credit. In addition, the proposed use of rehabilitating areas (eg mines) as offset sites to generate credits is of concern as the quality of these will remain poor for many years, and rehabilitation is associated with uncertain biodiversity outcomes. This does not support the legislative standard of ‘no net loss’.

If like-for-like cannot be found there must be strong evidence presented as to why an offsetting process should apply. The variation rules should not allow for non-local and non-regional offsetting. Consent authorities should have input in the acceptability of offsetting arrangements, given they are able to reduce or increase the offsetting requirement.

It is understood that as part of the ancillary rules, the Chief Executive of OEH will publish a list of circumstances where proponents will not be allowed to apply the variation rules. It is proposed that all critically endangered entities will be included on this list. PIA recommend that the proposed ancillary rules also include reference to Regional Strategies and how these should influence the consideration of variations to offset rules based on meeting adopted strategic planning outcomes for a habitat or region.

However, PIA also recognises a lack of flexibility can have significant implications for the achievement of other Government policy positions or announced key infrastructure for example in relation to committed urban development decisions based on wider social, environmental and economic drivers.

With the range and quantum of development projects in the peri-urban area of Sydney increasing, there is an increasing demand for biodiversity offset credits. There is concern that the offsets market will not operate successfully. Some recent landmark Government decisions and policies will require the retiring of a significant number of biodiversity credits. These include the designation of the Greater...
Macarthur Priority Growth Area, construction of the Western Sydney Airport and the Western Sydney Roads package. Future policy directions, such as the reservation of the M9 Western Sydney Orbital Motorway and possible unsolicited infrastructure proposals such as the Eastern Seaboard High Speed Train will most likely also draw upon the limited supply of offset credits if / when constructed.

Already the demand for credits in Western Sydney has increased dramatically with the market price for certain credits increasing from around $9,000 to $16,000 in the preceding 3 years. Many will applaud this as the market driven biodiversity offset credit approach working effectively. However, increasing financial costs of biodiversity offset measures triggered by Government land use and infrastructure policy decisions, that are made in the public interest, are passed on to the community by increased land prices and increased cost of infrastructure construction. Eventually, if unmanaged, there is a real vulnerability for the policy decision that the cost could become so prohibitive that the policy decision cannot be cost effectively implemented. Put simply, it becomes economically unviable to build infrastructure and homes to meet social needs due to the escalating input cost of environmental offsetting.

To reconcile competing urban development objectives variation rules will be necessary. However, they have the potential to erode the market concept of the offsetting approach and should be used according to clear rules. These variation rules should be the subject of further engagement with industry and other stakeholders to ensure the application of the rules are robust and transparent.

The like-for-like offset approach is fundamental to the integrity of the offset market. It is doubtful that ecosystem credit species can genuinely be offset for the same vegetation formation, trading group or subregion within an extensive area (100km) of the impacted site and still achieve the aim of maintaining and conserving biodiversity.

If the rules and reasonableness test (to be given more detail by the Environment Agency Head, pursuant to Clause 6.5(f)) give weight to situations where it is Government policy that the use of land will be changed in the public interest to support urban development – then this must be an explicit and public decision - and not compromise the offsetting methodology. For this reason it is believed that the biodiversity process needs to be linked to strategic planning policy across the state.

The Variation Ancillary Rules present detailed guidance for environmental officer and consultants in vegetation assessment and mapping. For example, our members have advised us of a number of court cases and environmental assessments where professional assessment of biometric vegetation types between consultant and OEH officer within a site have become overly technical, contentious and disputed.

In one case study in South West Sydney, there was prolonged disagreement as to whether vegetation on a particular property was either Cumberland Shale Hills Woodland (Tozer GW p28; HN 529) or Cumberland Shale Plains Woodland (Tozer GW p29; HN 528). It was noted that technically, the difference was minor and not generally apparent. It was only resolved by direct consultation with the authority on the matter. The process was inefficient, time consuming and professionally / technically flawed. This dispute under the current legislation is significant as the assessment of vegetation as either Hn 528 or 529 has significant influence on the cost and availability of offset credits. The variation Ancillary rules need to ensure that disputes of this nature (which technically may be unavoidable – as no two patches of vegetation ever exactly match) have less impact on the application of a ‘Like-for-Like” variation.

**Definition of ‘serious and irreversible’ impact**

The biodiversity offsetting approach should not apply where there is a ‘serious and irreversible’ impact. However, the definition in cl 6.7 of Regulations is too narrow due to inclusion of only those species /communities of the highest threat level – not impacts to habitat generally in relation to habitat function in its ecosystem context (eg as a corridor or key patch).
As noted by Tweed Council, the guidance on interpreting ‘serious and irreversible’ impact is premised on impacts in excess of thresholds for candidate species. No thresholds have yet been developed and the candidate list is qualified as being indicative only. There are several key self-confounding aspects of the guidance including that the principles for determining serious and irreversible impacts appear inconsistent with the candidate list, and the notion that there is presently sufficient ‘best current ecological knowledge’ to identify those species that are ‘unlikely to respond to management’ in order to meet the relevant principle that defines serious and irreversible impact in cl 6.7.

Whilst applications for development consent under Part 4 of the EP&A Act must be refused if there are ‘serious and irreversible impacts’, State Significant Development, Part 5 activity or biocertification of land are allowable as long as ‘serious and irreversible impacts’ is ‘taken into consideration’. If serious and irreversible impacts are identified and determined for any type of proposal then the proposal must be refused (whether Pt 4 or 5) – unless accompanied by a published transparent policy based justification for which the relevant authority is accountable.

**Council overlay to offset conditions via council biodiversity policies**

Many councils have adopted biodiversity strategies based on available scientific evidence and which have been developed with local landowners and community stakeholders. These strategies typically have a broader emphasis on habitat, rather than the specific conservation of threatened species and communities. As a result, councils when assessing development will be obliged to reconcile the outputs of Biodiversity Assessment Reports with the considerations of their adopted strategies.

Council officers will be expected to judge the extent to which proposed offsets also meet their policy objectives and include conditions on consent or reject development accordingly. On appeal, this will place councils in the position of disputing the relative merits of their adopted policy versus the output of the BAM. This is an unnecessary and costly proposition. This also means that there are some duplications, possibly in field work or even assessment models. This is ineffective as a process.

PIA regards the duplication of offsets processes under the Regulation versus separate biodiversity considerations in Council planning strategies to be a serious flaw in the design of the scheme. It will also make it time consuming and cost intensive for all parties.

**Strategic planning for biodiversity**

Effective local strategic land use planning appears to be undermined by the biocertification arrangements, which allows local matters to be disregarded and councils no longer needed as sponsors. The provisions enable the Environment Agency Head to override local planning without consultation. Lake Macquarie Council have noted that insufficient emphasis has been placed on strategic biodiversity planning by state and local government to prevent the need for vegetation clearing in the first place.

The Act and Regulation make effective planning for biodiversity at the strategic stage more difficult because of the separation of provisions between the BC Act, LLS Act and the EP&A Act, and by mandating a fragmented and complex biodiversity certification and offsets process. With a separate process for reviewing biodiversity, and a greater role for OEH there is more potential for biodiversity considerations to be excluded from (rather than integrated) with general strategic land use planning processes. Given biocertification is meant to occur in conjunction with local environmental plan amendments, the Regulations should require a higher level of local involvement.

**Biodiversity Assessment Methodology (BAM) and Council capacity building**

The proposed BAM ‘avoid and minimise test’ is important in the determination of development and clearing applications, and must be considered at the earliest stages in the development process, and not as a late consideration as proposed in the exhibited methodology. The process needs to explicitly recognise that it is not practical to offset habitat corridors and difficult to replace connectivity once lost.
The majority of local councils would not have trained staff experts in BAM/Biocertification systems, so assessment would be difficult with refusals hard to defend. The development of a capacity building program, offered and resourced by OEH, for council officers/practitioners is supported. It should be noted that training in the BAM must be ongoing to upskill all council officers required to assess BAM reports. It is important that Council officers be trained in the use of the BAM tool so that they can ensure that the information provided by the accredited assessor is accurate and can be integrated with consideration and conditions arising from a council’s local biodiversity policies.

In addition on large sites, it is extremely costly to undertake the field work in absolute compliance with BAM. It is considered that a two stage process should be considered in the number, or scale of quadrats, when a site is over certain hectares. The BAM approach and level of detail should reflect on the scale, level of detail - rezoning vs development application, due to cost and time.

**Sensitive Biodiversity Values Land Map – Cumulative clearing concerns**

A significant issue is the extent to which OEH and Council mapping products are consistent. The Sensitive Biodiversity Values mapping should take into consideration existing mapping of local councils. Many councils already have similar layers mapped as part of their Local Environment Plan. Councils are appropriate agencies to provide this information as they have the most detailed on-ground knowledge of their local area. Council mapping products include vegetation corridors, vegetation mapping, species habitat distribution modelling and biodiversity values mapping. Previous experience noted by Lake Macquarie City Council has shown OEH maps are likely to be unreliable at the local level, and only valid at the regional or state scale. In this respect rezoning and development application ecological studies should all be placed on a common database, so where details studies have been undertaken, this is transparent for all levels of government and applicants to view.

If an area clearing threshold is set, it should be required that all DAs are assessed against a centralised database of all previous DAs. A successive DA that, when considered in concert with a previous DA, tips the proposed clearing over the area threshold, should then trigger the BAM.

**Coverage and scope of Vegetation SEPP**

The State Environmental Planning Policy (Vegetation), Sensitive Land Values Map, and Codes should be made available for public comment prior to the finalisation and enactment of the reforms (not just the Explanation of Intended Effects).

For example, it is not clear how SILEP 5.9 &5.94 clauses would be reproduced in the SEPP. It is also not clear whether the new clauses would be similar to the Tree Preservation Order (TPO) clauses in terms of conditions and compliance and whether a DCP would still have legal powers with no LEP backing.

Areas of mixed vegetation including non-native vegetation may provide extensive canopy in the urban forest, yet non-native vegetation that is not of heritage value does not appear to be considered in the SEPP. It is recommended that the urban forest be considered and included in the SEPP.

4. CONCLUSION

The reforms, as revealed in the Regulations, represent a substantial transfer of responsibility and workload to local government without sufficient provision for them to fully engage and resource this transfer. The reforms run counter to good planning practice by separating consideration of biodiversity issues from other environmental, social and economic factors - this does not reflect the critical integrating role of strategic planning.

Some important conflicts remain in the approaches proposed and in the capacity of property owners, State Authorities and local government to implement the reforms. In particular, the potential for
confusion and higher costs due to the operation of two systems of biodiversity assessment which could both impact on consent conditions (i.e., via OEH offsets and via council biodiversity policies).

PIA is of the view that there is a high risk that the Regulation would not result in improvements in biodiversity outcomes in line with the principles of the Act. There is insufficient evidence that the formula (and variation rules) for offset calculation/allocation/purchase of credits would result in a valid or sufficient outcomes.

PIA remains concerned that the Regulatory Impact Statement does not fully address the issues raised and does not offer sufficient justification for the approach outlined in the Regulations and supporting policy material.

In summary, the Regulations present a complex and costly market-based offset solution - for which a market is unlikely to operate successfully - or with certainty. There is a high risk of regulatory failure compounded by the co-existence of separate council biodiversity policy appraisal processes that can also influence planning decisions.

5. RECOMMENDATIONS

PIA regards the reforms as an overly complex and costly solution which will not provide certainty for development – nor necessarily meet biodiversity and planning outcomes sought in the objectives of both the Environmental Planning and Assessment Act and Biodiversity Conservation Act. As a result, PIA recommends:

- That the commencement of the Regulations be delayed for 1 year to enable further capacity building, refinement, integration and consultation with local government and industry;
- That further detail on the operation of scheme - including publication on the ancillary rules (in relation to the offset variation rules), maps and the full Vegetation SEPP (in addition to the EIE) be exhibited well in advance of scheme commencement;
- That a well-resourced education campaign for councils and practitioners be delivered prior to full implementation; and
- That a system of independent and transparent post implementation monitoring and review of biodiversity outcomes and regulatory process be committed to.

6. PIA CONTACT

Should you wish to discuss our response please contact myself or the Chair of the PIA NSW Policy Subcommittee, David Broyd on davidbcs@bigpond.com.

Yours sincerely,

Jenny Rudolph
President, PIA NSW