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<b>Document Control</b>			
Document ID ECM_23376604 - Wollongong DCP 2009 – Chapter E18: Native Biodiversity Impact Assessment			
Rev No	Adoption Date	In force Date	Revision Details
1	15/12/2009	1/3/2010	Adopted
2	03/04/2023	01/07/2023	Amended

## 1 INTRODUCTION –

The Wollongong Local Government Area (LGA) is biologically diverse and contains a high number of ecological communities, native plants and animals that play an important role in the natural landscapes of the city.

Council has acknowledged the value of biodiversity and the role of Council and the community in its protection and preservation in the Community Strategic Plan Goal 1 “We value and protect our environment” and in the Sustainable Wollongong Strategy. This Development Control Plan (DCP) Chapter supports the Wollongong Local Environmental Plan (WLEP) 2009 by guiding development outcomes which align with our responsibility to manage and protect native flora and fauna, threatened species populations and endangered ecological communities.

## 2 PURPOSE

The purpose of this Chapter is to establish a framework for the submission of applications relating to development, activities or actions that have the potential to adversely impact on native biodiversity. It prescribes Council's requirements relating to flora and fauna impact assessments, and threatened species and threatened ecological community surveys and reports, including the Test of Significance and Biodiversity Development Assessment Reports (BDARs).

## 3 LAND TO WHICH THIS CHAPTER APPLIES

This Chapter of the DCP applies to all lands within the Wollongong Local Government Area (LGA).

## 4 DEVELOPMENT TO WHICH THIS CHAPTER APPLIES

This Chapter applies to development, activities and actions that may impact on biodiversity including both development requiring consent under Part 4 of the *Environmental Planning and Assessment Act 1979*, and tree/vegetation clearing for which a permit is sought under the NSW State Environmental Planning Policy (Biodiversity and Conservation) 2021. It does not apply to activities under Part 5 of the *Environmental Planning and Assessment Act 1979*.

This Chapter also provides guidance on biodiversity assessment associated with Planning Proposals under Part 3 of the *Environmental Planning and Assessment Act 1979*.

## 5 OBJECTIVES

The objectives of this DCP Chapter are to:

1. Protect and enhance biodiversity in the Wollongong LGA, including threatened species, populations, ecological communities and corridors for flora and fauna;
2. Provide a consistent framework to assess applications which propose the clearing, removal or pruning of native vegetation/trees;
3. Ensure the impacts of development/vegetation clearing on biodiversity are managed through the Mitigation Hierarchy, with an emphasis on avoidance, and then if unavoidable, minimisation in accordance with the relevant legislation, policy and Council's commitment to protect and enhance biodiversity;
4. Support compensation mechanisms where impacts to biodiversity are unavoidable.

## 6 RELATED LEGISLATION

The following key legislation is related to this Chapter, noting that it is the applicant's responsibility to be familiar with, and comply with, all legislation current at the time of an application -

- Environmental Planning and Assessment Act 1979.

- Biodiversity Conservation Act 2016.
- National Parks and Wildlife Act 1974.
- Fisheries Management Act 1994.
- Environment Protection and Biodiversity Conservation Act 1999 (Commonwealth).
- NSW State Environmental Planning Policy (Biodiversity and Conservation) 2021.
- NSW Biodiversity Conservation Regulation 2017.

**Note:** It is an offence to harm or pick protected species, threatened species, populations or endangered ecological communities (EECs) under the *Biodiversity Conservation Act 2016* and the *Fisheries Management Act 1994*, without appropriate approvals or exemptions. The *Environment Protection and Biodiversity Conservation Act 1999* also prescribes offences for unapproved significant impacts on threatened species and threatened ecological communities. Prosecutions can result in significant penalties including fines and imprisonment.

## 7 RELATIONSHIP TO OTHER DCP CHAPTERS

This Chapter should be read in conjunction with Chapter E17: Preservation and Management of Trees and Vegetation. Chapter E18 relates to biodiversity and includes consideration of impacts to both flora and fauna and their interaction with landscape elements that sustain a diverse ecosystem, in contrast to Chapter E17, which relates only to the preservation of trees and other vegetation.

## 8 APPROVAL PATHWAYS

A person must not undertake clearing, pruning or removal of a declared tree or vegetation without development consent through a Development Application, or a Vegetation Clearing Permit granted by Council (see Chapter E17).

Applications to Council for tree and/or vegetation clearing, removal and pruning are received by Council in the form of a **Development Application** (under Part 4 of the EP&A Act 1979) or a **Vegetation Clearing Permit Application** (where NSW SEPP – Biodiversity and Conservation 2021 applies). Some variations and exemptions to these approval pathways exist - these are detailed in Section 9 below.

**Note:** Applicants should also consider any implications under the State Environmental Planning Policy (Resilience and Hazards) 2021 by referring to associated mapping to determine if any impacts have the potential to occur in mapped coastal wetlands or littoral rainforests.

## 9 CONTROLS

### 9.1 Native Biodiversity Impacts Associated with a Development Application

9.1.1 A **Development Application** submitted to Council must demonstrate that any clearing, pruning or removal of a declared tree or vegetation associated with a development is to be undertaken in accordance with the **Mitigation Hierarchy** – of first avoid, then minimise, then offset. This means that the first priority is to avoid impacts of a proposal on biodiversity values. Where impacts cannot be avoided, a reasonable attempt must be made to minimise any impact. When all feasible measures have been taken to avoid and minimise the impacts, offsets should be used to compensate for any remaining impacts.

9.1.1.1 **Avoid:** Applicants must undertake the following measures to avoid biodiversity impacts associated with any development - careful site selection or actions taken through the design, planning, construction and operational phases of the development to completely avoid impacts on biodiversity values, or certain areas of biodiversity. Refer to the Biodiversity Assessment Method (BAM) for operational guidance.

9.1.1.2 **Minimise:** Where impacts cannot be avoided, measures are to be applied throughout the development planning and design and the operational life cycle which seek to reduce the residual impacts of development on biodiversity values. Mitigation measures must be genuine and be able to demonstrate that they will result in improvement or no net loss in perpetuity or for the life of the development and associated impacts.

9.1.1.3 **Offset:** Offset measures must be undertaken to compensate for any residual significant, adverse impacts that cannot be avoided and / or minimised, in order to achieve no net loss or a net gain of biodiversity and biodiversity values.

9.1.2 If the Development Application (DA) will impact **native vegetation:**

- The NSW Government online tool should be checked to determine if the proposed clearing will trigger the Biodiversity Offsets Scheme (BOS) (See sections 9.4 and 9.5).

## 9.2 Native Biodiversity Impacts that are not associated with a Development Application

9.2.1 Applicants seeking to clear, prune or remove a declared tree(s) or vegetation that is not associated with a development application, must check the NSW Government's online tool to determine if the proposed clearing triggers the Biodiversity Offsets Scheme (BOS).

9.2.2 Where the BOS is not triggered applicants must apply to Council for a **Vegetation Clearing Permit**.

9.2.3 If the proposed clearing of native vegetation exceeds the BOS threshold, Council is not the appropriate regulatory authority for these activities and an application must be made to the NSW Native Vegetation Panel.

9.2.3 Exemptions to the requirement for a Vegetation Clearing Permit Application apply where the land is zoned for Rural purposes (RU1, RU2, RU3 or RU4). Council is not the appropriate regulatory authority for these activities. Advice regarding approval must be sought from the NSW Local Land Services.

## 9.3 Flora and Fauna Assessments

Flora and fauna assessments are required to be conducted and corresponding reports prepared and submitted to Council under the following circumstances-

1. For developments proposed under Part 4 of the *Environmental Planning and Assessment Act 1979* where direct or indirect impacts are anticipated to native biodiversity, including prescribed impacts as defined under the *Biodiversity Conservation Regulation 2017*.
2. For native vegetation clearing activities not associated with other development for which a Vegetation Clearing Permit is required and, where the clearing relates to -
  - (a) Threatened species, and/or threatened ecological communities (listed under the *Biodiversity Conservation Act 2016*), and/or
  - (b) Fauna habitat e.g. hollow-bearing trees, and/or
  - (c) Lands identified in the Wollongong LEP 2009 Natural Resources Sensitivity–Biodiversity Layer, and/or
  - (d) Lands identified in the Wollongong LEP 2009 Illawarra Escarpment Map, and/or
  - (e) Lands zoned as C2, C3 or C4, and/or
  - (f) Vegetation within 40m of a watercourse.

Flora and fauna assessment reports must be prepared by a suitably qualified expert and in accordance with the NSW Government 'Threatened Species Survey and Assessment Guidelines and Field Survey Methods'.

A flora and fauna assessment will assist Council in determining the potential impacts of a development/ clearing and whether the BOS is applicable to the development.

## 9.4 Biodiversity Offsets Scheme (BOS)

The *Biodiversity Conservation Act 2016* and the corresponding *Biodiversity Conservation Regulation 2017* outline the framework for addressing impacts on biodiversity from development and clearing, based on the

Mitigation Hierarchy of avoid, minimise and offset impacts. They provide a mechanism to offset any residual impacts to biodiversity above prescribed thresholds through application of the BOS.

For all activities likely to have biodiversity impacts proposed to be conducted under Part 4 of the *Environmental Planning and Assessment Act 1979* and/or a Vegetation Clearing Permit (issued under the State Environmental Planning Policy (Biodiversity and Conservation) 2021) applicants must determine if the BOS applies through application of the Biodiversity Values Map and Threshold (BMAT) tool. Relevant Development Applications and Applications for Vegetation Clearing Permits should be accompanied by a BMAT report.\*

\* The accuracy of the BMAT tool report is dependent on the accuracy of the information input into the tool. In this regard applicants must provide the total development footprint including that which is required for construction. Council may request resubmission of the reports if there is any uncertainty about the accuracy of information.

## 9.5 The Biodiversity Assessment Method (BAM) and Biodiversity Development Assessment Reports (BDARs)

For proposed activities associated with a development application, once it is determined that the BOS applies, the applicant must engage an accredited assessor to apply the Biodiversity Assessment Method (BAM) to the proposal.

After applying the BAM, the accredited person will prepare a Biodiversity Development Assessment Report (BDAR) if required.

As the consent authority Council will consider the information in the BDAR when deciding whether to approve the development proposal and any appropriate conditions required to mitigate the identified impacts. Any required changes to the proposed activities are likely to necessitate amendments to the BDAR.

It is Council's preference that any impacts incurred as a result of development undertaken in the Wollongong LGA be offset by actions in the Wollongong LGA, such as purchasing and retiring credits that have been generated in Wollongong.

If Council is satisfied with the BDAR and the measures proposed to avoid and minimise biodiversity impacts and the development is approved, Council will issue conditions of consent that will include a requirement for the applicant to:

- retire any applicable biodiversity credits to offset the residual impact on biodiversity values of the number and class specified in the report, or
- make a payment to the Biodiversity Conservation Fund to the value of the credits in accordance with the offsets payment calculator.

Any conditions of consent must be complied with before any development is carried out that would impact on native biodiversity values.

**Note:** the NSW Government has requested that any non-compliant BDAR be referred to them for reporting and auditing purposes.

## 9.6 Test of Significance

Where the proposed activities relate to impacts on threatened species and/or threatened ecological communities but do not trigger the BOS vegetation clearing threshold, applicants must complete a 'Test of Significance' (5 part test) in accordance with Section 7.3 of the *Biodiversity Conservation Act 2016*.

Tests of significance must be prepared by a suitably qualified expert in accordance the NSW Government Threatened Species Test of Significance Guidelines, and Threatened Species Survey and Assessment Guidelines and Field Survey Methods.

If the 'Test of Significance' assessment indicates that there will be or is likely to be a significant impact, the applicant must carry out an assessment according to the BAM and the [BAM Operational Manual](#) and prepare a BDAR.

Vegetation Clearing Permit applications, wherein the activities are determined to have a significant impact, will be refused.

## 9.7 Serious and Irreversible Impacts (SAlls)

The BOS recognises that there are some impacts to biodiversity that the community expects will not occur, such as impacts to threatened entities that are most at risk of extinction from potential development. These are defined as Serious and Irreversible Impacts (SAlls). In preparing a BDAR the assessor is required to provide information on SAlls that may be incurred as a result of the proposed activities.

The principles for determining SAlls are detailed in the NSW government SAll guidance document. The most current list of SAll candidates and triggers should be referenced from the NSW BioNet Threatened Biodiversity Data Collection database.

### Key Council considerations for SAlls:

1. Council is responsible for deciding whether the impact from the development or activity is likely to be serious and irreversible;
2. Council MUST refuse a development application where a SAlls is determined likely.

**Note:** The lack of full scientific certainty should not be used as a defence in postponing measures to prevent environmental degradation. Therefore, applications should adopt a precautionary principle that is guided by -

- a) Careful evaluation to avoid serious or irreversible damage to the biodiversity, in particular threatened species, and
- b) An assessment of the risk weighted consequences of various options.

### 9.7.1 Guiding Principles for Serious and Irreversible Impacts in the Wollongong Context

Whilst it is acknowledged that every site and case will have its own unique circumstances that will need to be considered, the following four guiding principles provide a framework for assessing SAll in Wollongong and reflect expectations for activities that have the potential to impact on Critically Endangered Ecological Communities -

#### 1) AVOID

The primary goal is to avoid further loss of Critically Endangered Ecological Communities or other SAll entities due to development. SAll entities are already at high risk of extinction in the immediate future as determined by the NSW Scientific Committee and their inclusion as SAll candidate entities. Additional loss will result in further decline and greater risk of extinction.

The applicant for the proposed activity must demonstrate measures to avoid any impact upon SAll entities. Loss of developable land and commercial non-viability are not a consideration when assessing SAll.

#### 2) MITIGATE

Where impacts to the SAll entity cannot be avoided, the applicant must demonstrate measures to mitigate any impacts (direct and indirect). Mitigation measures must be genuine and be able to demonstrate that they will result in improvement or no net loss of the SAll entity in perpetuity or for the life of the development.

#### 3) MAINTAIN

The applicant must demonstrate that the viability and functionality of the SAll patch/connectivity is maintained or improved as a result of the development.

#### 4) **OFFSET**

Any offsetting of unavoidable impacts on the SAll entity are to occur within the Wollongong LGA.

### 9.8 Local Compensatory Requirements

Notwithstanding the requirements of the BOS, applicants may be required to undertake compensatory activities to offset the proposed impacts incurred through an approval to clear vegetation and/or incur impacts to native biodiversity. This is to ensure that there is no long-term net loss of native biodiversity across the LGA. These activities may be guided by Council's biodiversity offsetting/compensatory policies and may include payment of a fee to Council to fund biodiversity remediation activities on Council owned/managed land on behalf of the applicant, or replacement of the vegetation with suitable local native vegetation species in an appropriate location within the private property.

### 9.9 Proposals That Require a Variation to Controls

Any proposal that involves variations to the development controls in this Section of the DCP or offsetting should be discussed through Council's pre-lodgement consultation process before submitting a development application.

### 9.10 Protection of Conservation Lands

Development must not adversely impact upon existing or planned conservation lands including -

- a) Conservation zoned lands under the Wollongong LEP 2009;
- b) Conservation lands established under Biodiversity Certification Agreements;
- c) Biodiversity Stewardship sites;
- d) Biobanking sites;
- e) Sites with registered Conservation or Wildlife Refuge Agreements; and
- f) NPWS estate.

The introduction of stormwater or other indirect impacts may result in negative impacts on these sites, which are established to improve biodiversity outcomes. Consequently, development must be planned and implemented to avoid any adverse impacts upon conservation lands. Where a proposed development is determined to impact on conservation lands Council will refuse the application.

### 9.11 Planning Proposals

Planning Proposals must be prepared in accordance with Council's Planning Proposal Policy, which includes preservation and conservation of the environment as a priority. Anticipated future development should be designed in accordance with the Mitigation Hierarchy established by the *Biodiversity Conservation Act 2016*; firstly avoid, then minimise impacts on existing vegetation and ecosystems as a priority. In most instances a Biodiversity Constraints Assessment will be required to inform Planning Proposals. Applicants must advise Council where future BDARs and/or offsetting requirements are anticipated.

### 9.12 Biodiversity Certification

Council encourages developers to investigate and pursue Biodiversity Certification for Planning Proposals where the future anticipated development is likely to result in impacts to native biodiversity values, in particular threatened species, threatened ecological communities and/or their habitat.

It is Council's preference that any offsets undertaken as a result of conservation measures through Biodiversity Certification in the Wollongong LGA occur within the Wollongong LGA.

Council may consider dedication (ownership and management) of Biodiversity Stewardship sites established through Biodiversity Certification.

If a development is located in an area that is already subject to Biodiversity Certification, the development application must be in accordance with the certification.

## DEFINITIONS AND ACRONYMS

**BAM:** Biodiversity Assessment Method established under the *Biodiversity Conservation Act 2016*.

**BDAR:** Biodiversity Development Assessment Report prepared in accordance with the *Biodiversity Conservation Act 2016*.

**Biodiversity:** The same meaning as defined in the *Biodiversity Conservation Act 2016*.

**Biodiversity values:** The same meaning as defined in the *Biodiversity Conservation Act 2016* and *Biodiversity Conservation Regulation 2017*.

**Biodiversity offset:** measures taken to compensate for any residual significant, adverse impacts that cannot be avoided, minimised and / or rehabilitated or restored, in order to achieve no net loss or a net gain of biodiversity. See also mitigation hierarchy.

**BMAT:** Biodiversity Values Map and Threshold Tool.

**BOS:** Biodiversity Offsets Scheme established under the *Biodiversity Conservation Act 2016*.

**DA:** Development application under Part 4 of the *Environmental Planning and Assessment Act 1979*.

**Endangered ecological community (EEC):** Ecological communities that face a very high risk of extinction in the near future as listed under NSW State and/or Commonwealth threatened species legislation.

**Endangered population:** An isolated population of a species that faces a very high risk of extinction in the near future as listed under NSW State and/or Commonwealth threatened species legislation.

**Endangered species:** A species that faces a very high risk of extinction in the near future as listed under NSW State and/or Commonwealth threatened species legislation.

**Environmentally Sensitive Land:** Conservation Zones, land within 40m of a mapped watercourse, and LEP Clause 7.2 and/or 7.8 mapped lands.

**Indirect Impacts:** Impacts that occur when the proposal affects native vegetation and threatened species habitat beyond the development footprint or within retained areas (e.g. transporting weeds or pathogens, dumping rubbish). This includes impacts from activities related to the construction or operational phase of the proposal and prescribed impacts.

**Key threatening process:** Threats that adversely affect threatened species, populations or ecological communities, or could cause species, populations or ecological communities to become threatened as listed under NSW State and/or Commonwealth threatened species legislation.

### Mitigation Hierarchy -

- Avoid, minimise, offset. This means that the first priority is to avoid impacts of a proposal on biodiversity values. Where impacts cannot be avoided, a reasonable attempt must be made to minimise any impact. When all feasible measures have been taken to avoid and minimise the impacts, offsets should be used to compensate for any remaining impacts.
- Avoid: measures taken by an applicant such as careful site selection or actions taken through the design, planning, construction and operational phases of the development to completely avoid impacts on biodiversity values, or certain areas of biodiversity. Refer to the BAM for operational guidance.
- Minimise: a process applied throughout the development planning and design life cycle which seeks to reduce the residual impacts of development on biodiversity values.

- **Offset:** measures taken to compensate for any residual significant, adverse impacts that cannot be avoided and / or minimised, in order to achieve no net loss or a net gain of biodiversity and biodiversity values.

**Native Vegetation:** Native vegetation is defined under the Part 5A, Division 1 Section 60B of the *Local Land Services Act 2013*.

**Native Vegetation:** For the purposes of this section of the DCP, native vegetation means any of the following types of plants native to New South Wales -

- (a) trees (including any sapling or shrub or any scrub).
- (b) understorey plants.
- (c) groundcover (being any type of herbaceous vegetation).
- (d) plants occurring in a wetland.

A plant is native to New South Wales if it was established in New South Wales before European settlement.

**Prescribed Native Vegetation -**

- Remnant or regrowth native vegetation
- Native vegetation planted for the purpose of environmental or habitat rehabilitation or restoration
- Threatened species or ecological communities

**Note:** That this does not include native vegetation within a standard landscaped residential garden unless they meet the definition of a prescribed tree in DCP Chapter E17.

**SAIL:** Refers to serious and irreversible impacts – see section 6.7 of the *Biodiversity Conservation Regulation 2017*.

**Threatened ecological community (TEC):** ecological communities listed as critically endangered, endangered or vulnerable under NSW State or Commonwealth threatened species legislation.

**Threatened species:** Any individual species listed as critically endangered, endangered or vulnerable under NSW State or Commonwealth threatened species legislation.