



131 Macquarie Street
Hobart TAS 7000

tel: (03) 6223 2770
fax: (03) 6223 2074
email: edotas@edo.org.au

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John Ramsay
Tasmanian Planning Commission
GPO Box 1691
Hobart TAS 7001

By email: enquiry@planning.tas.gov.au

Dear Mr Ramsay

Draft Planning Directive - Statewide Codes / Bushfire Code

The Environmental Defenders Office (**EDO**) is a non-profit, community based legal service specialising in environmental and planning law. We welcome the opportunity to comment on the following draft Statewide Codes:

- Bushfire Prone Areas Code;
- Landslide Code;
- Potentially Contaminated Land Code; and
- Flood Prone Land Code.

We do not seek to make any comments in respect of the draft Road and Rail Assets Code.

BUSHFIRE PRONE AREAS CODE

We are generally supportive of the proposed Bushfire Prone Area Code. Our principal concern relates to the impact of vegetation clearing required in order to comply with the Code on threatened vegetation communities and habitat areas. While previously such clearing would have been subject to assessment by the Forest Practices Authority, amendments to the *Forest Practices Regulations 2007* now mean that clearing authorised in respect of approved buildings will not be subject to a Forest Practices Plan.

We acknowledge that this issue would be more appropriately dealt with in a Vegetation Clearance Code. However, in the absence of such a code, it is critical that a consistent approach is adopted across Tasmania to the assessment of development which will involve clearing threatened vegetation.

We recommend that all relevant Acceptable Solutions be qualified by "and will not involve clearing of threatened native vegetation communities (as defined in Part 3A of the *Nature Conservation Act 2002*)".

Where clearing and maintaining a hazard management area will involve clearing a threatened native vegetation community, the proposal should at least be subject to a Performance Criteria (and therefore public notification) to ensure that the applicant demonstrates that there is no alternative to the loss of significant vegetation, or that offset measures are proposed.

We urge the Commission to introduce a Statewide Code dealing with vegetation clearance as a matter of urgency.

LANDSLIDE CODE

Application of the Code to Potential Landslide Areas

We strongly support the recognition in the Code that risk assessment is required both for sites that are mapped as hazardous and sites which, due to their location, characteristics or history of recent activity, have the potential to be hazardous. However, we do not believe that this objective is adequately reflected in the Code.

The Code is stated to apply to land:

- (a) shown in a planning scheme¹ as land to which this Code applies; and*
- (b) where the characteristics or investigations of the site and surrounding area suggest that there is a potential for landslide movement.*

The description in (b) is very broad and does not make it sufficiently clear which land the Code will apply to.

The definitions in E3.3 refer to "Potential Landslide Area", but the definition includes a different, but equally broad, description of landslide risk areas "contained in sources such as Council records... but not mapped." It is unclear what records this could include – it could potentially extend to reports prepared in support of (or opposed to) development on surrounding properties. Furthermore, the defined term "Potential Landslide Area" is not actually used in the Code.

We recommend the following amendments to clarify the scope of the Code:

- Clause E3.2.1(b) be replaced by "any Potential Landslide Area"
- The definition of "Potential Landslide Area" be amended to include any land:
 - (a) Shown on the planning scheme plans as having potential for landslides;*
 - (b) Within a Landslip A or B area proclaimed under Part 9A of the Mineral Resources Development Act 1995 (this is separated from the previous point to ensure that Landslip A and B areas are included, even if not explicitly recognised in planning scheme mapping);*
 - (c) Identified in any Mineral Resources Tasmania advisory landslide susceptibility or hazard map;*
 - (d) Within the geological rock types with slopes steeper than those in Table 2; and*
 - (e) Which the planning authority advises is potentially unstable, having regard to Council reports, evidence of recent landslide activity in the vicinity of the land, information in the Mineral Resources Tasmania landslide database or other appropriate sources of information.*

¹ We note that the definition of 'planning scheme' in the Planning Directive should include existing planning schemes and interim planning schemes.

Landslide risk management report

We strongly support the adoption of the *Australian Geomechanics Society Practice Note for Landslide Risk Management 2007* as a benchmark for landslide risk assessment. As presently drafted, the Code requires only that the landslide risk management report include details of methodology and investigations carried out, "in accordance with" the Practice Note.

The Code should more explicitly require that all aspects of the report be prepared (rather than just described) in accordance with the Practice Note.

We recommend that the initial statement in the definition of "Landslide risk management report" be amended to read:

means a report on the landslide risk assessment for the land prepared in accordance with the Australian Geomechanics Society Practice Note for Landslide Risk Management 2007 by an appropriately qualified person, which includes:

(a) details of the investigations carried out and the methods used...

Note: this is the approach adopted in the Flood Prone Land Code

Public participation

As drafted, the Code does not require any notification in respect of development in potential landslide areas. Landslide / increased instability induced by development can have significant implications for people and property in the area surrounding a development site. In our experience, many risk management reports produced in support of development applications are based on a desktop analysis, with limited site-specific data. As a result, the conclusions often do not have regard to recent landslide activity on the site, or in the adjoining area, and may understate the on-site and off-site risks.

We believe that it would be preferable for adjoining owners to be notified of any proposed development. This would provide an opportunity for potentially affected neighbours to raise additional concerns, provide information regarding their experience in the area, or challenge conclusions in the landslide risk management report regarding proposed risk management strategies.

Currently, the Code also relies exclusively on the landslide risk assessment to determine the level of risk – provided the risk assessment indicates that there is no risk, or that the risk is acceptable, planning authorities are powerless to refuse an application. However, as discussed above, there may be situations where the risk assessment may not have had regard to all relevant factors. Including performance criteria in the Code would provide planning authorities with an opportunity to refuse a development application where, because of their local knowledge, they disagree with a conclusion that the assessed level of risk is acceptable.

We note that planning authorities would be able to use their powers under s.54 of LUPAA to seek further information if they believe that a risk assessment is inadequate, and the risk of litigation would deter planning authorities from refusing an application against recommendations in a landslide risk assessment in all but rare situations.

We recommend either of the following amendments to the Code:

- Acceptable Solutions in E3.5.1 and E3.5.2 are converted to Performance Criteria (e.g. “The applicant demonstrates to the satisfaction of the planning authority that the level of risk is acceptable, or can be reduced to an acceptable level through specified mitigation measures”), and there are no Acceptable Solutions for the Code; **or**
- Acceptable Solution A.1(b) is converted to a Performance Criteria, so that a development will be subject to notification where the landslide risk management report indicates that there is a risk, but that the risk is acceptable.

Note: we consider the first proposal to be most appropriate.

POTENTIALLY CONTAMINATED SITES CODE

Potentially contaminating activities

We strongly support this Code, and endorse the proposed list of potentially contaminating activities, particularly the inclusion of several significant activities which are not currently included in the EPA Information Bulletin (such as abrasive blasting, pest control, racing venues and utility depots).

Information Bulletin 112 also notes that EPA sign-off is appropriate where the land has previously hosted a highly potentially contaminating activity or where the proposed use or development will expose workers to significant contamination risks through excavation / earthworks etc. This additional level of care should be reflected in the Code by identifying “higher risk” potentially contaminating activities and developments, and ensuring that any higher risk application is subject to EPA sign-off.

Information requirements

The Code should include a list of information that must accompany a development application to demonstrate compliance with relevant criteria. These could include:

- A site plan showing the location of all existing and proposed sensitive uses;
- A plan showing all sensitive uses, waterways or sensitive sites (e.g. wetlands, habitat for threatened species) within 500m of the site;
- Details of the proposed extent of land disturbance associated with the use or development; and
- Details of all past contaminating activities carried out on the site.

Appropriate review of documentation

Similar to the Landslide Code, this Code requires planning authorities to rely on site investigation reports or remediation action plans prepared by consultants.

As noted in the EPA Division Information Bulletin 112, sign-off is a complex process and is limited to a review of the documentation provided by the applicant rather than on-site investigation to verify the information included in the relevant reports. Many planning authorities lack the internal expertise or resources to adequately review relevant reports to determine whether a development should proceed. While there are inherent limitations in the EPA sign-off process, it is preferable to

allowing a development to be a permitted use without adequate review of the documentation provided.

For this reason, we recommend that development on potentially contaminated land be subject to performance criteria in some situations, including where the proposal involves a sensitive use and where the relevant reports have not been subject to EPA sign-off. This will allow affected neighbours, interest groups and those with information that could assist in the assessment of the proposal to comment on the likely risks presented by development on the site.

We recommend that the Code be amended as follows:

- Acceptable Solutions A.1(a), (c) and (e) be amended by inserting “which has been signed-off by the EPA or pursuant to an approved independent review process” after the relevant report / plan / form referred to in the paragraph;
- Acceptable Solution A.1(d) be deleted;
- Performance Criteria P.1 be inserted:
 - P.1 Potentially contaminated land may be used or developed if a report prepared by an appropriately qualified person demonstrates that:*
 - (a) *there is no contamination or the level of contamination does not require further assessment; or*
 - (b) *the proposal does not involve a sensitive use and soil disturbance will occur over less than 250m² and development will be carried out in accordance with a contaminant management plan; or*
 - (c) *the contamination levels are acceptable for the use or development proposed; or*
 - (d) *the land can be remediated to a standard that will enable a site completion form to be issued; or*
 - (e) *all contamination risks associated with the use or development can be appropriately managed.*
- Performance Criteria P.2 be inserted:
 - P.2 Where a proposed use or development involves*
 - (a) *high risk potentially contaminated land (Note: this term should be defined by reference to a list of activities nominated by the EPA as “high risk”); and / or*
 - (b) *significant worker exposure to soil or significant excavation or earthworks (including, but not limited to, installation of basements, footings and underground car parks)*

all relevant reports must be signed-off by the EPA or pursuant to an approved independent review process.

While it is beyond the scope of the assessment being made by the Commission, we note that the successful implementation of the Potentially Contaminated Land Code will rely to a large extent on:

- planning authorities, developers and the community having ready access to a clear database of potentially contaminated sites, and prior uses of land. It would be preferable for the information to be available on resources such as the LIST, rather than requiring applicants to make a Property Information Request;

- improvements in the current methodologies for assessing domestic scale sites and for assessing cumulative impacts of contamination (the NEPM assessment guidelines use sampling densities generally more applicable to large industrial sites);
- adequate resources being available to Council officers and the Contaminated Sites Unit to review and sign off on site investigation reports. We understand that sign-off from the Director of the EPA can currently take many months.

FLOOD PRONE LAND CODE

We generally support the Flood Prone Land Code and the proposed use and development standards. However, P.1(b) is confusing – while it appears to be aimed at taking into account whether the community benefit of a proposed use may justify it being located in a flood prone area, this is not clear. It may be that a use or development of high community benefit should not be located in a flood prone area due to the risk of inundation interrupting the beneficial use.

It is also not clear whether regard is to be had to whether the use or development can be “reasonably located” on the site, or whether there are alternative (presumably less flood prone) sites on which such a use could be “reasonably located”.

We recommend that P.1(b) be amended to make its intention less ambiguous.

If the intention is to introduce an “overriding community benefit” test², it may be preferable to make P.1(b) a separate performance criteria:

P.2 Use and development on flood prone land may be approved where it can be demonstrated that:

(a) the use or development is a community benefit; and

(b) there is no suitable alternative site for the use or development.

The EDO appreciates the opportunity to make these comments. Please do not hesitate to contact us to discuss any issue raised in this submission.

Kind regards,

Environmental Defenders Office (Tas) Inc

Per:



Jess Feehely
Principal Lawyer

² Similar to the test outlined in the Bushfire Prone Areas Code (E1.5.2)