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Planning and Environment

State Planning Policy 4/11: Protecting Wetlands of High Ecological Significance in Great Barrier Reef Catchments

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David Nicholls, Partner
d.nicholls@hopgoodganim.com.au

Olivia Williamson, Associate
o.williamson@hopgoodganim.com.au

State Planning Policy 4/11: Protecting Wetlands of High Ecological Significance in Great Barrier Reef Catchments

State Planning Policy 4/11: Protecting Wetlands of High Ecological Significance in Great Barrier Reef Catchments took effect on 25 November 2011.

This SPP seeks to ensure that development in or adjacent to wetlands of high ecological significance in Great Barrier Reef catchments is planned, designed, constructed and operated to prevent the loss or degradation of wetlands and their values, or enhances these values - in particular, the hydrological regime and ecological values of those wetlands.

Here, partner David Nicholls and associate Olivia Williamson outline the operation and effect of the SPP on development within the Great Barrier Reef catchments.

Key points

- The SPP will be a relevant consideration for any future development applications involving high impact earthworks in Great Barrier Reef catchments.
- Achievement of the policy outcomes of the SPP will depend on whether the proposed development is in an urban area or in other than an urban area.
- It is possible for development to be considered acceptable, even if it does not fully achieve the policy outcome of the SPP, if it is either providing for an overriding need in the public interest or a development commitment, or is for certain types of community infrastructure.
- For existing development applications, the local government (and the Planning and Environment Court in any appeal) may give weight to the SPP in its assessment under sections 317 and 495 of the *Sustainable Planning Act 2009* (SPA).

Background to the SPP

Before this SPP took effect on 25 November 2011, there were two temporary SPPs in effect: temporary SPP 1/10, *Protecting Wetlands of High Ecological Significance in Great Barrier Reef Catchments*, took effect on 2 May 2010, and temporary SPP 1/11, *Protecting Wetlands of High Ecological Significance in Great Barrier Reef Catchments*, took effect on 3 May 2011.

Due to its recent adoption, this SPP is not yet reflected in relevant local government planning schemes. Because of this, it is appropriate to consider the SPP itself in carrying out assessment of development.

The SPP applies to an extensive area, from the Daintree River catchment in the north to the Burnett River and Mary River catchments in the south. The extent of this area is shown on the SPP 4/11 map, which can be accessed [online](#).

Property specific mapping is available on the Department of Environment and Resource Management's website. This mapping will identify whether land contains a high ecological significance (HES) wetland protection area or whether it contains a trigger area for wetland protection areas.

The SPP protects only freshwater wetlands. It recognises the inherent constraints of biophysical mapping at a large scale and provides for an alternative HES wetland boundary as an acceptable outcome to the performance outcome which precludes development in a HES wetland.¹

¹ See AO1.1(b) and Section 4.22 of the SPP Guideline

Wetland protection areas consist of two parts: the HES wetland, and the surrounding trigger area. The trigger areas include the area of hydrological influence surrounding the wetland. The trigger area is 100m in urban areas and 500m outside urban areas.

Property specific mapping can also be obtained for land in relation to wetland management areas. These areas are separate to the Great Barrier Reef wetland protection areas and reflect the Department of Environment and Resource Management's existing wetland advice role.

Development to which the SPP applies

An amendment to the *Sustainable Planning Regulation 2009*, schedule 3, establishes the development assessment triggers for a wetland protection area, which are:

- material change of use (that is not for a domestic housing activity) on land situated in a wetland protection area which involves high impact operational works;
- reconfiguring a lot on land situated in a wetland protection area where the reconfiguration results in more than six lots or if any of the resulting lots is less than five hectares, and which involves high impact operational works; and
- operational work that is high impact earthworks in a wetland protection area, other than operational work for a domestic housing activity.

Schedule 26 of the *Sustainable Planning Regulation 2009* provides the definition of "high impact earthworks". It also outlines works that are excluded from the definition. To summarise, high impact earthworks means operational work that involves changing the form of land, or places a structure on land, in a way that diverts water to or from a wetland.

High impact earthworks can therefore include draining or channelling, construction or raising of a dam, levee or weir, filling or levelling of land and constructing roads, culverts or causeways.

Examples of work that is not considered to be high impact earthworks include works for a domestic housing activity, to maintain infrastructure, works undertaken pursuant to the Transport Infrastructure Act, or for routine farm management activities.

How the SPP will impact development assessment

Under the SPA's integrated development assessment system (IDAS), an assessment manager's decision must generally not conflict with a SPP when assessing development.

A local government's decision (and the Court's decision on any appeal) about a development application must not conflict with a "relevant instrument" unless one of the departure rules is available, such as "sufficient grounds" to justify the decision despite the conflict.² For impact assessment, "relevant instruments" are defined to include:

- State planning policies, to the extent the policies are not identified in;
 - any relevant regional plan as being appropriately reflected in the regional plan; or
 - the planning scheme as being appropriately reflected in the planning scheme.

The SPA establishes a formal hierarchy of planning documents, and State planning policies sit towards the top of the tree.

² Section 326 of SPA

The policy outcome sought by the SPP is as follows:

"1.1 Development in or adjacent to wetlands of high ecological significance in Great Barrier Reef catchments is planned, designed, constructed and operated to prevent the loss or degradation of the wetlands and their environmental values, or to enhance these values."

Development to which this SPP applies is considered to achieve the policy outcome in section 1.1. above if the following overall outcomes are achieved:

"4.1.1 Other than in an urban area, the development –

(a) Is located outside HES wetlands; and

(b) Enhances existing HES wetland values or avoids adverse effects on HES wetlands.

4.2.2 In an urban area, the development –

(a) is located outside HES wetlands; and

(b) enhances existing HES wetland values or adverse effects on HES wetlands;

or

(c) where existing HES wetland values cannot be enhanced or adverse effects on HES wetlands cannot be avoided

(i) Those effects are minimised; and

(ii) An environmental offset is provided for any remaining environmental impacts."

Table 1 of Annex 1 - Development assessment code in the SPP - sets out the performance outcomes and acceptable outcomes for achieving compliance with the overall outcomes in section 4.1 above. The key themes include hydrology, pest and invasive species, development position, water quality, vegetation clearing and land degradation, ecological corridors, noise, light and visual disturbance, construction and operational management, maintenance and monitoring.

Despite section 4.1, development that does not fully achieve the policy outcome in section 1.1 may still be acceptable:

"4.5 Despite section 4.1, development that does not fully achieve the policy outcome in section 1.1 is acceptable if the development:

4.5.1 Either –

(a) provides for an overriding need in the public interest in accordance with the factors outlined at Annex 4;

or

(b) is a development commitment;

or

(c) is for one or more of the following types of community infrastructure

(i) aeronautical facilities of State significance described in SPP1/02 Development in Vicinity of Certain Airports and Aviation Facilities, and associated facilities;

(ii) emergency services facilities;

(iii) wharves, public jetties, port facilities and navigational facilities

(iv) domestic gas pipelines

(v) storage and works depots and similar facilities, including administrative facilities associated with the provision or maintenance of the community infrastructure in (i) to (iv)

4.5.2 Nevertheless, development described in 4.5.1 above is still required to:

(a) achieve the overall outcome(s) set out in the development assessment code, where relevant, to the maximum extent practicable where this would not compromise the intrinsic characteristics of the development; and

(b) provide an environmental offset for any adverse impacts on a HES wetland that cannot be avoided, except where the development arises from and is necessary to give effect to a development approval."

In summary, development which provides for an overriding need, or is a development commitment or a prescribed type of community infrastructure, need not fully achieve the overall policy outcome in the SPP. However, such development is still required to achieve the overall outcomes in the development assessment code to the maximum extent practicable, and must provide an environmental offset for any adverse impacts on a HES wetland that cannot be avoided (except in the instance of a development commitment).

The factors for determining an overriding need in the public interest contained in Annex 4 include the following:

- The overall social, economic and environmental benefits of the development outweigh:
 - any detrimental effect upon the natural values of the land and adjacent areas.
 - any conflicts it has with the policy outcome of the SPP.
- The development cannot be located elsewhere so as to avoid conflicting with the policy outcome of this SPP.

The following are regarded as not establishing an overriding need in the public interest:

- Uses with relatively few location-based requirements
- Interests in or options over land
- Availability or ownership of land

Effect of the SPP on proposed development in an urban area

Section 4.1 of the SPP divides the achievement of the policy outcomes in the SPP into two categories, development in an urban area and development other than in an urban area.

"Urban area" is defined in the SPP and adopts the definition used in the *Sustainable Planning Regulation 2009*, where "urban area" means:

"(a) an area identified in a gazette notice by the chief executive under the Vegetation Management Act 1999 as an urban area;

(b) if no gazette notice has been published – an area identified as an area intended specifically for urban purposes, including future urban purposes (but not rural residential or future rural residential purposes) on a map in a planning scheme that:

(i) identifies the areas using cadastral boundaries

(ii) is used exclusively or primarily to assess development applications.”

“Urban purposes” means “purposes for which land is used in cities or towns, including residential, industrial, sporting, recreation and commercial purposes, but not including environmental, conservation, rural, natural or wilderness area purposes.”

Proposed development in an urban area ought to be located outside HES wetlands and should enhance existing HES wetland values. Where existing HES wetland values cannot be enhanced or adverse effects avoided, those effects are to be minimised and an environmental offset is required for any remaining environment impact.

Effect of the SPP on proposed development in a non urban area

For proposed development in a non urban area, the SPP requires that the development must be located outside HES wetlands and must enhance existing HES values or avoid adverse effects on HES wetlands. Unlike the provisions regarding development in “urban areas”, the SPP does not offer an alternative for development in non urban areas to still achieve the policy objectives if adverse effects cannot be avoided by minimising those effects and providing offsets for any remaining environmental impact.

Effect of the SPP on an existing development commitment

It is acceptable for a development commitment arising from, and necessary to give effect to, a development approval to not fully achieve the SPP.

For the purposes of the SPP, “development commitment” means any of the following:

(a) Development that arises from, and is necessary to give effect to, a development approval;

(b) Is located within a State development area and is consistent with a development scheme prepared for the State development area;

(c) The Coordinator-General has evaluated an environmental impact statement under the State Development and Public Works Organisation Act 1971, part 4, section 35(3) and the report recommends the development be approved (with conditions);

(d) Is consistent with a designation of land for community infrastructure under the Sustainable Planning Act 2009.

A “development approval” is defined to mean:

“(a) a decision notice or a negotiated decision notice that—

(i) approves, wholly or partially, development applied for in a development application (whether or not the approval has conditions attached to it); and

(ii) is in the form of a preliminary approval, a development permit or an approval combining both a preliminary approval and a development permit in the one approval³.”

³ Schedule 3 of the SPA

Further, a development commitment is also an avenue for avoiding the need to provide an environmental offset for residual adverse impacts on HES. For example, if a site has an approval for a material change of use and reconfiguring a lot for a residential subdivision, and the conditions of these approvals require a subsequent development permit for operational works involving high impact earthworks to be obtained, no environmental offset will be required as part of this subsequent operational works development approval, although the other requirements of section 4.5.2(2) must still be met - that is, achieving the overall outcomes set out in the development assessment code, where relevant, to the maximum extent practicable, where this would not compromise the intrinsic characteristics of the development.

Effect of SPP on existing development applications

It is important to note that the provisions of the SPP provide exceptions for development commitments. A pre-existing development application is not given any special status in the application to it of the SPP's policies. It only achieves that status when it matures into a development approval.

In our view, all development approvals, whether arising from development applications made before or after the SPP commenced, are capable of becoming a development commitment. However, the latter will be subject to more rigorous assessment against the SPP. The assessment of the former depends on giving "weight" to the SPP's policies under sections 317 and 495 of the SPA. The amount of "weight" attracted by the SPP in those circumstances will vary according to the circumstances of each case.

To give the SPP weight seems to require an assessment to be made of the development application against the SPP's code, including consideration of whether the mapping boundaries are correct. The original jurisprudence relating to "weight" concerned draft planning instruments, and generally speaking the "weight" attributed to them regarding applications that were already on foot increased when the draft matured into an adopted instrument having legal effect. The purpose of attributing "weight" to such an instrument was to avoid a judgment of the Court that would make it more difficult for the planning authority to ultimately implement the draft planning scheme.⁴

The position is different with SPPs of the type under consideration here. The purpose of the SPP is to protect the whole of the Great Barrier Reef from land based pollutant effects through the cleansing effects of freshwater wetlands. Individual development applications would need to be considered in that light. The Courts have also said that the amount of weight to be attributed involves consideration of fairness to the applicant.⁵ It is likely that if the relevant area has been properly investigated for the purposes of an application made before the SPP commenced, then without any significant impacts as a result of approving the development, the SPP would not be given significant weight. This will, however, need to be considered on a case by case basis.

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⁴ *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGR 117; *Lewiac Pty Ltd v Gold Coast City Council* (1996) 2 Qd R 266

⁵ *Gelling & Ors v Cairns City Council & Anor* [2008] QPELR 585 at 587