

**Planning Proposal to Remove Enabling Clause 7.15  
for Water Bottling Facilities**

**Version 1 Pre Gateway**

**February 2019**

TSC File PP18/0004

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For the purpose of this Planning Proposal the following definition applies:

***Amendment*** means:

A document or text that adds to, removes from, or alters the original material or work that has been resolved by the elected body of the Tweed Shire Council but of its self has not been considered or formally endorsed by that body.

Amendments are shown in [square brackets].

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|   |           |
|---|-----------|
| <b>INTRODUCTION .....</b>   | <b>2</b>  |
| <b>PART 1 OBJECTIVES AND INTENDED OUTCOMES .....</b>  | <b>4</b>  |
| <b>PART 2 EXPLANATION OF PROVISIONS.....</b>  | <b>4</b>  |
| <b>PART 3 JUSTIFICATION.....</b>  | <b>5</b>  |
| <b>Section A - Need for the planning proposal .....</b>   | <b>5</b>  |
| 1 Is the planning proposal a result of any strategic study or report? .....   | 5         |
| 2 Is the planning proposal the best means of achieving the objectives or intended outcomes, or is there a better way? .....   | 12        |
| <b>Section B - Relationship to strategic planning framework .....</b>   | <b>12</b> |
| 1 Is the planning proposal consistent with the objectives and actions contained within the applicable regional or sub-regional strategy (including the Sydney Metropolitan Strategy and exhibited draft strategies)?..... | 12        |
| 2 Is the planning proposal consistent with the local Council's Community Strategic Plan, or other local strategic plan? .....   | 13        |
| 3 Is the planning proposal consistent with the applicable State Environmental Planning Policies (SEPPs)? .....  | 13        |
| 4 Is the planning proposal consistent with applicable Ministerial Directions (s9.1 Directions)? .....   | 15        |
| <b>Section C - Environmental, Social and economic impact .....</b>  | <b>19</b> |
| 1 Is there any likelihood that critical habitat or threatened species, populations or ecological communities, or their habitats will be adversely affected as a result of the proposal? .....                             | 19        |
| 2 Are there any other likely environmental effects as a result of the planning proposal and how are they proposed to be managed? .....  | 19        |
| 3 How has the planning proposal adequately addressed any social and economic effects? .....   | 20        |
| <b>Section D - State and Commonwealth interests .....</b>   | <b>20</b> |
| 1 Is there adequate public infrastructure for the planning proposal?.....   | 20        |
| 2 What are the views of State and Commonwealth public authorities consulted in accordance with the gateway determination? .....   | 21        |
| <b>PART 4 MAPPING .....</b>   | <b>21</b> |
| <b>PART 5 COMMUNITY CONSULTATION .....</b>  | <b>21</b> |
| <b>PART 6 TIMEFRAME .....</b>   | <b>21</b> |

## Introduction

Water extraction and bottling facilities are located in various rural areas in Tweed Shire. These uses were largely established prior to gazettal of Tweed Local Environmental Plan (LEP) 2014. Following an approach by an existing operator to modify their facility, it became apparent that water extraction and bottling facilities were no longer permissible in rural zones. This was as a consequence of land use definition changes contained in the standard instrument LEP template [dictionary] and consequently, the Tweed LEP 2014, whereby water extraction and bottling became prohibited due to change in the wording of the definition for 'rural industry' provided within the standardised template. This caused a situation where existing water extraction/bottling operations in rural zones were not able to secure a long term feasibility for their businesses, particularly within the context of any proposed expansion or redevelopment.

To mitigate this undesired impact, and primarily in the interest of the representation of the private interests of existing water extraction/bottling operators, Tweed Shire Council prepared planning proposal PP15/0004 (finalised by publication on the NSW legislative website in July 2016, as LEP Amendment No 16), which sought amendment to the Tweed LEP 2014 to re-instate the permissibility of water extraction.

Throughout the preparation and public exhibition of PP15/0004, concerns about conflicting land uses and impacts on agricultural land were raised and this resulted in the removal of RU1 Primary Production zoning from the scope of the planning proposal, permitting water extraction/bottling on land zoned RU2 Rural Landscape only.

Following gazettal of LEP Amendment No 16 facilitating water extraction/bottling on land in RU2 Rural Landscape zoning, five (5) development applications have been lodged with Council with three (3) of them related to expansion to or remedy of compliance issues with ongoing operators and two (2) for new operations on new sites.

The LEP amendment process and subsequent development applications lodged for intensification of water extraction in the Tweed have caused concern among the local community, with members of the public approaching Council either individually or by way of organised petitions expressing their reservations about long-term impacts of water extraction. Among these concerns, there was a perception that water belongs to the community and should not be used for private profit, as well as concerns about the impacts that heavy vehicles transporting extracted water will have on the safety and amenity of the local road network.

Whilst not a determinative matter, it is nonetheless relevant to acknowledge that between the making of PP15/0004 and the recent requests to remove the enabling clause there has been an election and a subsequent change in the make-up of Council, and with it the opportunity for the current Council to respond to growing public concern and community objection by viewing the water extraction and bottling controls less favourably than the earlier Council. It is well within the bounds of the duly elected Council to review past decisions, and ultimately change them, if the landscape of the issue or concern has, as in this instance, materially altered to the point where a new decision on the public interest is warranted. Coupled with additional analysis of existing and potential water extraction sites across the Shire, and as evidenced by its resolution at the meeting of 7 December 2017, Council sought fit to initiate a

planning proposal to remove the enabling clause, therefore reverting water extraction and bottling as a land use to its original LEP 2014 status of 'prohibited' in the rural zones of the Tweed Shire.

A planning proposal was prepared to this effect and submitted to the NSW Department of Planning and Environment (DPE) for Gateway Determination on 23 March 2018.

Formal notification dated 30 May 2018 was received from the DPE stating the draft proposal did not present sufficient strategic justification to progress, and that the DPE were unable to proceed until Council supplied sufficient further information and justification to support the planning proposal. The DPE stated, amongst other advice, that given water bottling facilities were introduced as a permissible use in 2016 on request from Council, any justification to subsequently prohibit the same land use so shortly after should defend against the previous rationalisations put forward by Council that supported the inclusion of water bottling facilities.

Based on the above advice, Council subsequently resolved on 19 July 2018 to discontinue PP18/0002 and request it be withdrawn, with correspondence seeking such sent to the DPE on 25 July 2018. The withdrawal was accepted however in conjunction Council was advised that submission of a further planning proposal with more robust justification for the proposed amendments would be considered. In effect, the DPE has at this point neither supported nor refused the planning proposal. Rather they have indicated that they are seeking a much stronger justification to now remove the permissibility of water extraction and bottling.

At its meeting on Thursday 15 November 2018, Council resolved to *reinstate a more comprehensive planning proposal to remove clause 7.15 from the Tweed LEP 2014 in light of the precautionary principle in regard to the long term sustainability of this activity, safety and amenity concerns, wear and tear on unsuitable rural roads, and the high level of opposition in the community for this activity.*

[At the Planning Committee Meeting of Thursday 7 February 2019 Council further considered the content of the draft Planning Proposal prepared by staff, resolving on several amendments and these are detailed in the report and resolution to that meeting, and the amendments are incorporated within this Planning Proposal].

This planning proposal has been prepared in response to [~~this~~ these] latest Council resolution[s], for consideration by the DPE.

The planning proposal has been prepared in accordance with guidelines published by the NSW Government and is comprised of the following parts: Part 1 outlines the objectives and intended outcomes of the proposed amendments. Part 2 explains the provisions through which the amendment will take place. Part 3 seeks to justify the need to amend the Tweed LEP 2014 against the statutory framework and is followed by an outline of community consultation proposed for the process and an indicative timeline.

## **Part 1 Objectives and intended outcomes**

The objective of the planning proposal is to give effect to the [substantive policy decision resolved in the] Council resolution of 15 November 2018 by way of amending the Tweed LEP 2014 to the effect that *water bottling facility* as a land use becomes prohibited in the rural zones of the Tweed Shire.

## **Part 2 Explanation of provisions**

This section of the planning proposal serves to describe in detail the extent of proposed changes to the LEP and best means to achieve them.

The intended outcome of this planning proposal is sought to be achieved by way of removal of clause 7.15 'Water bottling facilities in Zone RU2 Rural Landscape' from the Tweed LEP 2014. At present, the wording of this clause is as follows:

### **7.15 Water bottling facilities in Zone RU2 Rural Landscape**

*(1) Despite any other provision of this Plan, development may be carried out with development consent for the purposes of a water bottling facility on land in Zone RU2 Rural Landscape if the consent authority is satisfied that development will not have an adverse impact on natural water systems or the potential agricultural use of the land.*

*(2) Despite any other provision of this Plan, development may be carried out with development consent for the construction of a pipe or similar structure on any land for the purposes of conveying groundwater to a water bottling facility.*

*(3) In this clause:*

*Water bottling facility means a building or place at which groundwater from land in Zone RU2 Rural Landscape is extracted, handled, treated, processed, stored or packed for commercial purposes.*

The Tweed's rural zones are 'closed' zones, meaning that only those land uses specifically listed in the land use table as permitted with consent are permissible. There is no other standard land use definition within which water extraction and associated bottling could be described, therefore the effect of removal of the specific enabling clause 7.15 means that the use would become prohibited within the rural zones.



## Part 3 Justification

### Section A - Need for the planning proposal

#### 1 IS THE PLANNING PROPOSAL A RESULT OF ANY STRATEGIC STUDY OR REPORT?

This planning proposal has been prepared in response to Council resolution of 15 November 2018.

DPE has previously advised Council that a planning proposal seeking to prohibit water bottling facilities needs to include specific information, not limited to but including demonstrated evidence of the negative impacts caused by water extraction activities and evidence of how the activity is not sustainable, and addressing the previous justification for inclusion of the land use within the LEP.

The below narratives outline Council's strategic justification for the prohibition of water bottling facilities and is structured around the abovementioned themes.

##### a) Lack of data

The Tweed Shire is poorly studied in terms of groundwater. Examination of the North Coast Fractured Rock Aquifer Water Sharing Plan (The WSP) and associated documents reveals that:

- There is no data on recharge rates in the shire and a statewide default figure of 6% recharge is used,
- There is no data on local aquifers, rather The WSP uses a volumetric limit for the entire area based on the flow rates in the Tweed River,
- There is no data on local impacts potentially associated with extraction except three proponent commissioned pumping studies. These studies are neither adequate to determine local impacts nor likely to be correct in their view that the bores and nearby surface waters are not connected<sup>1</sup>,
- The WSP was never intended to address more local impacts and aquifers. As the WSP notes, it is intended as a macro document and should be understood as useful in that respect<sup>2</sup>.

As the National Groundwater Strategy 2016-2026 notes, "In many areas, fundamental research regarding the physical nature of groundwater systems, their natural recharge and discharge regimes, groundwater resource characteristics (such as the size, location, dynamics and sustainability of extraction) and vulnerability to hydrological perturbations are needed to inform management<sup>3</sup>." None of these fundamental studies have been undertaken in this shire.

<sup>1</sup> Cook, P. (2018) Potential Impact of Groundwater Pumping on Rowlands Creek.

<sup>2</sup> NSW DPI Water (2016) Water Sharing Plan for the North Coast Fractured and Porous Rock Groundwater Sources: Background document, p. v.

<sup>3</sup> National Groundwater Strategy 2016-2026, section 3.1.2.

There have been no studies of groundwater dependent ecosystems (GDEs) in the area nor identification of priority groundwater dependent ecosystems. The WSP presumes that a number of areas are GDEs, but once again there is no data on their nature, scale or importance. In light of the fact that the area has numerous World Heritage listed Gondwanan rainforests with numerous endangered and threatened species and ecosystems, a precautionary approach to protecting their access to groundwater is clearly justified.

#### **b) Evidence of how water extraction is not sustainable**

It is both the role of Council and the Office of Water through their respective regulatory functions to ensure the suitability and/or sustainability of water extraction development both at the time of considering the issue of a licence to extract water as well as at the time of assessing a development application for above ground works. This includes impacts that arise both above and below the ground surface and whether on the physical or natural environment or the public in general.

The scientific literature broadly accepts that groundwater is critically important source of water for river, wetland, lake and terrestrial ecosystems, yet concedes that there remains significant scientific uncertainty as to the impact that groundwater extraction may or does have on both deep water aquifer systems and surface water systems<sup>4</sup>. When experts within the scientific community are unable to form consensus or provide certainty as to possible long term impacts, it appears highly unreasonable to require local government, as an assessing and determining authority for land uses associated with extraction, to provide such certainty in the form of demonstrated evidence and justification that the extraction of water itself is unsustainable. Given the Office of Water is responsible for licensing and ensuring sustainable use of water access supply, it must follow that the State government has overarching responsibility and ownership of the potential impacts of the water extraction and bottling industry. That being correct, it must have the correlating responsibility of investigating, monitoring and reporting on the use, impact and future sustainability of ground water extraction.

In relation to the above, and of note, is the recent announcement by the NSW Chief Scientist and Engineer of an independent review into the impacts on groundwater quantity arising from groundwater extraction by the bottled water industry in the Northern Rivers Region of NSW.

The terms of reference for the review include a commitment to provide advice on the potential impacts on groundwater resources, having regard to the sustainable take of the resource and the scale of the current bottled water industry and proposed or potential expansion of the industry; and the impact of the associated groundwater take on surface water.

An initial report [~~is intended to be~~ was] released [~~in~~ on the 13<sup>th</sup>] February 2019, with a final report [~~to be~~] provided by mid-2019.

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<sup>4</sup> Gleeson T. & Richter B., How Much Groundwater can we pump and protect environmental flows through time? Presumptive standards for conjunctive management of aquifers and rivers. River Research Applications Vol 34 (1) 2017

In the meantime, while there is a question about the precision and comprehensiveness of the current information and evidence to support any definitive conclusion about environmental impacts, it is seen to be consistent with NSW Policy to err on the side of caution until such time as the exactness of the impact is known and upon which informed decisions can be made. This is best described and implemented through practices on which the community can have confidence in the planning system; namely, the precautionary principle.

To contextualise the notion that prevention is better than cure one need look no further than the value of precaution in historical contexts where it was abandoned. Asbestos, lead, benzene, pesticides, ozone depleting chemicals and overfishing to name a few, at some level, either ignored or dismissed early suggestions for precaution as irrational or unnecessary. Yet it is now widely accepted that it was a lack of acknowledgment and understanding of the inherent risks that lead to the significant understatement of not only the risks themselves, but also the importance of precaution where evidence is inferior or absent. They serve as examples where decisions were made purporting to serve the public interest when on reflection they had the opposite effect.

The precautionary principle can be misunderstood as it is too often assumed to be unscientific. However it is given clear statutory recognition in numerous NSW statutes, including the *Protection of the Environment Administration Act 1991*; the *Protection of the Environment Operations Act 1997*; the *National Parks and Wildlife Act 1974*, the *Fisheries Management Act 1994* and most significantly, the *Environmental Planning and Assessment Act 1979*. It follows then that precaution in the absence of information is fundamental to the public interest and should therefore be a central element in the process of decision making under any of the above legislative instruments, and given due weight when further advocated by a duly elected body politic. It is the defining feature of *The National Strategy for Ecologically Sustainable Development* (1992), as endorsed by the Council of Australian Governments, December 1992, which speaks to the equity with and between generations, the protection of biological diversity and the need to maintain essential ecological processes and life-support systems.

With the imminent Chief Scientist's investigations and intention for evidence based advice to be provided within a relatively short time frame, the argument for risk aversion through the application of precaution appears even more justified, particularly in this instance where uncertainty of impacts is high, and where extensive community opposition exists. Further, any advice provided would be based on a review being tabled as 'independent', which adds rigour not only to the science itself, but also provides comfort to those in opposition that bias will be minimised and the balance of importance will be spread fairly across all approaches.

[This 'uncertainty' extends to the decision making process and is a phenomena referred to as 'decision making under uncertainty'. This phenomena is briefly discussed in the Chief Scientist and Engineer's Initial Report as one having various causes; notably there is a linkage between the uncertainty in the prediction and modelling of the environmental systems and the confidence held in them by those who are called to rely upon them in decision making. The inclusion of a discussion of this phenomena within the Report was clearly deemed to be warranted by the authors and may be instructive as to the regulatory framework lacking transparency or legibility. Notwithstanding any shortcomings that may exist with the actual data, its modelling, monitoring, collection or the like, a clear line of sight between the evidence

of what is happening on the ground and the overarching policy mechanisms ensuring environmental security and sustainability must be sufficiently clear and usable for a decision to be made with the requisite degree of certainty about the maintenance of those objectives being attained. The Council resolution to remove clause 7.15 from the Tweed LEP 2014 is in response to a growing concern that uncertainty within the decision making process has reached a highpoint where it must now give way to precaution].

Council and the NSW State Government have a responsibility to mandate processes that are aimed at sustaining and protecting the current levels of natural groundwater even if, as is the case, full scientific knowledge of the structure and behaviour of the aquifer, its mechanisms for recharge or the impact of take on surface water systems is not available.

Whilst this proposal seeks to remove the enabling clause in light of the precautionary principle, there remains sentiment to highlight that precaution does not necessarily mean a ban or prohibition. It simply urges that more time and space be found to consider the process or problem in order to achieve the best possible outcome based on comprehensive understanding of the issue at hand.

The request for Council to provide tangible and demonstrated evidence on how water extraction is not sustainable is both unreasonable and unachievable. By placing the onus of burden on levels of proof, the balance of emphasis tends to favour the pathway with the most backing. Introducing precaution offers to level the playing field by inviting a focus not only on risk, but also on uncertainty.

To prove there is an impact before prohibition can be considered also appears to be part of an increasing trend to promote consideration of socio-economic outcomes. Whilst these undoubtedly form part of the heads of consideration under the Objects of *the Environmental Planning and Assessment Act 1979* (EP&A Act), this broader trend of promoting socio economic benefits above all else fails to consider the role of the remaining Objects and intentions of the EP&A Act that relate to environmental interests, facilitation of ecologically sustainable development, opportunities for community participation and the broader public interest. These other Objects carry the same if not more weight in the context of the application of the precautionary approach given the difficulty in measuring, predicting or providing evidence for impacts on environmental interests prior to them occurring.

Tweed Shire Council understands that there would invariably be State based pressures for the lead planning agency to require Council to justify its decision making in planning terms. However it tenders the view in reply that the projection of this pressure into a request to artificially invent an evidence base for justifying a firm decision only serves to highlight the extent to which precaution is paramount, along with upholding both scientific rigour and democratic accountability under uncertainty. Such a request serves to change the rules of engagement by shifting the burden from the prospective beneficiary of a new exploitative industry to the community, and is an untenable outcome for good planning practice. A more appropriate pathway is that beneficiaries must themselves prove there is no unacceptable impact or harm before they may proceed. Council considers this as the acceptable approach, and it follows that where a decision has been made that later leads to doubt about the

acceptability of impact, and where there is an identified lack of evidence to support its continuance, it must be open to being reversed.

This planning proposal is responding to that very scenario just discussed above. It is in response to the Council's consideration of weighing up competing public interests, including the risk of permitting water extraction and bottling to continue and the foreseeable risk of harm to the environment if the information and assertions about water availability and potential risk of harm are in fact not correct. In assessing where the balance lies between the weight to be given to one interest and that to be given to another, risk needs to be taken into consideration and in this instance, the probability of risk of long term or irreversible environmental damage is fundamental to shifting the balance towards favouring a precautionary approach that can only be achieved through protection of environment.

### **c) Evidence of the negative impacts caused by the water extraction activity**

The use of ground water resources for water bottling has a complex legislative framework with a key feature being that the 'extraction' of water from subterranean sources is licensed in NSW by the Office of Water. The impacts arising from the extraction of water are considered by the Office of Water in the objectives of the *Water Management Act 2000* and are soon to be further investigated by the NSW Chief Scientist [in the Final Report] as discussed above.

Its 'use' may also be regulated by councils when associated with activities or works involving, for example, its storage, processing or transportation. Council's merit/environmental impact assessment is therefore based upon that aspect of development and not upon those that may arise directly from the drawing of the water, or collateral impact on the water source, or its flow-on impacts to the wider environment. Those wider impacts have been advanced by the community in terms of impact on vegetation and landscapes from the creation of water scarcity as well as the much broader impacts associated with the related use of plastics in the bottling and distribution process to the end consumer.

It is the potential for and current reporting of observations of negative impacts on the environment and wider community from the taking and distribution of ground water for commercial bottling and sale that are of concern and relevant to this planning proposal, in the regulatory context discussed above. Those largely surround the risk of environmental harm, and adverse impacts on amenity and public safety. The latter concerns the use of plant (heavy vehicles) and equipment that have the potential to impact at a site and locality level. While the use of non-biodegradable or sustainable material in the process of extraction to consumer raise serious issue for the environment they do not represent the key issues being considered and related to this planning proposal.

Heavy vehicles are used to transport water from the extraction site either in bulk by water tank trucks or already bottled in more traditional transportation trucks. Since the introduction of water extraction as a permissible use in Tweed LEP 2014, Council has received a significant number of complaints (including a petition with over 100 signatures) from the community raising concerns about the impacts that heavy vehicles transporting extracted water have on the safety and amenity of the local road network, including damage to rural roads from heavy

vehicles and safety concerns from trucks moving at high speed on narrow and winding rural roads.

It is extremely difficult to quantify or mitigate amenity impacts other than imposing conditions around days and hours of operation, which can then easily translate into post-consent compliance issues. Council is has recently been involved in two NSW Land and Environment Court cases based around compliance of water extraction operators in terms of approved operating hours for truck movements. Further, during assessment of a recent development application seeking to establish the new use of a rural property for the purposes of water extraction and bulk transportation off site for commercial sale, the applicant indicated a willingness to accept conditions requiring upgrades to the surrounding rural road network, to be carried out at the applicant's expense. In this instance a negotiated outcome may have proven to ameliorate some concerns regarding the heavy vehicle use. Despite this, the application was ultimately determined by Council by way of refusal, for numerous reasons, including that road works were required on private land and no satisfactory arrangements had been carried out with those private land holders. It follows that whilst the opportunity exists, such a negotiated outcome is not a guaranteed or foregone conclusion for all development applications and depends to a large degree on the extent of road works required, their location, consent of land owners, and associated costs.

Should water extraction and bottling be prohibited as this planning proposal is seeking, the number of heavy vehicles (water trucks) utilising rural roads and the broader Tweed road network would remain stable at their current approved levels, or reduce should any operators cease. Small increases in the numbers of water trucks on rural roads adds significantly to heavy vehicle counts by way of percentages, and Council has little data on underlying road pavement properties for most rural roads or load bearing capacities of bridges and culverts. Obtaining such data to assist understanding of heavy vehicle movement impacts on infrastructure brings significant cost and Council is not in position to undertake such assessments, therefore is unable to predict with any certainty what changes in heavy vehicle loading will do in terms of accelerating pavement damage. Prohibition of water extraction and bottling as a land use would result in a staying in, or at least no intensification of wear and tear on, or deterioration of, public infrastructure (roads) as would be the case should the use continue as permissible therefore facilitating expansion of the industry.

As an adjunct to those impacts directly regulated by councils, the negative environmental impacts from single use plastics warrants noting because there is a nexus between the water extraction and its supply to consumers. It is widely reported and well documented, particularly with respect to marine debris and associated impacts on marine wildlife, significant loads to landfill, and the non-biodegradable nature of most plastics. Whilst most contemporary plastic drink bottles are made from recyclable materials they are not biodegradable, and a recent statistic from the Australian Federal Department of Environment and Energy<sup>5</sup> states that only 14% of plastic is recovered for recycling or energy recovery with the remainder adding to landfill or marine and terrestrial debris.

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<sup>5</sup> Source: <http://www.environment.gov.au/protection/waste-resource-recovery/plastics-and-packaging>

Tweed Shire Council has recently by way of resolution solidified its position with respect to waste minimisation, including a banning of single use plastics and plastic water bottles from all Council events, along with its intent to become a leader and environmental steward in the reduction of waste through development of a campaign seeking the support of the community and local businesses in the Shire to eliminate such use. The primary reason for this is the well-known and well reported negative impacts on the environment of plastics. The extraction of water within the Tweed for the purpose of sale to consumers is therefore, and in addition to the other regulated impacts, totally at odds with the Council's position.

**d) Addressing the previous justification for the inclusion of water extraction into the LEP (via Amendment No. 16)**

PP15/0004 (Amendment 16) justified the inclusion of an enabling clause for water extraction into the Tweed LEP 2014 on the basis that existing lawful operators within the Shire were concerned that the unintended effect of prohibiting the land use under the standard instrument definitions would have impacts on their ability to expand operations, particularly in relation to expansion onto new parcels of land. Council initially requested several Schedule 1 site specific additional permitted uses relating only to existing operators as a remedy. However as part of its gateway determination the DPE considered a more appropriate approach was to seek an enabling clause to allow water bottling on all rural land, rather than favouring specific sites or land owners. Council was thus compelled to broaden the scope of the planning proposal to enable the land use throughout all rural zones, however as noted above, applied further amendments to remove RU1 Primary Production and apply the enabling clause only to RU2 zones in an effort to mitigate potential impacts on productive farmland.

PP15/0004 (Amendment 16) also relied on the justification that, once permissible, the impacts of above ground land uses associated with extraction of groundwater resources would be considered on a case-by-case basis as part of the development assessment process, with extraction allocation rates controlled by the licensing requirements of the NSW Department of Primary Industries (DPI). It did not, however, anticipate the rapid rate at which applications for new consents to operate and expansion of existing operations would be submitted in order to capitalise on the amendment. Nor did it anticipate the significant community objection based on amenity impacts, or new evidence prepared by objecting community groups suggesting the impact of commercial water extraction may reach beyond that anticipated by the DPI during their historical licensing and take allowances, and therefore may indeed have a greater environmental impact than initially expected.

Whilst at the time it was considered in the public interest, by virtue of protecting the economic and business interests of those existing operators, to reintroduce water bottling as a permissible use in the Tweed's rural areas, it was also considered at the time that the effect of the planning proposal would for the most part be limited to those few land owners who held lawful extraction licenses. The intention was to liberate those landowners who held lawful water extraction licenses from the unintended prohibition of their operations through the introduction of the SI LEP. The intention was not to facilitate a proliferation of expansion to existing and additional water bottling operators within the Tweed Shire. Notwithstanding, this has since occurred and is now quite clearly understood to be unacceptable to the community,

which in a logical sense now deems the extraction of water for commercial gain against the wider public interest.

## **2 IS THE PLANNING PROPOSAL THE BEST MEANS OF ACHIEVING THE OBJECTIVES OR INTENDED OUTCOMES, OR IS THERE A BETTER WAY?**

Notwithstanding Exempt and Complying Development Codes and other mechanisms to allow certain land uses through State Environmental Plan Policy pathways, land use permissibility at a local level is governed solely on the basis of the land use tables or enabling clauses and schedules contained within the Local Environmental Plan.

The intended outcome is the prohibition of water bottling facilities as a land use within the Tweed Shire, which requires removal of the existing enabling clause within the Tweed Local Environmental Plan 2014.

Division 3.4 (Environmental planning instruments – LEPs) of the EP&A Act provides that amendments to local environmental plans can only occur by way of a planning proposal process undertaken by a *planning proposal authority* which, in this instance, is Tweed Shire Council.

A planning proposal is thus the only means of achieving full prohibition of water bottling facilities with certainty, and is therefore the most appropriate and best means of achieving the intended outcome.

### **Section B - Relationship to strategic planning framework**

## **1 IS THE PLANNING PROPOSAL CONSISTENT WITH THE OBJECTIVES AND ACTIONS CONTAINED WITHIN THE APPLICABLE REGIONAL OR SUB-REGIONAL STRATEGY (INCLUDING THE SYDNEY METROPOLITAN STRATEGY AND EXHIBITED DRAFT STRATEGIES)?**

Tweed local government area is located within the North Coast region, subject to the *NSW North Coast Regional Plan 2036* (referred to herein as ‘the Plan’). The overall vision statement for the North Coast region prescribed under this Plan is “*the best region in Australia to live, work and play thanks to its spectacular environment and vibrant communities.*”

As far as groundwater resources are concerned, Direction 2 of the Plan (pages 18-23) provides actions and directives related with biodiversity, coastal and aquatic habitats and water catchments. More specifically, Action 2.2 provided within Direction 2 aims to *ensure local plans manage marine environments, water catchment areas and groundwater sources to avoid potential development impacts*. The intended objective of this planning proposal is consistent with this Action. The Plan’s directive *to manage groundwater sources* can be interpreted as *to control the use or exploitation of groundwater resources*. The ultimate objective of this planning proposal can in this context be described as *control the use or exploitation of groundwater resources* by way of prohibition.

Further, Direction 2 of the Plan makes a reference to the role of Water Quality Objectives in Strategic Planning. One of those Objectives refers to the role of local governments in



development planning process preventing impacts on water quality and improvements to catchment health. *The Local Planning for Healthy Waterways*: The NSW Water Quality Objectives document provides that management of water quality through local planning “can be more effective by way of recognising the community’s values for waterways in local environmental plans”<sup>6</sup>. Again, this planning proposal appears to be consistent with matters described above as it responds to the increasing number of local community members who are expressing concern about groundwater resources in the Tweed.

## **2 IS THE PLANNING PROPOSAL CONSISTENT WITH THE LOCAL COUNCIL’S COMMUNITY STRATEGIC PLAN, OR OTHER LOCAL STRATEGIC PLAN?**

The principal local strategic plan in the Tweed Shire is the *Tweed Community Strategic Plan (TSCP) 2017/2027*. The TSCP does not define actions or directives targeting matters related with groundwater resources and/or extraction of water. In the absence of relevant provisions, consistency of this planning proposal has been assessed against the vision statement of the TSCP 2017/2027 which states as follows: *The Tweed will be recognised for its desirable lifestyle, strong community, unique character and environment and the opportunities its residents enjoy*. It is considered that this planning proposal is consistent with this vision statement as it will not have any adverse impacts on community, lifestyle choices, unique character and environment.

In the previous planning proposal prepared to permit water extraction with development consent, Council demonstrated compliance of that outcome with the *Tweed Economic Development Strategy (TEDS) 2104*, in particular a key directives to create a ‘Diverse Business Base’ (Action 10.3.2). In considering the consistency between the previous and this planning proposal, the proposal to prohibit water extraction may no longer support business diversification as postulated under the TEDS, however it does support an alternative economic development objective of the strategy being *to grow and develop an economy which does not negatively affect the natural environment and landscape values of the Tweed* (page 10). The prohibition of water extraction and bottling may also support an alternative key directive of the TEDS seeking to promote ‘Sustainable Industries’ (Action 10.3.1) through encouraging links to Tweed’s ‘clean and green’ values/brand, meeting expectations of changing market preferences and expectations for improving the environmental health of the Tweed.

## **3 IS THE PLANNING PROPOSAL CONSISTENT WITH THE APPLICABLE STATE ENVIRONMENTAL PLANNING POLICIES (SEPPS)?**

This planning proposal is of relevance to the following SEPPs:

**SEPP (Rural Lands) 2008** - This SEPP provides for Rural Planning Principles and Rural Subdivision Principles for consideration at strategic planning. There are three (3) Rural Planning Principles of relevance to this planning proposal:

<sup>6</sup> Source: <http://www.environment.nsw.gov.au/resources/water/usingnswwqos06167.pdf>

- (a) *the promotion and protection of opportunities for current and potential productive and sustainable economic activities in rural areas;*
- (d) *in planning for rural lands, to balance the social, economic and environmental interests of the community; and*
- (e) *the identification and protection of natural resources, having regard to maintaining biodiversity, the protection of native vegetation, the importance of water resources and avoiding constrained land.*

The current management of groundwater resources remains the responsibility of the NSW Government Office of Water through their water licensing based on the Adaptive Management Framework. Adaptive management refers to the process of ongoing data collection, monitoring, evaluation and review during the life of the water sharing plan that enables either plan amendment or remaking of a plan after 10 years. The relevant policy framework (*The NSW State Groundwater Policy Framework Document*) encourages ecologically sustainable management of State's groundwater resources.

The rural parts of the Tweed are located within the Tweed River Alluvium groundwater management unit, and are generally characterised by high levels of groundwater development for irrigation, town supply and some industrial purposes (source: *Climate Change Impact on Groundwater Resources in Australia, 2011*). In 2012, The NSW Office of Water assessed the risk to the ecological value and associated groundwater dependant ecosystem in the Tweed River Alluvium as low (on a low-moderate-high scale).

LEP Amendment No. 16 to facilitate water extraction was based on available data indicating that in Tweed Shire sustainable extraction of groundwater can occur, as long as it is monitored and licensed by public authorities, thereby stating consistency with the provisions of the Rural Lands SEPP that seek to advance sustainable economic activities. The recent narratives around the Chief Scientist's independent review suggest uncertainty around whether the number and/or location of current groundwater monitoring bores are sufficient to allow comprehensive monitoring to take place. Coupled with this uncertainty, and the absence of data supporting concerns water extraction is either sustainable or unsustainable, this planning proposal is now considered more consistent with the provisions of the SEPP Rural Lands that seek to balance social, economic and environmental interests, and to protect natural resources having regard to the importance of water resources.

**SEPP 14 Coastal Wetlands** - this planning proposal gives effect to the aim of SEPP 14 which is '*to ensure that the coastal wetlands are protected in the environmental and economic interest of the State*'. Wetlands and groundwater constitute parts of a dynamic water cycle as one of the avenues for the groundwater to reappear at the surface is through wetlands formations. This planning proposal is considered as consistent with SEPP 14.

#### 4 IS THE PLANNING PROPOSAL CONSISTENT WITH APPLICABLE MINISTERIAL DIRECTIONS (S9.1 DIRECTIONS)?

The consistency of this planning proposal with the relevant Ministerial Directions under section 9.1 of the EP&A Act is provided in table below.

| <b>Table No.2 – Consistency with s117(2) Directions</b>           |  |  |                                   |
|---|--|--|-----------------------------------|
| <b>S.117 direction</b>  | <b>Application</b>   | <b>Relevance to this planning proposal</b>   | <b>Consistency with direction</b> |
| <b>1. Employment &amp; Resources</b>                              |  |  |                                   |
| <b>1.1 Business and Industrial Zones</b>                          | Applies when a relevant planning authority prepares a planning proposal that will affect land within an existing or proposed business or industrial zone (including the alteration of any existing business or industrial zone boundary).  | This planning proposal will not affect business or industrial zones.   | N/A                               |
| <b>1.2 Rural Zones</b>  | A planning proposal must not:<br>a) rezone land from a rural zone to a residential, business, industrial, village or tourist zone, or<br>b) contain provisions that will increase the permissible density of land within a rural zone (other than land within an existing town or village).  | This planning proposal applies to rural zone RU2 Rural Landscape. It does not seek amendments to the Land Zoning Map and will not lead to an increase in permissible density of land within a rural zone | Consistent                        |
| <b>1.3 Mining, Petroleum Production and Extractive Industries</b> | Applies when a relevant planning authority prepares a planning proposal that would have the effect of:<br><br>(a) prohibiting the mining of coal or other minerals, production of petroleum, or winning or obtaining of extractive materials, or<br><br>(b) restricting the potential development of resources of coal, other minerals, petroleum or extractive materials which are of State or regional significance by permitting a land use | Nothing in this planning proposal will prohibit or restrict exploration or mining of the resources identified in the Direction.  | Consistent                        |

| <b>Table No.2 – Consistency with s117(2) Directions</b> |   |   |   |
|---|---|---|---|
| <b>S.117 direction</b>                                  | <b>Application</b>  | <b>Relevance to this planning proposal</b>  | <b>Consistency with direction</b>               |
|   | that is likely to be incompatible with such development.  |   |   |
| 1.5 Rural Lands   | <p>Applies when:</p> <p>(a) a relevant planning authority prepares a planning proposal that will affect land within an existing or proposed rural or environment protection zone (including the alteration of any existing rural or environment protection zone boundary), or</p> <p>(b) a relevant planning authority prepares a planning proposal that changes the existing minimum lot size on land within a rural or environment protection zone.</p> <p>The planning proposal is to be consistent with the relevant sections of SEPP (Rural Lands) 2008.</p> | <p>Consistency of this planning proposal with SEPP (Rural Lands) 2008 was addressed under Part 3 Section 3 of this planning proposal. In short, this planning proposal may be considered contrary to the Rural Planning Principle seeking to advance sustainable economic activities on rural land. Notwithstanding, the proposal is deemed consistent with Rural Planning Principle (d) which seeks to balance the social, economic and environmental interests of the community, and (e) the identification and protection of natural resources, having regard to maintaining biodiversity, the protection of native vegetation, the importance of water resources and avoiding constrained land,</p> | <p>Variations are of minor significance (a)</p> |
| <b>2. Environment and Heritage</b>                      |   |   |   |
| 2.1 Environment Protection Zones                        | <p>A planning proposal must consider protection and conservation of environmentally sensitive areas. A planning proposal that applies to land within an environment protection zone or land otherwise identified for environment protection purposes in a LEP must not reduce the environmental protection standards that apply to the land (including by modifying development standards that apply to the land).</p>  | <p>This planning proposal responds to concerns that commercial water extraction may have adverse environmental impacts and seeks to prohibit that use on a Shire-wide basis. This outcome is considered as consistent with Direction 2.1</p>  | <p>Consistent</p>                               |

| <b>Table No.2 – Consistency with s117(2) Directions</b>                    |  |   |                                   |
|--|--|---|-----------------------------------|
| <b>S.117 direction</b>   | <b>Application</b>   | <b>Relevance to this planning proposal</b>  | <b>Consistency with direction</b> |
| 2.2 Coastal Protection   | The objective of this direction is to implement the principles in the NSW Coastal Policy and applies to the coastal zone, as defined in the Coastal Protection Act 1979.   | This planning proposal responds to concerns that commercial water extraction may have adverse environmental impacts and seeks to prohibit that use on a Shire-wide basis. This outcome is considered as consistent with Direction 2.2   | Consistent                        |
| <b>5. Regional Planning</b>  |  |   |                                   |
| 5.3 Farmland of State and Regional Significance on the NSW Far North Coast | <p>Applies (to Tweed) when a relevant planning authority prepares a planning proposal for land mapped as:</p> <ul style="list-style-type: none"> <li>(a) State significant farmland, or</li> <li>(b) regionally significant farmland, or</li> <li>(c) significant non-contiguous farmland.</li> </ul> <p>The objective is to ensure that the best agricultural land will be available for current and future generations, to provide more certainty on the status of the best agricultural land, and to reduce land use conflicts.</p> | Whilst this planning proposal applies to rural land, it does not seek zoning amendments to land identified as State or Regionally Significant Farmland.   | Consistent                        |
| 5.10 Implementation of Regional Plans                                      | Planning proposals must be consistent with a Regional Plan released by the Minister for Planning   | Consistency of this planning proposal with the North Coast Regional Growth Plan has been provided within Part 3 Section B of the document   | Generally consistent              |
| <b>6. Local Plan Making</b>  |  |   |                                   |
| 6.1 Approval and Referral Requirements                                     | The objective is to ensure that LEP provisions encourage efficient and appropriate assessment of development, and seeks to minimise inclusion of provisions that require the concurrence, consultation or referral to a Minister or public authority.  | This planning proposal seeks to prohibit a currently permissible land use. In doing so, the amendment would not create any additional development assessment procedures or concurrence consultation or approvals beyond that required for current lawful operators who may wish to alter or | Consistent                        |

| <b>Table No.2 – Consistency with s117(2) Directions</b> |                    |   |                                   |
|---|--------------------|---|-----------------------------------|
| <b>S.117 direction</b>                                  | <b>Application</b> | <b>Relevance to this planning proposal</b>  | <b>Consistency with direction</b> |
|   |                    | expand their operations under existing use rights.<br>No additional consultation or referrals would result. |                                   |

## **Section C - Environmental, Social and economic impact**

### **1 IS THERE ANY LIKELIHOOD THAT CRITICAL HABITAT OR THREATENED SPECIES, POPULATIONS OR ECOLOGICAL COMMUNITIES, OR THEIR HABITATS WILL BE ADVERSELY AFFECTED AS A RESULT OF THE PROPOSAL?**

Whilst there is a strong belief amongst a significant number of community members and organised groups that prohibiting commercial water extraction and bottling will protect the environment, no substantial evidence is available to support such claims that commercial extraction of water, at its current levels, is more damaging to the environment than, for example, extraction of water for intensive livestock agriculture, which is a frequent occurrence in rural Tweed and will remain a permissible use.

In the absence of evidence and the subsequent remaining questions as to whether extraction of ground water can or will have an adverse impact on the environment, including critical habitat or threatened species, populations or ecological communities, it is considered there could indeed be a likelihood of adverse affectation, and it is therefore in the upmost of the public interest to apply the full precautionary principle in terms of preventing, or at a minimum deferring, the expansion of such operations until such time as an evidence base can be relied upon to be confident of no adverse effects.

### **2 ARE THERE ANY OTHER LIKELY ENVIRONMENTAL EFFECTS AS A RESULT OF THE PLANNING PROPOSAL AND HOW ARE THEY PROPOSED TO BE MANAGED?**

No other adverse environmental impacts have been identified at this point.

On the contrary it is anticipated that by and large the effect of prohibition of water extraction and bottling would result in a range of positive environmental outcomes, including but not limited to:

- i. The volumes of groundwater being extracted from the Tweed remaining relatively stable at their current levels or lowering should any operators cease. Any environmental damage that will or could occur due to increased or additional takes would therefore be averted.
- ii. The number of heavy vehicles utilising rural roads would remain stable at their current levels, or reduce should any operators cease. There would therefore be no increased subsequent risks to public safety from heavy vehicles on rural roads, and similarly any real or perceived excessive wear and tear on public roads would not intensify.
- iii. Decreasing reliance on single use plastic bottles and associated wastage in the Tweed will contribute to broader sustainability outcomes in keeping with strategic actions within Council's Community Strategic Plan including to decrease the carbon footprint of the Tweed community and Tweed Shire Council's broader established position aimed at reducing consumption plastics.

### **3 HOW HAS THE PLANNING PROPOSAL ADEQUATELY ADDRESSED ANY SOCIAL AND ECONOMIC EFFECTS?**

Legal advice was sought with respect of economic implications to Council in terms of liability for economic loss to current legally operating water extraction businesses. In summary, the advice stated that the making of the LEP amendment is a policy decision of Council and would not attract liability in negligence to third parties. In other words, it is Council's role as public authority to weight up competing interests for the greater public benefit, and there is no presumed duty of care for economic or business viability of existing individual operators when making policy level decisions.

Notwithstanding the above, there remains a moral imperative to weigh up the greater public interest against the interests of certain individual land owners and their economic interests, which can also be considered to be within the realm of the public interest. Prohibition of the land use will result in, among other effects, a staying in the number of development consents issued for extraction of groundwater for commercial sale. No new approvals would be granted regardless of new, or existing but nonoperational licenses, which may be issued by the NSW Office of Water. The effect would be a limitation on some rural landowners to diversify into water extraction as an alternative use for their land. This is, however, not considered a strong enough impairment to warrant continuing permissibility of water extraction against increasing public discontent and opposition. Prohibition of the land use would by no means sterilise land otherwise capable of handling the numerous alternative permissible land uses in the RU2 zone, and it would remain open to land owners of RU2 land to pursue any alternative permissible land use within the zone.

Should this planning proposal be accepted and commercial bottling of water in the Tweed Shire be prohibited, there will remain numerous land holders who would continue to operate under lawful licenses from the NSW Office of Water, and lawful development consents issued by Council. Any prohibition would not impair those land owners ability to continue operating at their current intensity (with the use of Existing Use rights savings provisions within the EP&A Act). Further, the EP&A Regulations do allow for some level of intensification or modification of existing lawful uses to occur with development consent, thereby allowing some level of economic increase to those already financially committed to the industry (subject to merit assessment and consent from Council and any increase in corresponding NSW Office of Water licensing and approvals).

## **Section D - State and Commonwealth interests**

### **1 IS THERE ADEQUATE PUBLIC INFRASTRUCTURE FOR THE PLANNING PROPOSAL?**

This planning proposal will not result in increased demand for public infrastructure.



## 2 WHAT ARE THE VIEWS OF STATE AND COMMONWEALTH PUBLIC AUTHORITIES CONSULTED IN ACCORDANCE WITH THE GATEWAY DETERMINATION?

No formal consultation on this proposed amendment has been carried out to date. Should it receive a Gateway Determination to proceed, this section will be updated to provide for a summary of consultation with relevant public authorities.

### Part 4 Mapping

The proposed amendment does not require any mapping changes.

### Part 5 Community consultation

No formal consultation on this planning proposal has been carried out yet. Should this planning proposal receive a Gateway Determination to proceed, this section will be updated to provide for a summary of community consultation.

### Part 6 Timeframe

| Task   | Timeframe                | Completed |
|--|--------------------------|-----------|
| Referral of the Planning Proposal for Gateway determination  | February 2019            |           |
| Gateway Determination  | April 2019               |           |
| Undertake requirements of the Gateway Determination and prepare V2 Planning Proposal               | May 2019                 |           |
| Public exhibition  | June 2019                |           |
| Agency consultation  | June 2019                |           |
| Review submissions, respond and prepare V3 Planning Proposal for Council's consideration           | July 2019                |           |
| Council report recommending referral of the planning proposal to the DPE to make the LEP amendment | August 2019              |           |
| Revisions to the planning proposal   | August / September 2019  |           |
| Referral of the planning proposal to the DPE for Gateway alteration                                | September / October 2019 |           |
| Plan Made  | November / December 2019 |           |



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