

Your ref: email dated 7 December 2023 Our ref: DOC23/1075085-3

Department of Planning, Housing and Infrastructure Planning Land Use Strategy Locked Bag 5022 PARRAMATTA NSW 2150

Attention: Mr Timothy Coorey

Dear Mr Coorey

RE: High Environmental Value report, Planning Proposal, Swift Place, South West Rocks (PP-2021-4455)

Thank you for your e-mail dated 7 December 2023 about the planning proposal at Swift Place, South West Rocks, seeking comments from the Biodiversity, Conservation and Science Group (BCS) of the NSW Department of Climate Change, Energy, the Environment and Water on the revised ecological study. I appreciate the opportunity to provide input.

We have reviewed the High Environmental Values (HEV) report prepared by Biodiversity Australia (November 2023) in response to the Northern Regional Planning Panel's conditions.

Further work is required on the HEV report and planning proposal to accurately map the presence of HEV land in the planning area in accordance with criteria 1, 2 and 3 set out in the North Coast Regional Plan 2041 and to apply Environmental Conservation zones to that land. These matters are discussed in detail in **Attachment 1** to this letter.

In summary, BCS recommends:

- 1. The planning proposal be revised to map all parts of the planning area containing land mapped on the NSW Biodiversity Values Map as HEV land and apply the C2 Environmental Conservation zone to this land.
- 2. Surveys for Wallum froglet be conducted in the planning area in accordance with the *NSW Survey Guide for Threatened Frogs* (DPIE 2020).
- 3. All confirmed Wallum froglet habitat in the planning area be mapped as HEV land and the C2 Environmental Conservation zone applied to that land.
- 4. The planning proposal be revised to map all areas of Plant Community Type 4004 as HEV land and apply the C2 Environmental Conservation zone to that land.
- 5. Further information be provided on the proposed koala habitat compensation area regarding its tenure, any existing in-perpetuity biodiversity management agreements over the land, the proposed future tenure for the land, and the mechanism proposed to secure its in-perpetuity management, if the Northern Regional Planning Panel decides to proceed to gateway determination with the planning proposal.

If you have any further questions about this issue, please contact Mr Bill Larkin, Senior Conservation Planning Officer North East, Biodiversity, Conservation and Science Group, on 6659 8216 or at bill.larkin@environment.nsw.gov.au.

Yours sincerely

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DIMITRI YOUNG Senior Team Leader Planning North East Biodiversity, Conservation and Science

23 January 2024

Enclosure: Attachment 1 – Detailed DCCEEW BCS Comments - HEV Report – Planning Proposal – Swift Place, South West Rocks

Attachment 1: Detailed DCCEEW BCS Comments – High Environmental Values Report - Planning Proposal - Swift Place, South West Rocks

The Biodiversity Conservation and Science Group (BCS) of the Department of Climate Change, Energy, the Environment and Water has reviewed the High Environmental Values (HEV) report prepared by Biodiversity Australia (November 2023) and we provide the following comments and recommendations.

Land Mapped on the Biodiversity Values Map

A large portion of the planning area contains land mapped on the NSW Biodiversity Values Map (BV map) and hence aligns with the North Coast Regional Plan 2041 (NRCP 2041) High Environmental Value (HEV) land criterion 1. The BV Map is made up of several components and the component intersecting the planning area is the Swift Parrot Important Habitat Map.

The HEV report considered the BV map to be partially incorrect and the consultant has submitted a request to the Department's BV mapping team for a review of the Swift Parrot Important Habitat Map. However, until the Department's BV mapping team has conducted a review of the Swift Parrot Important Habitat map, a decision made to either amend or not amend the BV map, and any map amendments completed, the land currently mapped on the BV map remains as HEV land as per the NCRP 2041 criterion 1.

BCS Recommendation

1. The planning proposal be revised to map all parts of the planning area containing land mapped on the NSW Biodiversity Values Map as HEV land and apply the C2 Environmental Conservation zone to this land.

Key habitat for threated species

Section 4.1.2.3 of the HEV report indicates that amphibian surveys were carried out on 28 and 30 June 2022 and additional amphibian survey effort was undertaken during October 2023, however no dates of the October survey have been provided.

The *NSW Survey Guide for Threatened Frogs* (DPIE 2020) specifies the survey period for Wallum froglet (*Crinia tinnula*) to be all year, but only after flooding rains, specifying flooding rains for Wallum froglet as rainfall occurring after acid swamps have filled. The Bureau of Meteorology (BOM) rainfall data for June 2022 indicates only 7.8mm of rain for the entire month and 1mm of rain occurred during the survey period, hence invalidating the June 2022 surveys.

The BOM rainfall data for October 2023 indicates minimal rainfall occurring over the month with an increase in the end of October. However only 4.4mm of rainfall occurred in September and August and rainfall was significantly below the mean average for the South West Rock area. Consequently the October 2023 Wallum froglet surveys also did not accord with the survey requirements of the guidelines.

Despite the survey for Wallum froglet not being carried out in accordance with the Department's published guidelines, the HEV report notes the October 2023 survey confirmed the presence of the previously recorded Wallum froglet frequently over the planning area.

The HEV report also refers to a previous Wallum froglet study carried out by Connell Wagner in 2007 that was used to inform the previous rezoning which resulted in land to the east of the planning area being rezoned to R1 residential, land to the south being rezoned to C2 Environmental Conservation and the planning area remaining as RU2 rural landscape. The author of the 2007 Connell Wagner report is not an approved and listed expert for *Crinia tinnula* in accordance with Section 5.3, Box 3 of the BAM 2020. Hence, the reference in the HEV report to this author being an expert is incorrect. Furthermore, BCS considers the report is significantly outdated as it was prepared 17 years ago and so should not be relied upon.

In summary, the HEV report documents surveys conducted for Wallum froglet that did not accord with the survey period or survey effort specified in the *NSW Survey Guide for Threatened Frogs* (DPIE 2020), and despite suboptimal survey conditions and reduced survey effort, the species was still recorded frequently over the planning area. Hence, the planning area aligns with the key habitat of threatened species HEV land criterion 3 specified in the NCRP 2041.

BCS Recommendations

- 2. Surveys for Wallum froglet be conducted in the planning area in accordance with the *NSW Survey Guide for Threatened Frogs* (DPIE 2020).
- 3. All confirmed Wallum froglet habitat in the planning area be mapped as HEV land and the C2 Environmental Conservation zone applied to that land.

Threatened Ecological Communities

The NRCP 2041 HEV Criterion 2 is land containing native vegetation of high conservation value including Threatened Ecological Communities. Section 3.3 of the HEV report has assessed and mapped the Plant Community Types (PCTs) in the planning area (PCT 3915 and 4004) and PCT 4004 is associated with the Endangered Ecological Community (EEC) *Swamp Sclerophyll Forest on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner Bioregions*. However, the HEV report indicates that PCT 4004 in the planning area is not the EEC, as the areas of PCT 4004 do not meet the geomorphological criteria set out in the NSW Threatened Species Scientific Committee's (NSW TSSC) Final Determination.

The Guidelines for interpreting listing criteria for species, populations and ecological communities under the NSW Biodiversity Conservation Act 2016, (June 2020) published by the NSW TSSC, seek to assist with interpretation of the concepts and terms in the listing criteria set out in the Biodiversity Conservation (BC) Regulation 2017. The guidelines discuss the current format of the TSSC Final Determinations and are available at

https://www.environment.nsw.gov.au/resources/threatenedspecies/1AGuidelines20180302.pdf.

The guidelines state the NSW TSSC, "has developed a format for listing of threatened ecological communities that contains the following elements:

Parts 1 & 2: Section 1.6 of the Act defines an ecological community as "an assemblage of species occupying a particular area". These features of an ecological community are described in Parts 1 and 2 of this Determination, respectively.

Part 3: Part 3 of the Determination describes the eligibility for listing of the ecological community in Schedule 2 of the Act according to criteria as prescribed by the Biodiversity Conservation Regulation 2017.

Part 4: Part 4 of the Determination provides additional information <u>intended to aid recognition</u> of this community in the field. Rather than being diagnostic, information in Part 4 is a guide to <u>assist recognition</u> and given natural variability, along with disturbance history, the ecological community may sometimes occur outside the typical range of variation in the features described in Part 4". (added underlining)

As the TSCC has expressed a clear intention to revise the coastal floodplain EEC determinations to accord with the new format, the BCS continues to advise that all coastal floodplain vegetation (including regenerating areas) within the study area (namely PCT 4004) accord with an EEC despite any underlying geology.

The definition of an ecological community is discussed under 4.1 of the guidelines, which state.

"The BC Act (section 1.6) defines an ecological community as 'an assemblage of species occupying a particular area'. This definition closely follows modern scientific texts (e.g. Begon et al. 2006) and embodies three requirements (Preston & Adam 2004a):

i) the constituents of a community must be species;

ii) the species need to be brought together into an assemblage; and

iii) the assemblage of species must occupy a particular area."

The guidelines also state:

"The question of whether supplementary descriptors can be determinative regarding the occurrence of a listed community at a given location has been controversial. Some environmental consultants have argued that a listed community cannot be present at a site if the features of the site do not match the supplementary descriptors in the Final Determination, irrespective of whether the assemblage of species and particular area match those described in the Final Determination (e.g. NSWLEC 1022).

This determinative interpretation is rarely consistent with the NSW TSSC's intent in providing information about supplementary descriptors to assist identification of a community. Courts have generally taken a broad (non-determinative) interpretation of supplementary descriptors (e.g. NSWLEC 2971 - VAW Kurri Kurri vs Scientific Committee 2003, NSWLEC 7703). Preston & Adam (2004b) stress that supplementary descriptors... "cannot be used as a substitute for a description of the assemblage of species and the particular area in which the community is located. Rather they should be seen as a valuable adjunct." This reasoning stems from the statutory definition of an ecological community. Nonetheless determinative interpretations of supplementary descriptors continue to be presented (e.g. NSWLEC 1022), and it is important that wording of Determinations gives guidance as to whether a broad interpretation is intended." (added underlining)

The HEV report also refers to information contained in Appendix E of the Department of Planning and Environment (DPE) document `*Updating BioNet Plant Community Types: Eastern New South Wales PCT Classification Version 1.1 (June 2022).*

This document describes the methods and steps undertaken to incorporate the recent major revision to the classification of native plant assemblages of eastern NSW for the coast and tablelands bioregions into the PCT master list. Appendix E of the report states the principles in the report are relevant to the interpretation of Final Determinations made by the NSW TSSC for the purposes of the DPE operational needs to relate the approved PCTs included in the PCT master list. Hence, the principles in Appendix E cannot be used or relied upon to map the presence or absence of Threatened Ecological Communities (TEC) on a particular site as they are only relevant to the work documented by the report.

Although the edaphic criteria define 'some of the known essential features' of the habitat, the TEC may occur outside these stated ranges unless the Final Determination limits the TEC to just those ranges.

The TSSC Final Determination for the Swamp sclerophyll forest on coastal floodplain EEC, does not specifically limit the presence of the EEC to those ranges as it uses non-definitive language such as:

- 'associated with' (associated with humic clay loams and sandy loams, on waterlogged or periodically inundated alluvial flats and drainage lines associated with coastal floodplains),
- 'generally occurs' (generally occurs below 20 m (though sometimes up to 50 m) elevation,)
- 'often' (often on small floodplains or where the larger floodplains adjoin lithic substrates or coastal sand plains in the NSW North Coast, Sydney Basin and South East Corner bioregions)
- 'generally occupies' (generally occupies small alluvial flats and peripheral parts of floodplains where they adjoin lithic substrates or coastal sandplains.)

• *'usually'* (The soils are usually waterlogged, stained black or dark grey with humus, and show little influence of saline ground water)

Hence, despite the information in Appendix E of *Updating BioNet Plant Community Types: Eastern New South Wales PCT Classification Version 1.1 (June 2022)* not being appropriate for use to map the presence or absence of TECs at a particular site, it does not contradict the advice that BCS continues to provide regarding the mapping of coastal floodplain EECs.

We therefore disagree with the assessor's argument in determining the EEC, *Swamp sclerophyll forest on coastal floodplain of the NSW North Coast, Sydney Basin and South East Corner Bioregions* does not occur on the subject land due to edaphic criteria and soil landscapes. As discussed above, these supplementary descriptors are important additional information but are not key to defining an ecological community according to the definition in the BC Act.

BCS recommendation

4. The planning proposal be revised to map all areas of Plant Community Type 4004 as HEV land and apply the C2 Environmental Conservation zone to that land.

Compliance with the Kempsey Shire Comprehensive Koala Plan of Management

Section 4.3 of the HEV report has demonstrated that an area to the south of the planning area (Shown in Figure 12 of the HEV report) contains suitable ecological attributes for a koala habitat compensation area that would accord with the requirements of the Kempsey Shire Council Comprehensive Koala Plan of Management. However, there is no information on the tenure of that land, whether it is already subject to existing in-perpetuity biodiversity management agreements, or whether it can be secured in perpetuity for such management.

BCS recommendation

5. Further information be provided on the proposed koala habitat compensation area regarding its tenure, any existing in-perpetuity biodiversity management agreements over the land, the proposed future tenure for the land, and the mechanism proposed to secure its in-perpetuity management, if the Northern Regional Planning Panel decides to proceed to gateway determination with the planning proposal.