

PLANNING circular

PLANNING SYSTEM

Act and regulation changes / Local planning

Circular

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Considering flooding in land use planning: guidance and statutory requirements

This circular provides information on how to consider flooding in land use. It supersedes Planning Circular PS07-003. This circular also discusses changes to requirements for planning certificates issued under section 10.7 of the *Environmental Planning and Assessment Act 1979* and local planning direction 4.3 on flooding, which affects planning proposals and draft Local Environmental Plans (LEPs).

Introduction

The NSW Government's Flood Prone Land Policy (the policy) is set out in the *Floodplain Development Manual: the management of flood liable land*, April 2005 (the manual) or its update.

The policy provides that councils are primarily responsible for managing flood risk to reduce the risk to life, property damage and other impacts in their local government areas. It also acknowledges that flood-prone land is a valuable resource that should not be sterilised by unnecessarily precluding its development.

The manual helps councils make informed decisions about managing flooding through the development and implementation of floodplain risk management (FRM) plans through the FRM process.

Section 733 of the *Local Government Act 1993* protects councils from liability

if they have followed the principles of the manual. This circular is consistent with the principles of the manual.

The manual sets out key issues relating to protecting existing and future occupants of flood-prone land that need to be considered in land use planning. These include the:

- safety of people including evacuation considerations
- management of flood damage to public and private property and infrastructure
- management of the cumulative impacts of development
- management of the impacts of development on emergency services.

This circular provides advice on a package of changes regarding how land use planning considers flooding and flood-related constraints.

The package includes:

- an amendment to schedule 4, section 7A of the *Environmental Planning and Assessment Regulation 2000* (the Regulation)
- a revised local planning direction regarding flooding issued under section 9.1 of the *Environmental Planning and Assessment Act 1979* (the Act)
- revised Local Environmental Plan (LEP) flood clauses
- a new guideline: *Considering Flooding in Land Use Planning (2020)*
- revoking the *Guideline on Development Controls on Low Flood Risk Areas (2007)*.

The manual and its supporting documents, *Considering Flooding in Land Use Planning Guideline (2020)*, and the National Best Practice Guidance Australian Institute of Disaster Resilience (*AIDR Handbook 7* and its supporting documents *AIDR Guideline 7.5* and *AIDR Practice Note 7.7*, all encourage the full range of flood risk to be considered in land use planning.

Understanding the constraints that flooding places on development of land can assist in identifying areas suitable for different types of development, as well as risk-appropriate controls that should apply to different types of development in LEPs. Development Control Plans (DCPs) may provide details of more specific controls relating to the varying constraints in different areas of the floodplain.

Effective consideration of flood risk in land use planning involves developing an understanding of the full range of flood behaviour up to the Probable Maximum Flood (PMF) and considering this in management of flood risk.

Section 10.7 planning certificates—Amendment to the EP&A Regulation

Schedule 4 of the EP&A Regulation has been amended¹ by the *Environmental Planning and Assessment Amendment (Flood Related Development Controls Information) Regulation 2020*¹.

Councils will continue to be required to distinguish between land where different categories of flood-related development controls apply.

Flood-related development controls are not defined but would include any development controls relating to flooding that apply to land, that are a matter for consideration under section 4.15 of the Act.

Clause 7A(1)¹ of the Regulation has been amended to require councils to include a notation on section 10.7 certificates if flood-related development controls relating to the Flood Planning Area apply to the land.

Clause 7A(2)¹ of the Regulation now requires councils to include a notation on section 10.7 planning certificates if flood-related development controls apply to sensitive, vulnerable, or critical uses, hazardous industries, hazardous storage establishments, or where risk to life considerations apply outside the Flood Planning Area.

Clause 7A(3)¹ of the Regulation is a new requirement in planning certificates. It requires councils to include a notation to advise whether there is a need to consider the impact of development against an established regional evacuation strategy or flood-related state emergency sub-plan, within the Regional Evacuation Consideration area (if the information is available).

If flood-related development controls only relate to regional flood evacuation considerations, the notation under clause 7A(3) should be 'Yes'. Answers to 7A(1) and 7A(2) should not change.

The amendment to the Regulation will commence on DD MONTH YYYY to allow councils that have the information available, time to change the formation of their section 10.7 certificates.

If councils do not have this information, then a 'no' response should be provided under the relevant clause until such time as the information is made available to council and council updates its flood-related development controls.

¹ The drafting of this amendment and proposed Regulation clauses are indicative of the intent of the policy. Preparation of the final clauses will be undertaken by the Parliamentary Counsel following this public consultation process.

Local planning direction 4.3—Flooding

Draft LEPs (where a draft instrument is issued by Parliamentary Counsel) and planning proposals are required to be consistent with directions issued under section 9.1 of the EP&A Act. Local Planning Direction 4.3—Flooding requires, among other matters, draft plans to be consistent with the principles of the manual.

The direction has been revised to remove the need to obtain exceptional circumstances to apply flood-related residential development controls above the 1% Annual Exceedance Probability (AEP) flood event.

The revised direction will apply to draft LEPs that have not been issued with a gateway determination under section 3.34(2) of EP&A Act.

Considering Flooding in Land Use Planning Guideline

The guideline supports the principles of the manual and provides advice to councils on land use planning within flood-prone land. It provides councils greater flexibility in defining the areas to which flood-related development controls apply, with consideration of both defined flood events (used to set flood planning levels—FPL) and low-probability/high-consequence flooding. In addition, it allows for land requiring controls related to regional evacuation consideration to be identified.

The manual states that a defined flood event (DFE) of the 1% AEP, or a historic flood of similar scale, plus a freeboard should generally be used as the minimum recommended level for setting residential FPLs. Councils proposing a different FPL are required to demonstrate the merits of this approach through the FRM process.

Revised LEP clauses

To reflect the changes in the Regulation clauses¹ for flood-related development

Important note

This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before acting in relation to any matters covered by this circular.

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controls, three LEP clauses have been developed.

The LEP clauses relate to:

- Flood Planning Area
- Regional Evacuation Consideration Area
- Special Flood Considerations.

Further information

The revised local planning direction is attached. It is also available on the department's website at www.planning.nsw.gov.au/flooding

The Regulation is available from the NSW Legislation website at www.legislation.nsw.gov.au in the 'As Made' section.

The NSW Government's Floodplain Development Manual (2005) and supporting documents are available online at

environment.nsw.gov.au/topics/water/floodplains/floodplain-manual

and

environment.nsw.gov.au/topics/water/floodplains/floodplain-guidelines

Australian Institute of Disaster Resilience (AIDR) 2017 Managing the Floodplain Handbook and supporting documents are available online at

knowledge.aidr.org.au/resources/handbook-7-managing-the-floodplain/

For more information, please contact the relevant Department of Planning, Industry and Environment regional planning team.

Office contact details are available at www.planning.nsw.gov.au/Contact-Us

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Authorised by:
