



PLANNING SYSTEM

Act and regulation changes

Circular	PS 09–015
Issued	1 July 2009
Related	Replaces PS 06–013, PS 06–015

Commencement of certain provisions of the EP&A Amendment Act 2008 and EP&A Amendment (Plan Making) Regulation 2009

The purpose of this circular is to advise councils, relevant planning authorities, government agencies and the community of the provisions of the *Environmental Planning and Assessment Amendment Act 2008* and the Environmental Planning and Assessment Amendment (Plan Making) Regulation 2009 that commence on 1 July 2009.

Introduction

The Environmental Planning and Assessment Amendment Act 2008 (the Amendment Act) was assented to on 25 June 2008.

Provisions of the Amendment Act relating to the making of environmental planning instruments commence on 1 July 2009 along with the Environmental Planning and Assessment Amendment (Plan Making) Regulation 2009 (the Plan Making Regulation).

The relevant parts of the Amendment Act together with the Plan Making Regulation outline new requirements and procedures for the preparation of local environmental plans (LEPs) and State environmental planning policies (SEPPs).

The changes to the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) are identified as follows.

New procedures for preparing SEPPs

From 1 July 2009 there will be a slightly different procedure for preparing and making SEPPs.

Existing consultation provisions for draft SEPPs are replaced by new section 38 of the EP&A Act. New section 38 requires that before recommending the making of a SEPP by the Governor, the Minister is to take such steps, if any, as the Minister considers appropriate or necessary to:

- publicise an explanation of the intended effect of the proposed SEPP
- seek and consider submissions from the public on the matter.

There is also a new test for consultation procedures concerning threatened species under section 34A of the EP&A Act (this new test is discussed below).

Savings and transitional provisions—SEPPs

All draft SEPPs that have not been made before 1 July 2009 will be made under the new Division 2, Part 3 of the EP&A Act.

In respect of all draft SEPPs, any consultation about threatened species undertaken in relation to a proposed environmental planning instrument before 1 July 2009 under section 34A of the EP&A Act is taken to be consultation under the new section 34A.

In respect of draft SEPPs, any actions taken before 1 July 2009 in relation to preparing a SEPP under Division 2 of Part 3 of the EP&A Act, such as consultation with public authorities or other Ministers, is taken to have been done under the new Division 2 of Part 3 of the EP&A Act.

Abolition of REPs

From 1 July 2009 regional environmental plans (REPs) will no longer exist in the hierarchy of environmental planning instruments.

Existing REPs become 'deemed' SEPPs under new Division 2, Part 3 of the EP&A Act.

The Plan Making Regulation introduces saving provisions so that a provision of a REP that becomes a deemed SEPP on 1 July 2009 does not:

- prevail over any other environmental planning instrument because the plan becomes a SEPP on that date if it would not have prevailed over that instrument before 1 July 2009
- have the same effect as a provision of a SEPP for the purposes of Part 3A of the EP&A Act if it would not have had that effect before 1 July 2009.

These provisions maintain the existing statutory effect of SEPPs and REPs.

New procedures for preparing LEPs

Draft LEPs have been replaced with 'planning proposals'.

Planning proposal

A *planning proposal* is a document that explains the intended effect of, and justification for, a proposed LEP. The preparation of a planning proposal is the first step in the process of making a LEP.

Relevant planning authority

Planning proposals are prepared by the relevant planning authority. In the majority of cases councils will be the relevant planning authority, however, in certain circumstances the Minister can appoint the Director-General or other persons or bodies prescribed by the regulations to be the relevant planning authority.

Joint regional planning panels have been prescribed as bodies that can be directed by the Minister to be a relevant planning authority for the purpose of preparing a LEP.

Gateway determinations

The purpose of the gateway determination is to ensure there is sufficient justification early in the process to proceed with a planning proposal and to determine the ongoing information and assessment requirements. A gateway determination under section 56 of the EP&A Act must be obtained authorising a planning proposal to proceed before community consultation takes place. More than one gateway determination may be issued in the course of preparing a LEP.

Guidelines

A *guide to preparing local environmental plans* (Department of Planning 2009) explains in more detail the new procedures for preparing a LEP, including the Director-General's requirements regarding the specific matters that must be addressed in the justification of a planning proposal and the scope and content of the Minister's gateway determination under section 56.

The Director-General's requirements regarding the specific matters that must be addressed in the justification of a planning proposal have been issued in accordance with section 55(3) of the EP&A Act and are to be found in figures 3 and 4 of *A guide to preparing local environmental plans*.

Savings and Transitional Provisions - LEPs

Savings and transitional provisions will apply to all 'pending' draft LEPs that have not been made before the commencement of the new plan making provisions.

The savings and transitional provisions distinguish between draft 'principal' and draft 'amending' LEPs. An 'amending' LEP is one that contains only direct amendments of other environmental planning instruments (apart from provisions for citation, commencement, definitions, purpose, land to which it applies and similar ancillary provisions). Any other LEP is a 'principal' LEP, even if it also contains direct amendments of other environmental planning instruments.

Draft pending 'principal' LEPs, that is, where the council has resolved to prepare under section 54 of the EP&A Act and where the Director-General has received notification of the resolution before 1 July 2009 will continue to be prepared and made under the previous plan making provisions.

Draft pending 'amending' LEPs, again where the council has resolved to prepare under section 54 of the EP&A Act and the Director-General has received notification of the resolution before 1 July 2009, will continue to be made under the previous plan making provisions but only for the following periods:

- where a section 65 certificate has been issued before 1 July 2009—for one year until 1 July 2010
- where no section 65 certificate has been issued before 1 July 2009—for 18 months until 1 January 2011.

Under clause 12(2) of the EP&A Regulation, the Director-General can notify a council at any time that the new plan-making provisions will apply to any particular draft LEP. If this is the case, the Minister may, under clause 122(2) of Schedule 6 to the EP&A Act, dispense with some or all of the conditions precedent to the making of a LEP under the new plan-making provisions in Part 3 of the EP&A Act, or can require compliance with other requirements.

Expedited amendments of environmental planning instruments

The test that must be satisfied in order to make an expedited amendment of an environmental planning instrument under section 73A of the EP&A Act is now slightly broader. In addition to the matters currently specified in section 73A, the Minister is now able to dispense with some or all of the conditions precedent to the making of a LEP if the Minister considers the LEP will not have any significant adverse impact on the environment or adjoining land.

Consultation with Director-General of National Parks and Wildlife

Consultation under section 34A of the EP&A Act with the Director-General of National Parks and Wildlife about the preparation of an environmental planning instrument is now only required if, in the opinion of the relevant planning authority, critical habitat or threatened species, populations or ecological

communities, or their habitats, will or may be **adversely** affected by the proposed instrument.

Recouping costs associated with preparing planning proposals

The new section 54(3) of the EP&A Act provides that where an owner of land asks a relevant planning authority to exercise its powers under Division 4 (and prepare a planning proposal), the relevant planning authority may recover the costs of preparing the planning proposal from the landowner. The regulations allow relevant planning authorities to enter into an agreement with such persons for payment of the costs and expenses incurred by the authority in undertaking studies and other matters required in relation to the planning proposal.

Acquisition of land for a public purpose

The Plan Making Regulation maintains an existing requirement that land can only be reserved for acquisition by a public authority in a LEP if the concurrence of that public authority has first been obtained.

Planning certificates

Clauses 1, 2 and 8 of Schedule 4 of the EP&A Regulation have been amended to reflect the fact that, from 1 July 2009: planning proposals replace draft LEPs; REPs no longer exist; and existing REPs become deemed SEPPs. As such, the terminology used in certain parts of Schedule 4 has been revised.

For example, clause 1 of Schedule 4 of the EP&A Regulation now requires planning certificates to specify the name of each environmental planning instrument, each proposed environmental planning instrument that is or has been the subject of community consultation or on public exhibition under the EP&A Act and each development control plan that applies to the land.

An environmental planning instrument includes LEPs, REPs that are deemed SEPPs, and SEPPs. It also includes what were previously known as 'deemed environmental planning instruments' under the EP&A Act (clause 123, Schedule 6 of the EP&A Act). Councils should be aware that they must continue to list REPs that are deemed SEPPs on planning certificates, however, the names of the REPs have not changed.

A 'proposed environmental planning instrument' includes planning proposals for LEPs, draft LEPs and draft SEPPs.

The changes to clauses 1, 2 and 8 of Schedule 4 will not require any additional information to be included on planning certificates. Councils should, however, make sure that their templates for issuing section 149(2) planning certificates accurately reflect the revised terminology.

Further information

The Amendment Act and Plan Making Regulation are available online at www.legislation.nsw.gov.au.

If you have further enquiries please phone the Department's Information Centre 02 9228 6333 or email information@planning.nsw.gov.au.

Note: This and other Department of Planning circulars are published on the web at www.planning.nsw.gov.au/planningsystem/practicenotes.

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