

May 2021

Flood-prone land package frequently asked questions

The Department of Planning, Industry and Environment has updated a package of materials relating to the management of flood-prone land. The materials are:

- a new planning circular: Considering flooding in land use planning: guidance and statutory requirements (and revoking the existing planning circular PS 07-003),
- a new guideline: Considering Flooding in Land Use Planning (2021) (and revoking the Guideline on Development Controls on Low Flood Risk Areas),
- an amendment to clause 7A of Schedule 4 to the Environmental Planning and Assessment Regulation 2000. The changes will simplify the notation to advise of flood-related development controls up to the flood planning area (clause 7A(1)) or between the flood planning area and the PMF (clause 7A(2)),
- two standard instrument local environmental plan (LEP) clauses which introduce flood-related development controls (one mandatory, one optional),
- a SEPP amendment to replace councils existing flood planning clause with the new mandatory standard instrument clause, and
- a revised local planning direction regarding flooding issued under section 9.1 of the *Environmental Planning and Assessment Act 1979* (the Act).

This document answers frequently asked questions regarding the final flood-prone land package.

When will the flood-prone land package commence?

The flood-prone land package will come into effect on 14 July 2021.

Who is the primary manager of flood risk in NSW?

Local councils are the primary manager of flood risk and are responsible for properly considering flood risk in land-use planning.

The updated flood-prone land package will allow councils to apply appropriate controls for flood risk as assessed through the floodplain management process outlined in the Floodplain Development Manual.

Why change the existing package?

The new package will ensure both existing and future community are more resilient to flooding through addressing flood risk appropriately, as not all flood risk is the same for the same probability flood event and this needs to be taken into consideration when undertaking land-use planning.

The 2007 Planning Circular for Flood-Prone Land no longer aligns with the NSW Government's approach to flood risk management. The 2007 Planning Circular provided advice to councils on the Guideline on Development Controls on Low Flood Risk Areas, Ministerial Direction No. 4.3, and the *Environmental Planning and Assessment Regulation 2000* clauses relating to notations on planning certificates.

The 2007 package has restricted councils in NSW from applying residential development controls on land between the 1% Annual Exceedance Probability (AEP) and the Probable Maximum Flood (PMF). As a result, development has occurred in floodplains, above the 1% AEP but below the PMF, with limited or no flood-related development controls to manage the risk or build flood resilience into communities. This poses a risk to the physical and economic safety of communities, results in less resilient communities and creates an increasing risk to the NSW Government when extreme floods occur.

The revised flood-prone land package allows a more contemporary approach to better manage flood risk beyond the 1% AEP, including building greater resilience to the effects of climate change. The update package addresses the key concerns over the safety of people, the management of potential damage to property and infrastructure, and the management of the cumulative impacts of development, particularly on evacuation capacity.

Why can't the 1% AEP be the flood planning level (FPL) across NSW?

Flood risk in NSW is varied, the use of a single defined flood event across NSW has resulted in areas with higher flood risk not adequately being managed. The flood-prone land package ensures that flood risk is appropriately identified and managed in NSW.

The 1% AEP does not always address risk appropriately in catchments with significant risks – such as greater depth of inundation in events greater than the 1% AEP. The consequences of floods greater than the 1% AEP in these areas requires consideration of more extreme flood events to ensure the flood risk is adequately addressed, resulting in increased life safety and decreased damages.

Whilst the 1% AEP might be appropriate in some areas of NSW to manage the flood risk, it is not appropriate in others and therefore a variable approach that uses a flood risk assessment and merit based approach is needed to ensure the flood risk faced by NSW communities in new and existing developments is identified and appropriately managed.

The manual requires a merit based approach and to look at the full range of flooding up to and including the PMF - the guideline requires that 'where councils propose alternative FPLs, they are required to demonstrate and document the merits of this approach based on a risk management approach that is consistent with the floodplain risk management (FRM) process and the principles of the manual'.

The selection of a flood planning level aims to provide a balance between the ability to reasonably utilise land whilst recognising additional risks at the location. It considers that FRM is broader than the selection of an FPL and often involves the application of other measures, such as those that facilitate flood warning and evacuation, that can reduce risks to the community.

Does the NSW Government have a say on what a council sets as their defined flood event?

The NSW Government Floodplain Development Manual identifies the 1% AEP flood event, or an equivalent historic flood, as an appropriate starting point for determining the FPL.

The manual allows councils to select a rarer defined flood event (DFE) to address broad scale flood impacts in consideration of the social, economic, environmental and cultural consequences associated with floods of different probabilities.

The DFE is typically selected by council through the floodplain risk management process.

What are the changes to the Regulations regarding section 10.7 planning certificates?

Under Schedule 4: There are new requirements in section 10.7 planning certificates for land affected by flood-related development controls.

Clause 7A(1) has been amended to require councils to include a notation on section 10.7 planning certificates if the land or part of the land to which the certificate relates is within the flood planning area (FPA) and subject to flood-related development controls.

Clause 7A(2) has been amended to require councils to include a notation on section 10.7 planning certificates if the land or part of the land to which the certificate relates is between the FPA and the probable maximum flood (PMF) and subject to flood-related development controls.

7A(3) has been amended to include definitions.

Are the local environmental plan clauses proposed as optional or mandatory?

There are two standard instrument local environmental plan (LEP) clauses:

- The 'flood planning' clause is mandatory and will be automatically placed into all councils LEP, and
- The 'special flood consideration' clause is optional, and councils will be asked if they would like to opt into this clause.

Where does the flood planning clause apply?

The flood planning clause applies to land within the FPA, being land below the FPL.

The FPL is generally a combination of the DFE plus a freeboard.

The DFE is selected by council, (through the FRM process outlined in the Floodplain Development Manual) as the basis for limiting the likelihood of exposure to flooding and associated risks to life and property damage.

The manual identifies the 1% AEP flood event, or an equivalent historic flood, as an appropriate starting point for determining the FPL.

The manual allows councils to select a rarer DFE to address broad scale flood impacts in consideration of the social, economic, environmental and cultural consequences associated with floods of different probabilities.

Special flood considerations apply to land located above the FPA to the probable maximum flood (PMF).

What is the process for applying development controls beyond the 1% AEP?

Council can determine the specific process they apply for making decisions regarding where they apply flood related development controls, however, it is suggested that the process follow the FRM process outlined in the Floodplain Development Manual.

Controls above the 1% AEP could be applied through the special flood consideration clause if the land-uses are as listed in the clause.

Many councils already have development controls to the PMF to manage risk to life. Will there be a new standard LEP clause to enable this to now be statutory?

The special flood consideration clause can be used to apply development controls regarding flooding and risk to life considerations.

Are the national flood guidelines referred to?

Yes, 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 are referred to in the planning circular.

Where is the flood planning level defined?

The flood planning level is now defined in the guideline.

Who decides whether there is safe evacuation from the land?

The consent authority would determine whether there is safe evacuation, and this should include consultation with the NSW State Emergency Service.

Does the FPA have to be mapped?

Mapping is preferred but the clause can still apply to areas that are not mapped - i.e. to the area below the flood planning level.

Reference to flood maps in LEPs has been removed by the new mandatory standard instrument flood planning clause.

Local planning direction – how does clause 7 apply if council does not choose to include the special flood consideration LEP clause?

If council has chosen not to apply the special flood consideration clause, or it is not in effect then clause 7 of the local planning direction would not apply.

Where does the ‘flood planning’ mandatory standard instrument LEP clause apply?

The flood planning clause applies to land identified at or below the flood planning area as defined by council.

Councils should define their FPAs and FPLs in their development control plans (DCPs) and outline if there are multiple FPAs/FPLs in their LGA and where they apply.

Can a council have different FPAs throughout its LGA?

A council may have a different FPA for different catchments based on the flood risk identified through the FRM process.

Council may also have different FPLs based on the land-use type (for example, residential, industrial, commercial developments). These should be documented in their DCP.

Council may have a range of development controls in DCPs to suit the flood constraints and different types of development.

Key changes between public exhibition documents and the final documents

Local Environmental Plan (LEP) clauses

Based on feedback received from public exhibition the 'Regional flood considerations' clause has been removed from the package due to concerns raised that there is a lack of available information for councils to determine regional evacuation route capacities.

Two, rather than three LEP clauses have therefore been applied:

- Flood Planning (mandatory standard instrument clause)
- Special Flood Considerations (optional standard instrument clause)

Local planning direction

Where this direction applies has been updated so that the direction applies to "all relevant planning authorities that are responsible for flood-prone land."

What a planning proposal authority must do if this direction applies has been updated to include the addition of 4(d) so that a planning proposal will also need to be consistent with any adopted flood study and/or floodplain risk management plan. Changes to Clause 7 which was the removal of regional flood considerations and replacement with special flood considerations have also been made.

The consistency section has been updated to include a new Clause which will apply where there is no council adopted floodplain risk management study or plan.

Hazardous material definition was removed from the direction following feedback that it is too restrictive.

Planning circular

The Planning circular has been updated to include information on the changes to section 10.7 planning certificates. Additional information has been added relating to special flood considerations, and the reference to the regional evacuation consideration has been removed.

Guideline

The guideline was updated to remove the regional evacuation consideration areas (RECA) as a result of feedback received through the public exhibition. The definitions for FPA and FPL have been included. The definition for 'Hazardous Materials' was removed following feedback that it is too restrictive, and the definition for 'Sensitive and Hazardous development' was strengthened.

A recommendation for councils to "attach their adopted flood policies, flood studies and floodplain risk management studies and plans to their DCPs to ensure they are considered by the consent authority when determining a development application under section 4.15 of the EP&A Act." has now been included

The updated guideline outlines that if councils are proposing alternate FPLs they are required to demonstrate and document the merits of this approach based on a risk management approach and be consistent with the principles of the Floodplain Development Manual. The guideline also adds that councils may have multiple FPLs and FPAs dependent on the flood risk, the catchment and the land-use.

Additional information has been included on special flood considerations (SFC) which apply to land that in the event of a flood, may cause a particular risk to life and require the evacuation of people or other safety considerations. Special flood considerations area considers flood impacts beyond the 1% AEP.

Additional text has been added to the guideline regarding mapping and that some areas where flood-related development controls are not mapped.

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