

PLANNING SYSTEM

Assessment of state significant development and infrastructure

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This circular is to advise councils, state agencies, industry and the community of the commencement of the *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* and related instruments.

Introduction

The *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* commences on **1 October 2011** and amends the *Environmental Planning and Assessment Act 1979* (the Act).

These amendments include the repeal of the Part 3A 'major projects' system and a reprioritisation of development assessment effort in NSW so as to:

- increase planning decisions made at the local level
- focus state level assessment on development of genuine state significance, in particular for major infrastructure proposals
- increase independence of decisions made at the state level by delegating more determination functions to the Planning Assessment Commission (PAC)
- ensure that local environmental plans, including council development standards, are a consideration when assessing state significant development (SSD).

It is anticipated that this reprioritisation of development assessment effort will result in around a 50 per cent reduction in the number of matters that will be considered state significant, when compared with projects assessed under the previous state assessment system.

The purpose of this circular is to explain the new assessment processes for state significant proposals.

Separate advice is also available in circulars covering:

- determination of state significant applications
- return of certain regional development to councils for determination
- transitional arrangements – Part 3A repeal.

Changes to the Act

The *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* amends the Act, so that the Act:

- no longer includes Part 3A (major projects) as an assessment process for new applications
- includes a new assessment pathway under Part 4 of the Act for SSD
- includes a new assessment pathway (Part 5.1 of the Act) for state significant infrastructure (SSI)
- has new provisions for the membership of and functions of the Planning Assessment Commission to support the Commission in its expanded role in determining state significant proposals
- has new provisions for the membership of regional panels, and reduces the classes of regional development determined by regional panels
- includes consequential and transitional provisions necessary for the repeal of Part 3A and the establishment of the new SSD and SSI assessment processes for state significant proposals.

EP&A Regulation changes

The *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation) will also be amended on 1 October 2011, and include provisions:

- to implement the new SSD and SSI assessment processes, including outlining procedures for application lodgement and notification, and assessment timeframes
- for SSD and SSI assessment fees
- in respect of savings and transitional provisions which are necessary for the introduction of the new assessment processes and also to provide savings provisions for existing Part 3A projects that are already substantially progressed
- for the standard form, content and preparation of environmental impact statements.

State significant development

Development that is SSD

State Environmental Planning Policy (State and Regional Development) 2011 (SRD SEPP) will be made on 1 October 2011 and declares certain development to be SSD. Schedules 1 and 2 of the SRD SEPP list general classes of SSD and identified SSD sites which are subject to the SSD provisions of the Act, unless the development is permitted without development consent.

The Minister for Planning and Infrastructure may also declare development to be SSD by an order, but only if the Minister has obtained and made publicly available advice from the Planning Assessment Commission about the state or regional planning significance of the development.

Obtaining consent for SSD

As with other development that requires consent under Part 4 of the Act, SSD requires lodgement of a development application and the granting of consent before it may be carried out.

The Minister is the consent authority for SSD, however delegations have been established to allow the Planning Assessment Commission or senior officers of the Department of Planning and Infrastructure to determine SSD applications on the Minister's behalf.

Where an SSD proposal involves staged development applications, subsequent stages may be sent back to the relevant council for determination.

Lodging SSD applications

The EP&A Regulation sets out procedures before an SSD application can be lodged with the department, including:

- specific requirements to obtain land owner consent or provide land owner notification before SSD applications are made for different types of development proposals
- information requirements for SSD applications and accompanying documents, including submission of an environmental impact statement
- the form and content of an environmental impact statement (EIS), and procedures for obtaining environmental assessment requirements for EIS preparation (the EP&A Regulation now has standard EIS form and content requirements, as well as standard procedures for obtaining and consulting public authorities on environment assessment requirements for all EISs required under Part 4, Part 5 and Part 5.1 of the Act).

Before preparing an EIS, applicants must apply to the Director-General of the Department of Planning and Infrastructure for environmental assessment requirements (DGRs).

The department will then consult with relevant public authorities, including local councils, to provide input into the preparation of the DGRs.

The applicant is to ensure that the EIS complies with any DGRs issued for the SSD proposal, and that the form and content of the EIS is consistent with the requirements of the EP&A Regulation.

For SSD proposals of a certain type (eg. those that would have not previously required an EIS under the Act), the Director-General may not require the applicant to apply individually for DGRs. In that case the applicant will prepare an EIS conforming to standard requirements published on the department's website.

As with other development applications, an SSD application may be rejected by the department within 14 days of receipt if it is illegible, unclear or incomplete, including if it lacks the mandatory information and documents required to accompany an SSD application under the EP&A Regulation.

The EP&A Regulation provides that the development application must be accompanied by the prescribed fee. The EP&A Regulation sets out the assessment fees for SSD applications.

Public notification of SSD applications

SSD proposals are subject to the following notification, public exhibition and post-exhibition requirements:

- notification of all SSD applications in the local newspaper, the department's website, to public authorities, and to adjoining land owners or occupiers
- a minimum public exhibition period of 30 days, with extended periods of consultation for up to 45 days where exhibition periods overlap with school holidays
- applicants may be required by the Director-General to provide a written response to issues raised in submissions.

The EP&A Regulation also sets out what documents related to an SSD application must be made publicly available on the department's website and in such other locations as the Director-General determines. These include:

- SSD applications, modification applications and accompanying documents or information, including the EIS for the application
- DGRs issued for preparing the EIS
- any submissions received and any response to submissions provided by the applicant
- any environmental assessment report prepared by the Director-General
- any development consent or modification to a consent.

Any report by the PAC will also be publicly available. For further information about the above requirements please refer to the department's Advertising, notification and publication interim policy which is being developed and will be published shortly.

Assessing and determining SSD applications

Applications for SSD are assessed under section 79C of the Act, which requires consideration of (among other things):

- environmental planning instruments (including local environmental plans and SEPPs)
- planning agreements under s93F of the Act
- relevant regulation provisions
- likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts of the locality
- suitability of the site for the development
- submissions received on the proposal
- the public interest.

The Director-General will prepare an assessment report that considers these matters and makes a recommendation for either approval, with conditions to mitigate impacts, or for refusal.

In the assessment report the department will consider all matters raised by agencies and recommend conditions and requirements as appropriate to satisfy agency concerns.

Assessment of SSD applications differs from other development applications as follows:

- Development control plans do not apply to SSD, but may be considered on a case-by-case basis as appropriate.
- SSD proposals are not **integrated development** and do not require the concurrence of other state agencies – consultation with relevant public authorities occurs before the Director-General issues DGRs for the preparation of the EIS.
- Certain approvals from state agencies under other legislation are not required for SSD proposals, and some other approvals must not be refused and must be substantially consistent with the SSD consent (refer to sections 89J and 89K of the Act for details) – in its assessment, the department will consider all agency issues and will impose conditions and requirements as appropriate to satisfy agency concerns.
- for the purposes of applicant appeal rights, an SSD application is taken to be refused if the Minister has not determined it within 90 days of the application being made (the **deemed refusal period**).

Post-determination, appeals and modifications

Post-determination notification requirements for SSD applications are the same as for other development applications under Part 4 of the Act.

The following types of appeals to decisions apply for SSD proposals:

- applicant merit appeals (except where the Planning Assessment Commission determines an application after a formal public hearing)

- third party merit appeals if (but for being declared SSD) the proposal would otherwise have been designated development (except where the Planning Assessment Commission has held a formal public hearing)
- section 123 judicial review proceedings, provided they are commenced within 3 months of the notification of the decision.

SSD consents may be modified under section 96 of the Act. The procedures for requesting and assessing a request for a modification of an SSD consent are outlined in the Act and the EP&A Regulation. Applications for modifications to SSD consents are determined by the Minister or under delegation.

State significant infrastructure

Development that is SSI

The SRD SEPP declares certain development to be SSI. Schedule 3 of the SRD SEPP lists general classes of development that are declared to be SSI if the development is permissible without consent in a SEPP. Schedule 4 identifies specific projects that are also declared to be SSI, and Schedule 5 specifies critical state significant infrastructure.

The Minister may also declare specified infrastructure proposals on specified land to be SSI by making a SEPP, or an order to amend a SEPP, for that purpose.

In addition, the Planning Assessment Commission or Infrastructure NSW may recommend to the Minister to declare particular development to be SSI.

Obtaining approval for SSI

A person may not carry out SSI development without the approval of the Minister under Part 5.1 of the Act.

While the Minister is the approval authority for SSI development, delegations have been established to allow the Planning Assessment Commission or senior officers of the Department to determine certain SSI applications on the Minister's behalf.

The Act also allows for staged SSI applications, that set out concept proposals for the proposed infrastructure, and for which detailed proposals for separate parts of the infrastructure are to be the subject of subsequent applications for approval.

Lodging SSI applications

The Act and EP&A Regulation set out procedures for applying for approval for an SSI development. These include:

- specific requirements to obtain land owner consent or provide land owner notification before SSI applications are made for different types of proposals
- information requirements for SSI applications
- provisions to allow for amending applications prior to determination

- the form and content of an EIS, and procedures for obtaining DGRs for an EIS related to the SSI proposal.

Following receipt of an SSI application, the department will consult with relevant public authorities, including local councils, to provide input to the preparation of the DGRs for an EIS.

As with SSD, SSI proposals are not **integrated development** and do not require the concurrence of other state agencies. Furthermore, certain approvals from state agencies under other legislation are not required for SSI proposals, and some other approvals must not be refused and must be substantially consistent with the SSI approval (refer to sections 115ZG and 115ZH of the Act for details).

The EP&A Regulation sets out the assessment fees for SSI applications. The department will determine the fee amount within 14 days of the application being lodged. Once the applicant has been notified of the fee amount, the Minister may refuse to consider the application if the fee remains unpaid.

Public notification of SSI applications

SSI proposals are subject to the following public exhibition and post-exhibition provisions:

- The EIS is to be placed on public exhibition for a minimum period of 30 days, with extended periods of consultation for up to 45 days where exhibition periods overlap with school holidays.
- The Director-General is to provide submissions received to the proponent and certain public authorities.
- Proponents may be required by the Director-General to submit a written response to issues raised in submissions.
- proponents may be required by the Director-General to submit a preferred infrastructure report outlining any proposed changes to the proposal to minimise its environmental impact or to deal with any other issue raised during the assessment of the SSI application.

The Act and EP&A Regulation also set out what documents related to an SSI application must be made publicly available on the department's website or by an electronic link to the document on another website.

These include the following documents:

- applications to carry out SSI
- DGRs issued for preparing the EIS
- EISs placed on public exhibition and responses provided to the Director-General by the proponent after the end of the public exhibition period
- environmental assessment reports of the Director-General to the Minister
- any advice, recommendations or reports received from the Planning Assessment Commission
- approvals to carry out SSI given by the Minister

- requests for modifications of approvals given by the Minister and any modifications made by the Minister
- any reasons given to the proponent by the Minister for a decision not to approve or to modify the SSI proposal
- submissions made on the EIS or the report of the issues raised in those submissions (under section 115Z(6) of the Act, the proponent may be required to provide a response to issues raised in submissions on the EIS).

For further information about the above requirements please refer to the department's Advertising, notification and publication interim policy which is being developed and will be published shortly.

Assessing and determining SSI applications

Prior to the Minister determining an SSI application, the Director-General is to give the Minister a report on the SSI. The report is to include:

- a copy of the proponent's EIS and any preferred infrastructure report
- any advice provided by public authorities on the SSI
- a copy of any report or advice of the Planning Assessment Commission in respect of the SSI
- any environmental assessment undertaken by the Director-General or other matter the Director-General considers appropriate.

The Director-General is to complete the report within 90 days (the 90 days does not include time during which the Director-General is awaiting a response or a preferred infrastructure report) after the end of the public exhibition period for the EIS to which the report relates.

When determining whether or not to approve the carrying out of SSI, the Minister is to consider:

- the Director-General's report on the infrastructure and the advice and recommendations contained in the report
- any advice provided by the Minister having portfolio responsibility for the proponent
- any findings or recommendations of the Planning Assessment Commission following a review in respect of the SSI.

As for SSD, the Director-General's assessment report will consider all matters raised by agencies and recommend conditions and requirements as appropriate to satisfy agency concerns.

Post-determination, appeals and modifications

Following determination of an SSI application, the approval to carry out the SSI must be made publicly available.

Judicial review proceedings under section 123 of the Act are available against the Minister's determination of an SSI application provided they are commenced within 3 months of the notification of the decision. There are other restrictions on commencing judicial review proceedings against critical SSI.

A proponent may request the Minister to modify the Minister's approval for SSI. Requests for modification are to be lodged with the Director-General. The Director-General may notify the proponent of environmental assessment requirements with respect to the proposed modification that the proponent must comply with before the matter will be considered by the Minister.

Further information

The following instruments should be referred to for details in relation to the new state significant assessment processes:

- *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011*
- Environmental Planning and Assessment Amendment (Part 3A Repeal) Regulation 2011
- State Environmental Planning Policy (State and Regional Development) 2011

The documents can be found on the NSW Legislation website at: www.legislation.nsw.gov.au.

Other circulars and an overview of fact sheet have been prepared on the repeal of Part 3A of the Act and the introduction of the SSD and SSI assessment systems. These documents can be found on the department's website at: www.planning.nsw.gov.au.

For further information please contact the Department of Planning and Infrastructure's information centre on 1300 305 695.

Authorised by:

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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 taking action in relation to any matters covered by this circular.

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