
Department of Planning and Environment

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Explanation of Intended Effect: Special Flood Considerations Clause

Proposal relating to the 'special flood considerations' clause

January 2023



Acknowledgement of Country

The Department of Planning and Environment acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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Proposal to insert ‘special flood considerations’ clause into selected local environmental plans

Keeping our communities safe and building resilience

Significant flood events, such as those experienced recently across NSW in 2021 and 2022, have shown how important it is to consider flood risk up to and beyond the 1% annual exceedance probability (AEP) flood.¹

Better, risk-based consideration of flooding will build resilience in communities located on floodplains. It will reduce the extent of property damage and potential loss of life from severe to extreme flooding– ultimately improving the quality of life in NSW.

To help ensure development is resilient to probable flooding and to increase community resilience, a revised flood-prone land package was adopted in July 2021. This supports managing the flood risk between the flood planning area and the probable maximum flood. This package included an optional ‘special flood considerations’ clause (clause 5.22 of Standard Instrument – Principal Local Environmental Plan) so that more flood-related development controls – appropriate to the location – could be provided for as needed.

¹ A flood with 1% AEP has a one in a hundred chance of being exceeded in any year.

Introduction

This explanation of intended effect (EIE) outlines changes that the Department proposes to make to some councils' local environmental plans (LEPs).

The proposed change seeks to:

- amend 32 councils' LEPs by inserting clause 5.22 of the Standard Instrument – Principal Local Environmental Plan (Standard Instrument);
- in response to the recommendations of the Independent Flood Inquiry conducted by Mary O'Kane and Mick Fuller, the Department is seeking feedback from councils, key stakeholders and the community, on two options. Option one is inserting clause 5.22 into the Resilience and Hazards State Environment Planning Policy (SEPP), and option two is inserting the standard instrument clause 5.22 into all council LEPs. These options assist in fulfilling part of recommendation 21 of the Inquiry, which identified the need to simplify and improve the state planning processes especially when anticipating and recovering from a disaster and ensure that the strategic land use frameworks and related controls permit new developments only in line with the evacuation capacity both individually and cumulative
- update 11 councils' LEPs with minor housekeeping changes

The intention of the proposed amendments is to make individuals and communities more resilient to floods. The changes we propose also aim to make standard instrument LEPs and state planning instruments more consistent with each other. The proposed amendments are a part of ongoing strategies to improve flood management and response throughout NSW.

What is the optional 'special flood considerations' clause?

The optional 'special flood considerations' clause applies controls to:

- sensitive and hazardous development on land between the flood planning area and the probable maximum flood
- land the consent authority considers that, in a flood, may pose a particular risk to life and where people may need to evacuate or there are other safety concerns.

This will build resilience in future development, as well as reducing the extent of property damage and potential loss of life from severe to extreme flooding.

Read the clause at legislation.nsw.gov.au/view/html/inforce/current/epi-2006-155a#sec.5.22

As an optional clause under the Standard Instrument, it is open to councils to amend their LEPs and include the clause. To streamline the introduction of the first round of amendments, the Department has been working with Councils to progress the introduction of the clause through this amendment.

Proposal to amend 32 identified council LEPs

The Department is proposing to amend 32 LEPs through an amending State Environmental Planning Policy (SEPP). Councils have self-nominated to participate in the amending SEPP. This approach allows councils to adopt this amendment in less time and with fewer resources than progressing individual planning proposals.

To identify council areas to be included in the amending SEPP, the Department sought councils' interest to incorporate the optional 'special flood considerations' clause into their LEP in May 2021. The Department then consulted with each council, who in turn provided a council resolution to include the optional 'special flood considerations' clause in their LEPs and a reason why the clause should be adopted.

Following the expression of interest, a special flood-clause reference group was formed. The reference group allowed external views, and helped the Department evaluate if adopting the clause in the local environmental plan was justified. The group consisted of Floodplain Management Australia, Housing Institute of Australia, Insurance Council of Australia, Local Government NSW, Planning Institute of Australia, Urban Development Institute of Australia and Urban Taskforce.

The councils that sought to adopt the special flood consideration clause are listed in Appendix A.

This clause will only be inserted into local environmental plans that have adopted the Standard Instrument. Councils with both a standard LEP and non-standard LEP will only have the clause adopted into their standard LEP.

Councils that did not express interest in including the clause or could not meet the requirements for this process can still pursue the inclusion of the clause independently, as part of a council-led planning proposal.

Proposal for state-wide application of the clause

Recommendation 21 of the NSW Independent Flood Inquiry, released in August 2022, identified the need to simplify and improve the state planning processes especially when anticipating and recovering from a disaster and ensure that the strategic land use frameworks and related controls permit new developments only in line with the evacuation capacity both individually and cumulatively.

In response to that recommendation, this EIE is also seeking feedback from councils, key stakeholders and the community, on two options. Option one is inserting clause 5.22 into the Resilience and Hazards SEPP, or option two is inserting the standard instrument clause 5.22 into all council LEPs.

Stage 1 – Exhibition

This EIE, which identifies the proposed councils to adopt the clause, is publicly exhibited for a period of 28 days. Stakeholders are invited to provide feedback on the proposed LEP changes.

Stage 2 – Consideration of feedback and drafting of amending SEPP

Following exhibition, the Department will consider feedback received which will inform the final amendment to LEPs.

Stage 3 – Implementation

The Department will prepare the amending SEPP and finalise it to insert the optional clause into identified LEPs.

Proposed SEPP amendment

The intended effect of the proposed amendments is to insert the optional standard instrument clause 5.22 into 32 council LEPs, or alternatively, to insert clause 5.22 into all council LEPs or into the Resilience and Hazards SEPP. Minor housekeeping amendments to individual LEPs are also proposed.

These amendments are described in the following section of this EIE.

Proposed written instrument amendments – 32 LEPs

Table 1 outlines the proposed amendments to councils Standard Instrument LEPs.

Note, the proposed wording is indicative only, the final wording will be determined by the NSW Parliamentary Counsel's Office.

Proposed state-wide application of clause 5.22

The Independent Inquiry into the 2022 floods in NSW conducted by Mary O'Kane and Mick Fuller was released in August 2022. In response to the findings and in particular recommendation 21 of this inquiry, the Department is seeking feedback on two options for state-wide application of this clause. Option One is inserting clause 5.22 into the Resilience and Hazards State Environment Planning Policy (SEPP), or option two is inserting the standard instrument clause 5.22 into all council LEPs.

Proposed additional housekeeping amendments

A number of additional housekeeping amendments are proposed (Table 1) to:

- remove flood maps where they are no longer referenced in council LEPs
- remove any existing flood risk management clauses from those councils that have opted into the special flood consideration clause
- correct inconsistencies in 11 LEPs as a result of the flood planning SEPP amendment made on 14 July 2021.

An explanation of these proposed amendments is provided in Table 1.

The proposed wording is indicative only; the NSW Parliamentary Counsel's Office will determine the final wording.

Table 1. List of council LEPs to be amended

LEP	Change	Reason
LEPs listed under SEPP (Flood Planning) 2021, from which the definition of Flood Planning Map in the Dictionary was removed	Removal of environmental planning instrument flood maps	These maps are only directly referred to in the definition 'Flood Planning Map'. This definition is no longer referenced in the relevant LEPs.
Byron, Clarence Valley, Fairfield, Liverpool, Port Macquarie-Hastings and Tweed	Removal of floodplain risk management clause from LEP	This clause is being replaced with the standard instrument clause 5.22
Greater Taree Local Environmental Plan 2010	Removal of part 3.2 (3)	Refers to a repealed clause 7.2.
Gunnedah Local Environmental Plan 2012	Removal of the words '6.1 or' from clause 4.6(8)(ca). Removal of subclause (14) from the matter relating to Signage	Refers to a repealed clause 6.1
Maitland Local Environmental Plan 2011	Removal of the words 'and above the flood planning level within the meaning of clause 7.3'	Refers to old terminology that is no longer referenced.
Moree Plains Local Environmental Plan 2011	Removal of subclause (1)(c) from the matter relating to Signage from schedule 2	Refers to a repealed clause 7.6
Parramatta Local Environmental Plan 2011	Clauses 7.16 (2) and 7.18 (2) – removal of the words 'in addition to being satisfied of the matters mentioned in clause 6.3(3) in relation to the development on the land'	Refers to the repealed flood planning clause 6.3(3)
Shoalhaven Local Environmental Plan 2014	Clause 4.2D removal of the words 'to which clause 7.3 applies' from clause 4.3D(6) and insert at or below the flood planning level	Refers to the repealed flood planning clause 7.3
Tumut Local Environmental Plan 2012	Clause 3.3 removal of clause 3.3(2)(jb)	Refers to the repealed flood planning clause 6.2

LEP	Change	Reason
Tweed Local Environmental Plan 2014	Removal of clause 7.16	Refers to the repealed flood planning clause 7.3 and Flood Planning Map and no longer has a effect.
Wagga Wagga Local Environmental Plan 2010	Schedule 2 – Removal of the words ‘clause 7.2’ from subclause (3) and insert instead ‘clause 7.1’	Refers to the old terminology and the repealed flood planning clause 7.2
Wingecarribee Local Environmental Plan 2010	<p>Clause 7.3 (2A) (a) removal of ‘on the Flood Planning Area Map’</p> <p>Dictionary: remove definition ‘Flood Planning Area Map means the Wingecarribee Local Environmental Plan 2010 Flood Planning Area Map.’</p> <p>Removal of Environmental planning instrument flood map, as definition of map removed for LEP</p>	Remove old terminology.
Wollongong Local Environmental Plan 2009	Clause 3.3 – removal of clause 3.2(2)(jb)	Refers to the repealed flood planning clause 7.3

Feedback on the EIE

You can read the ‘special flood considerations’ clause at legislation.nsw.gov.au/view/html/inforce/current/epi-2006-155a#sec.5.22

We welcome your feedback while the draft amendments are on exhibition until 14 February 2023 by making a submission on the [planning portal](#).

All comments received during the exhibition of this EIE will be considered in the finalisation of the proposed amendments.

Appendix A List of Councils recommended to adopt the Special Flood Considerations Clause

Local environmental plan	Land uses to be removed from clause	Reason for considering clause
Bega Valley Local Environmental Plan 2013	sewerage systems; water supply systems	A council resolution has adopted the implementation of this clause, as it will allow the consideration of factors such as risk to life and evacuation when planning and assessing development applications in locations where hazards are present.
Byron Local Environmental Plan 2014	Nil	Byron LEP 2014 already includes an equivalent special flood considerations clause (clause 6.4 Floodplain risk management). Clause 6.4 is repealed and replaced with Optional Clause 5.22 to ensure consistency with the new Considering Flooding in Land Use Planning (2021) guideline, avoid obsolete provisions for at-risk development types, and to minimise exposure to risk from liability.
Canada Bay Local Environmental Plan 2013	Nil	This clause will ensure that approved uses can be appropriately managed to ensure risk to life and/or property is minimised.
Cessnock Local Environmental Plan 2011	Nil	Council considered that the clause will have implications in the expansion and alterations and additions of existing sensitive or hazardous development located between the flood planning area and the probable maximum flood.
Clarence Valley Local Environmental Plan 2011	Nil	Clarence Valley LEP 2014 already includes an equivalent special flood considerations clause (clause 7.4 Floodplain risk management). It is appropriate that the clause is repealed and replaced with Optional Clause 5.22 to ensure consistency with the new Considering Flooding in Land Use Planning (2021) guideline, avoid obsolete provisions for at risk development types, and to minimise exposure to risk from liability.
Coffs Harbour Local Environmental Plan 2013	Nil	Adoption of the clause will reduce the risk to life as a result of flooding and improve accessibility during extreme flood events.

Local environmental plan	Land uses to be removed from clause	Reason for considering clause
Coonamble Local Environmental Plan 2011	Nil	The clause will implement and support at a LEP level the West Coonamble Floodplain Risk Management Study and Plan (FRMS&P) and provide a basis for flood management for the local government area.
Eurobodalla Local Environmental Plan 2012	Caravan Parks; Early Education and Child Care Facilities; Eco-Tourist Facilities; Educational Establishments; Hostels; Information and Education Facilities; Sewerage Systems; Tourist and Visitor Accommodation; Water Supply Systems	The clause will implement and support at a LEP level through council's flood policy (Moruya Floodplain Code 2012).
Fairfield Local Environmental Plan 2013	Nil	Fairfield LEP 2013 already includes an equivalent special flood considerations clause (clause 6.4 Floodplain risk management). It is appropriate that the clause is repealed and replaced with Optional Clause 5.22 to ensure consistency with the new Considering Flooding in Land Use Planning (2021) guideline, avoid obsolete provisions for at risk development types, and to minimise exposure to risk from liability.
Goulburn Mulwaree Local Environmental Plan 2009	Boarding houses; Early education and care facilities; Eco tourist facilities; Group homes; Hostels; Information and education facilities; Respite Day Care Centres; Seniors Housing; Tourist and visitor accommodation; Sewerage systems and Water supply systems.	The clause will implement and support at a LEP level the Wollondilly River and Mulwaree Chain-of-Ponds Floodplain Risk Management Study and Plan 2003; and Wollondilly and Mulwaree Rivers Flood Study, 2016.
Inner West Local Environmental Plan 2022	Nil	This clause will ensure that approved uses can be appropriately managed to ensure risk to life and/or property is minimised.

Local environmental plan	Land uses to be removed from clause	Reason for considering clause
Kempsey Local Environmental Plan 2013	Early education and care facilities; Eco-tourist facilities; Educational establishments; Hazardous industries; Hazardous storage establishments; Information and education facilities; Respite day care centres; Sewerage Systems; Water Supply Systems	The adoption of the clause will build greater resilience in our community during and after flood events, reduce property damage and loss of life as a result of flood events, manage and mitigate flood events, and create better management of flood risk.
Liverpool Local Environmental Plan 2008	Nil	Liverpool LEP 2008 already includes an equivalent special flood considerations clause (clause 7.8A Floodplain risk management). It is appropriate that the clause is repealed and replaced with Optional Clause 5.22 to ensure consistency with the new Considering Flooding in Land Use Planning (2021) guideline, avoid obsolete provisions for at risk development types, and to minimise exposure to risk from liability.
Murray Local Environmental Plan 2011	Nil	<p>The clause will implement and support at a LEP level through the floodplain management studies and plans adopted by council for its various rivers and creeks:</p> <ul style="list-style-type: none"> • Barham Floodplain Risk Management Study and Plan • Moulamein Floodplain Risk Management Study and Plan • Murray Downs Floodplain Risk Management Study and Plan • Tooleybuc Floodplain Risk Management Study and Plan
Muswellbrook Local Environmental Plan 2009	Nil	The clause will implement and support at a LEP level by the Muswellbrook Floodplain Risk Management Study and Plan (April 2019)

Local environmental plan	Land uses to be removed from clause	Reason for considering clause
Narromine Local Environmental Plan 2011	Nil	The clause will improve overall level of flood awareness and preparedness within the community for flood, reducing costs to the community overall.
Newcastle Local Environmental Plan 2012	Nil	Adoption of the optional clause will strengthen council's position where highly vulnerable development is not considered appropriate due to having the additional supporting weight of an environmental planning instrument.
Northern Beaches, which includes: Warringah Local Environmental Plan 2011 Pittwater Local Environmental Plan 2014 Manly Local Environmental Plan 2013	Nil	The clause will implement and support at a LEP level the floodplain management study and plan and result in reduced risk to life, reduced rate of development applications for inappropriate development.
Orange Local Environmental Plan 2011	Sewerage Systems; Water Supply Systems; Hazardous Industries; Hazardous Storage Establishments	The clause will implement and support at a LEP level the Blackmans Swamp Creek and Ploughman's Creek Floodplain Risk Management Study and Plan (December 2020)
Port Macquarie-Hastings Local Environmental Plan 2011	Nil	Port Macquarie-Hastings LEP 2011 already includes an equivalent special flood considerations clause (clause 7.4 Floodplain risk management). It is appropriate that the clause is repealed and replaced with Optional Clause 5.22 to ensure consistency with the new Considering Flooding in Land Use Planning (2021) guideline, avoid obsolete provisions for at risk development types, and to minimise exposure to risk from liability.

Local environmental plan	Land uses to be removed from clause	Reason for considering clause
Randwick Local Environmental Plan 2012	Boarding Houses; Early Education and Care Facilities; Hostels; Tourist and Visitor Accommodation	<p>The clause will implement and support at a LEP level the Floodplain Risk Management Studies and Plans, polices and development control plan.</p> <ul style="list-style-type: none"> • Kensington-Centennial Park Flood Study - (2013) • Kensington-Centennial-Park-Flood-Study Floodplain Risk Management Study and Plan - Completed (2019) • Birds Gully and Bunnerong Road Flood Study (2018) • Green Square - West Kensington Floodplain Risk Management Study and Plan (2012) • Coogee Bay Flood Study (2013) • Coogee-Bay-Flood-Study Floodplain Risk Management Study and Plan - (2016) • Maroubra Bay Flood Study (2013) • Maroubra-Bay- Floodplain Risk Management Study and Plan (2017) • Lurline Bay, Matrville, Malabar and Yarra Bay Flood Study (2021)
Richmond Valley Local Environmental Plan 2012	Nil	<p>The clause will implement and support at a LEP level the FRMS&Ps.</p> <ul style="list-style-type: none"> • Casino Floodplain Risk Management Plan (adopted 21 May 2002) • Mid-Richmond Floodplain Risk Management Plan (adopted 17 February 2004).
Shellharbour Local Environmental Plan 2013	Nil	<p>Development on flood-prone land will be able to be assessed in accordance with the NSW Government's Flood-Prone Land Policy and Floodplain Development Manual</p>

Local environmental plan	Land uses to be removed from clause	Reason for considering clause
Shoalhaven Local Environmental Plan 2014	Boarding Houses; Caravan Parks; Eco-Tourist Facilities; Hostels; Information and Education Facilities; Sewerage Systems; Tourist and Visitor Accommodation; Water Supply Systems	<p>The clause will implement and support at a LEP level the floodplain management studies and Plans:</p> <ul style="list-style-type: none"> • Bomaderry Creek Floodplain Risk Management Study and Plan (2016) • Broughton Creek Floodplain Risk Management Study and Plan (2012) • Burrill Lake Floodplain Risk Management Study and Plan (2013) • Lake Conjola Floodplain Risk Management Study and Plan (2013) • Currumbene Creek and Moona Moona Creek Floodplain Risk Management Study and Plan (2016) • Kangaroo Valley Floodplain Risk Management Study and Plan (2016) • Lower Shoalhaven River Floodplain Risk Management Study and Plan (2008) • Lower Shoalhaven River Floodplain Risk Management Study and Plan – Climate Change Assessment (2011) • Nowra and Browns Creek Floodplain Risk Management Study and Plan (2016) • Riverview Road Floodplain Risk Management Study and Plan (2002) • St Georges Basin Floodplain Risk Management Study and Plan (2006) • St Georges Basin Floodplain Risk Management Study and Plan – Climate Change Assessment (2013) • Tabourie Lake Floodplain Risk Management Study and Plan (2016) • Terara Village Floodplain Risk Management Study and Plan (2002)

Local environmental plan	Land uses to be removed from clause	Reason for considering clause
<p>Snowy Monaro, which includes:</p> <p>Bombala Local Environmental Plan 2012</p> <p>Cooma-Monaro Local Environmental Plan 2013</p> <p>Snowy River Local Environmental Plan 2013</p>	<p>Boarding Houses; Caravan Parks; Eco-Tourist Facilities; Information and Education Facilities, Sewerage Systems; Tourist and Visitor Accommodation; Water Supply Systems</p>	<p>The clause will implement and support at a LEP level the floodplain management studies and plans:</p> <ul style="list-style-type: none"> • Cooma, Berridale, Bredbo and Michelago FRMS&P (2021) • Jindabyne and Bombala Flood Study - associated with Snowy Mountains Special Activation Precinct • Bombala - Bombala Floodplain Risk Management Study and Plan (2013)
<p>Sutherland Local Environmental Plan 2015</p>	<p>Nil</p>	<p>The clause will implement and support at a LEP level the floodplain management studies and plans:</p> <ul style="list-style-type: none"> • Bundeena Creek Floodplain Risk Management Study and Plan May 2019 • Georges River Floodplain Risk Management Study and Plan May 2004 • Oyster Creek Floodplain Risk Management Study and Plan Sept 2010 • Woronora River Floodplain Risk Management Study and Plan Sept 1995 • Kurnell Township Floodplain Risk Management Study and Plan 2013 • Gwawley Bay catchment Floodplain Risk Management Study and Plan 2015 • Draft Woollooware Bay Floodplain Risk Management Study and Plan Jan 2022
<p>Tweed Shire, which includes:</p> <p>Tweed Local Environmental Plan 2014</p> <p>Tweed City Centre Local Environmental Plan 2014</p>	<p>Information and Education Facilities</p>	<p>Tweed Shire LEP 2014 already includes an equivalent special flood considerations clause (clause 7.4 Floodplain risk management) and Tweed City Centre LEP 2014 (clause 6.3 floodplain risk Management clause). It is appropriate that the clause is repealed from both LEPs and replaced with Optional Clause 5.22 to ensure consistency with the new Considering Flooding in Land Use Planning (2021) guideline, avoid obsolete provisions for at risk development types, and to minimise exposure to risk from liability.</p>

Local environmental plan	Land uses to be removed from clause	Reason for considering clause
Upper Hunter Local Environmental Plan 2013	Nil	<p>The clause will implement and support at a LEP level the floodplain management studies and plans:</p> <ul style="list-style-type: none"> • Scone Floodplain Management Study and Plan (February 1999) • Aberdeen Floodplain Risk Management Study and Plan (2015) • Murrurundi, Blandford & Willow Tree – Floodplain Management Study (1998)
Upper Lachlan Local Environmental Plan 2010	Nil	This clause will ensure that approved uses can be appropriately managed to ensure risk to life and/or property is minimised.
Wagga Wagga Local Environmental Plan 2010	Nil	The clause will reduce risk to life within these areas as developments will be better equipped to deal with flood events.
Willoughby Local Environmental Plan 2012	Caravan Parks; Correctional Centres	The incorporation of the clause will provide greater transparency in development assessment. It will also provide greater statutory weight in ensuring appropriate development of land subject to potential flood affectation. It provides consistency with industry best practice and will reduce the risk and cost of flooding throughout the local government area.
Wollongong Local Environmental Plan 2009	Nil	<p>The clause will implement and support at a LEP level numerous flood studies and the floodplain management study and plans:</p> <ul style="list-style-type: none"> • Allens Creek 2019 • Mullet Creek 2019 • Brooks Creek 2018 • Duck Creek 2019 • Fairy and Cabbage Tree Creeks 2020 • Towradgi Creek 2003 • Collins Creek 2019 • Hewitts Creek 2019 • Minnegang Creek 2019 • Lake Illawarra 2012 • Wollongong City 2019