Overview of 2021 EP&A Regulation

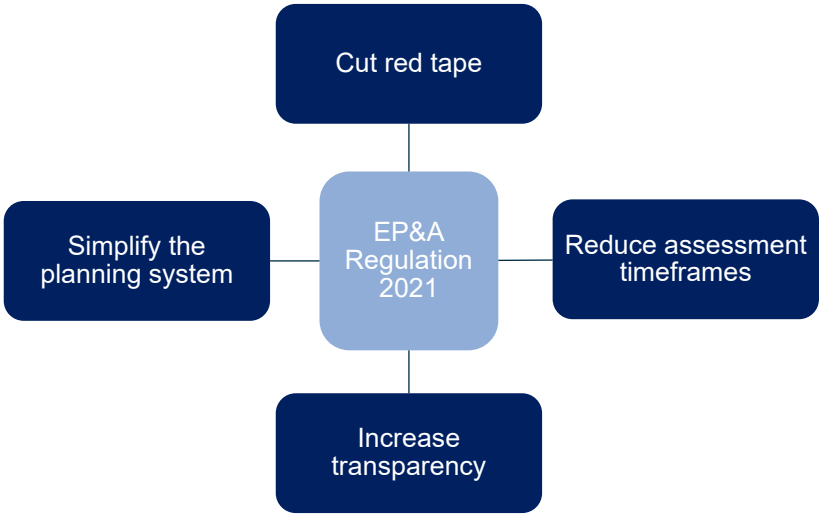
Summary of changes

The *Environmental Planning and Assessment Regulation 2021* (2021 EP&A Regulation) contains key provisions for the day-to-day operation of the NSW planning system. It supports the *Environmental Planning and Assessment Act 1979* (the Act).

The 2021 EP&A Regulation is designed to make the planning system easier to use. The changes have been informed by feedback received on issues with the former regulation, the *Environmental Planning and Assessment Regulation 2000* (the 2000 Regulation).

NOTE: The Parliamentary Counsel's Office (PCO) has initiated a change whereby clauses within remade regulations will now be referred to as 'sections'. Therefore, this guide uses 'sections' for the 2021 EP&A Regulation and 'clauses' when referring to provisions in the *Environmental Planning and Assessment Regulation 2000* (2000 Regulation).

What are the benefits of the changes?



The 2021 EP&A Regulation largely continues the provisions of the 2000 Regulation and makes the following targeted changes:

Reduces administrative burden and increase procedural efficiency

- reduces administrative burden in the processes and requirements for development applications (DAs) and modification applications. This includes updates to application requirements and refining notification requirements.
- improves support for efficient digital communication processes through a broad shift to online publication and email correspondence, including removal of outdated requirements to make hard copies of documents available. Traditional communication methods can also be used voluntarily to meet community needs.

Simplifies the planning system

- makes improvements to DA processes to simplify the calculation of assessment and deemed refusal periods, stop the clock provisions, and concurrence and referral provisions.
- simplifies requirements for planning certificates to reduce complexity and remove unnecessary content.
- restructures and renumbers provisions and updates definitions to support easier navigation and clarity.

Establishes a modern and transparent planning system

- improves information disclosure for complying development certificate applications, approvals, and notifications to support increased transparency for this assessment system.
- supports transparency with the new requirement to publish environmental assessments of certain activities (e.g. infrastructure). This aligns with stakeholder expectations for this assessment system.
- makes improvements to the designated development provisions to modernise this assessment system. These revisions to the development categories and definitions respond to recent changes in industry, technology, and broader policy reforms.
- removes lower risk solar farms and smaller poultry farms from designated development to enable economic productivity and cut red tape.

Key amendments

Existing use rights

- Replaces the term ‘floor space’ with ‘gross floor area’ for the purpose of considering whether an existing use can be changed and adopts the Standard Instrument—Principal Local Environmental Plan (Standard Instrument LEP) definition of this term. This delivers consistency in the way floor area is calculated by applicants and consent authorities when considering applications to increase the floor area of premises that have the benefit of existing use rights.

Development applications (other than complying development)

- Improves the quality of applications and reduce administrative burden
    - Updates application requirements, including to simplify the provisions and remove/update outdated requirements.
    - Prescribes additional requirements for modification applications and proposed amendments to development applications that are still under assessment, to improve the quality of information submitted with these applications and reduce administrative burden.

  NOTE: the amendments to application requirements as part of the remake of the Regulation relate to local development applications. They will not affect any changes to requirements for State significant development (SSD) and State significant infrastructure (SSI) that have been made through the *Environmental Planning and Assessment Amendment (Major Projects) Regulation 2021*.
- Removes the requirement for landowner’s consent for the surrender or modification of a development consent, where the original DA could have been made without the consent of the landowner.

- Clarifies that the consent authority can reject a modification application in certain circumstances.
- Clarifies that withdrawal provisions afforded to DAs also apply to all modification applications.
- Requires a consent authority who approves a modification to provide the applicant with a modified development consent that complies with any requirements specified by the Secretary of the Department of Planning, Industry and Environment (Secretary). This provides a consistent approach to modifying a development consent and ensures development consents are iteratively updated to reflect subsequent modifications.
- Requires consent authorities to notify submitters of determinations on internal review applications.

Simplifies stop the clock and concurrence and referrals provisions

- Simplifies the drafting of stop the clock provisions to clarify complex rules and remove redundant provisions.
- Eliminates unnecessary concessional delays in the assessment period. For example, removing the two concessional days occurring while the concurrence authority or approval body's request for additional information remains unanswered (under cl 110(1)(a) and (b) of the 2000 Regulation), to reflect the use of emails and instant uploads of reports and to simplify the calculation of assessment periods.
- Removes unnecessary requirements to notify concurrence authorities and approval bodies, including by providing that modification applications under section 4.55(1) and (1A) of the Act do not need to be referred, except where they propose changes to conditions imposed by the concurrence authority or the general terms of approval of the relevant approval body.
- Provides greater certainty around the day that the clock stops when an information request has been issued.
- Reduces unnecessary delays and provide greater certainty around the period for providing additional information by requiring authorities to specify a reasonable period in which the information must be provided.
- Clarifies when the clock restarts in circumstances when an application is amended.
- Provides that the assessment clock starts when payment is received (unless payment is waived) and allow someone else to make a payment on behalf of the applicant.
- Facilitates a shared understanding of elapsed time in the deemed refusal period by providing that an information request issued by the consent authority must:
    - specify the number of days that have elapsed in the assessment period, and
    - inform the applicant that the assessment period ceases to run between the date the request is issued and the date the applicant provides the information or notifies (or is taken to have notified) the consent authority that the information will not be provided.

Reduces administrative burden associated with post-determination notifications

- Distinguishes between a notice of determination issued to an applicant and a notice issued to any other party. This ensures that, even where a submitter has not provided an email contact, the consent authority would only need to post that person a letter (rather than the full list of information that currently needs to be sent to all parties).
- Clarifies that the requirement for a consent authority to send a copy of its notice of determination to the approval body can be satisfied by uploading the notice to the NSW Planning Portal (the Planning Portal).

- **Further detail on the initiative to improve the quality of DAs**

Related initiative – updates to application requirements to improve the quality of DAs and reduce administrative burden

The 2021 EP&A Regulation requires all DAs to be made in the approved form, and to include all the information and documents specified in the approved form or required by the Act and the Regulation. The consent authority will be able to reject any application that does not contain this information.

The DA requirements that were set out in Schedule 1 of the 2000 Regulation are now transferred across to the approved form, which is located on the Planning Portal.

The Department will undertake consultation with councils to develop improvements to the approved form. This will include updates to application requirements to simplify the provisions, remove/update outdated requirements and include new or more specific requirements for particular applications, to improve the quality of information provided with DAs and reduce administrative burden.

Complying development certificates

- Improves information provision and disclosure for complying development certificate (CDC) applications:
  - Requires the following to be included in CDC applications:
    - Details on site configuration and building envelope of the proposed building(s) or works.
    - Detailed engineering plans for telecommunications or electricity works.
    - A site plan that is drawn to scale and shows the location of any registered easements on the land.
    - The maximum site coverage of the land.
  - Requires all titles of reports, studies, plans and documentation relied upon to determine the CDC application to be listed on the CDC with sufficient guidance on how and where the documents can be accessed.
  - Requires pre-approval notices to identify the relevant SEPP or the relevant code in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* under which the CDC has been proposed.
  - Requires disclosure of site plans in a pre-approval notice.
  - Requires a statement by a qualified person to certify that the land has been appropriately investigated in accordance with the guidelines made or approved by the NSW EPA under section 105 of the *Contaminated Land Management Act 1997*.
  - Clarifies what is meant by a qualified person for the purpose of contaminated land requirements.

NOTE: Other new application requirements for CDC applications: Section 120(1) provides that an application for a CDC must be in the approved form and include all the information and documents specified in the approved form (or required by the Act or the Regulation). CDC applications are also required to provide:

- previous DA reference numbers for change of use CDC applications.
- additional information on prior approvals (approvals granted under the *Local Government Act 1993, Road Act 1993* or approval for removal of a tree issued within the last 20 years, when such information is readily available or accessible).

Environmental assessment under Part 5 of the Act

Amendments to improve the transparency and operation of environmental impact assessment of activities under Part 5 of the Act

- Retitles the relevant provision (currently clause 228 'What factors must be taken into account concerning the impact of an activity on the environment?') to reference a 'review of environmental factors' (known as a 'REF'). This distinguishes the process from the Environmental Impact Statements (EIS) process and give statutory recognition to a widely used phrase.
- Allows the Secretary to prescribe guidelines for the form of environmental assessment for activities that do not require an EIS.
- Requires agencies to publish environmental impact assessment (EIA) reports (documenting their REFs) for activities that meet a specified threshold. The requirement to publish REFs will commence on 1 July 2022. This will provide more time for determining authorities to prepare for implementation.
- Inserts two additional requirements for agencies to consider:
    - Any environmental factors that may be relevant to the likely impact of an activity on the environment and not just those factors listed in clause 228.
    - Any strategic plans made under Part 3 of the Act, including local strategic planning statements, regional and district plans.
- Removes redundant clauses, including provisions relating to fisheries management and the Australian Rail Track Corporation Ltd.
- Updates the requirements for publication of EIS decision reports.

Designated development

- Adds new categories to capture emerging technologies.
- Removes lower risk photovoltaic solar energy generation and smaller scale poultry farms.
- Aligns designated development categories with the POEO Act where appropriate, to:
    - match thresholds and clause coverage.
    - adopt definitions and terminology.
    - align petroleum works with related legislation.
- Varies the concrete works, intensive livestock agriculture, and breweries and distilleries categories based on industry specific changes.
- Alters location-based triggers to:
    - replace the ESA definition with an updated 'environmentally sensitive areas of State significance' (ESASS) definition. This change improves consistency across legislative definitions of environmental areas and improve the coverage of protections around key environmental areas.
    - standardise wetland buffers to 100 metres (current buffers range from 40 – 100 metres). This supports adequate protections for wetlands from higher risk development types and aligns better with the *State Environmental Planning Policy (Coastal Management) 2018*.
    - revise the drinking water catchment definition. The improved definition helps to manage risks to water quality, focus on water utility operations, remove ambiguity of the term 'potable', and ensure relevant groundwater works are included.

- clarify that certain 'associated works' do not trigger designated development. This helps ensure designated development applies as intended. For example, an access road in proximity to a dwelling should not (of itself) trigger the requirement for an EIS.

- Alters exclusions to designated development to clarify provisions around DAs for alterations and additions and removing certain Local Environmental Plan (LEP) and Regional Environmental Plan (REP) exemptions.
- Includes housekeeping and miscellaneous updates to revise definitions, improve phrasing and clause structure, remove outdated clauses, update cross-references to agencies, legislation, and external documents, and refine wording to clarify policy intent.

Planning certificates

Changes to planning certificates commence on 1 October 2022 and aim to:

- reduce certificate complexity and improve clarity and consistency.
- reduce administrative burden and remove unnecessary regulatory requirements.
- ensure interested parties can readily access information on land that is relevant, accurate, and easy to interpret.

The 2021 EP&A Regulation:

- refines and reorders the list of matters in the planning certificates schedule (Schedule 2 of the 2021 EP&A Regulation) to focus the content of section 10.7(2) certificates on land use and development controls essential to conveyancing.
- retains the requirement to list all relevant planning instruments and development control plans (DCPs) and requires councils to include draft DCPs.
- requires councils to include information on all State Environmental Planning Policies (SEPPs) that zone land.
- specifies that draft environmental planning instruments (EPIs) and draft DCPs that have not been made within three years from the date they were last on public exhibition do not need to be included on planning certificates.
- renames and rewords the complying development clause to clarify the purpose of clause and the information it requires councils to provide. Expands it to include key land use classifications that affect the ability to undertake exempt development.
- updates the provisions related to hazard risk restrictions to explicitly include contamination, aircraft noise, salinity, and coastal hazard and sea level rise in the list of risks. Including contamination will require councils to include a statement as to whether a policy adopted by the council or another public authority restricts the development of the land due to the likelihood of contamination. Under the 2000 Regulation, this information was included at the discretion of the relevant council.
- requires councils to indicate whether the land is in a special contributions area and to note whether any draft contributions plans apply to the land.
- requires councils to identify on planning certificates whether any additional permitted uses apply to the land under the relevant LEP.

Fees and charges

The 2000 Regulation sets the fees and charges for various planning related services offered by councils and other consent authorities. The two types of fees applied in the 2000 Regulation are:

- fixed or flat fees

- sliding scale fees based on the estimated costs of development, known as 'ad valorem', fees.

The 2021 EP&A Regulation amends the fixed fees to include movements in the consumer price index (CPI) that have occurred since the last CPI increase to fees in the Regulation in 2011, and to allow for ongoing minor adjustments in these fees either annually or biannually. This allows fixed fees to gradually increase over time to better reflect the cost of providing planning services.

The first increase to these fees applies on 1 July 2023.

The 2021 EP&A Regulation applies CPI adjustments to only the fixed fees in the Regulation, because the ad valorem component of DA fees allows for an inbuilt and ongoing increase in the total amount of maximum DA fees payable by applicants due to the increasing cost of development.

Electronic communication methods

- Removes requirements for hard copies of documents to be made available for free or for a fee and instead require that this information to be made available online or electronically.
- Clarifies that provisions that require a document to be delivered, posted, published can be met through electronic methods.

Miscellaneous (including definitions)

- Amends the 2000 Regulation so a large boarding house, seniors housing, a group home or a hostel does not have to obtain a BASIX certificate. This is because these types of developments are class 3 buildings and are already subject to energy efficiency requirements under the Building Code of Australia and water efficiency requirements under the National Construction Code and Australian Standard AS/NZS 3500.
- Updates the definition of urban release area so that maps can be published online.

When will these changes commence?

The 2021 EP&A Regulation commences on 1 March 2022. Transitional arrangements apply for certain provisions:

- The 2000 Regulation continues to apply to a DA and CDC application made but not finally determined before 1 March 2022.
- Section 171 does not apply in relation to an activity if the determining authority had, immediately before 1 March 2022, considered the likely impact of the activity under the Act, section 5.9 and the 2000 Regulation, clause 228.
- Clauses 264–267 and 268 of the 2000 Regulation continue to apply to development applications lodged before 1 March 2022. See Section 5 of Schedule 6 Savings, transitional and other provisions for further detail.
- Schedule 4 Planning Certificates of the 2000 Regulation continues to apply until the end of 31 September 2022. Section 290 applies from the beginning of 1 October 2022.