



7 February 2023

Department of Planning & Environment  
Attention: Anja Te Wake  
Locked Bag 5022  
PARRAMATTA NSW 2124

Contact: Arif Yasin Chohan  
Our Ref: DOC2023/016755  
Your Ref: EIE Special Flood Consideration  
Clause Exhibition

Dear Anja

### **Submission - Explanation of Intended Effect: Special Flood Consideration Clause**

I refer to the Explanation of Intended Effect (EIE) – Special Flood Consideration Clause currently on exhibition.

Council understand that the Department has commenced the Flood-Prone Land Package to keep NSW's community safe and to build resilience. The intent is to introduce risk-based flood planning controls to better manage flood risk throughout NSW, particularly flood risk beyond the 1% AEP (annual exceedance probability).

Council notes that as part of the Flood-Prone Land Package, two new clauses were to be introduced in the *Standard Instrument - Principal Local Environmental Plan* through a self-repealing amending State Environmental Planning Policy (SEPP). The compulsory 'Flood planning' clause 5.21 has already been added into the Local Environmental Plans (LEPs) of all NSW councils and the optional 'Special flood consideration' clause 5.22 will be incorporated into councils who self-nominated to opt into the clause.

It is noted that the Explanation of Intended Effect (EIE) is seeking feedback on whether to include the 'Special flood consideration' clause 5.22 into the LEPs of 32 councils including the Cessnock City Council who opted into the clause.

Council believes the 'Special flood consideration' clause will introduce flood related development controls appropriate to location as needed. As such, inclusion of this clause in Council's LEP gives more flexibility and control to amend the clause when required for effective development control in a floodplain, in particular, the areas between flood planning area and probable maximum flood. Therefore, Council has opted into the 'Special flood consideration' clause into the *Cessnock Local Environmental Plan 2011* (CLEP).

Following the Department's email of 26 August 2021, Council resolved (**Annexure A & B**) to opt into the 'Special flood considerations' clause into the CLEP at its meeting of 20 October 2021 and accordingly, the Department was informed through a letter DOC2021/163307 on 25 October 2021 (**Annexure C**).

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ABN 60 919 148 928

Council at its meeting of 20 October 2021 resolved:

1. ***That Council advises the Department of Planning, Industry and Environment that it would like to 'opt in' to optional clause 5.22 of the Standard Instrument (Local Environmental Plans) Order 2006.***

On 30 November 2021 'Council Justification Form' (**Annexure D**) was submitted to the Department upon its request to inform the Explanation of Intended Effects (EIE) for a self-repealed amending State Environmental Planning Policy (SEPP). Following that 'Council Rational Form' was also submitted to the Department on 19 January 2022 (**Annexure E**).

Council's intent to opt into the 'Special flood consideration' clause 5.22 of the Standard Instrument – Principal Local Environmental Plan was formally confirmed to the Department. However, Council wants to reiterate through this submission that Council wishes to include all provisions of the 'Special flood consideration' clause 5.22 as noted below without removing any land use from clause 5.22(5):

**5.22 Special flood considerations [optional]**

- (1) *The objectives of this clause are as follows-*
  - (a) *to enable the safe occupation and evacuation of people subject to flooding,*
  - (b) *to ensure development on land is compatible with the land's flood behaviour in the event of a flood,*
  - (c) *to avoid adverse or cumulative impacts on flood behaviour,*
  - (d) *to protect the operational capacity of emergency response facilities and critical infrastructure during flood events,*
  - (e) *to avoid adverse effects of hazardous development on the environment during flood events.*
- (2) *This clause applies to-*
  - (a) *for sensitive and hazardous development—land between the flood planning area and the probable maximum flood, and*
  - (b) *for development that is not sensitive and hazardous development—land the consent authority considers to be land that, in the event of a flood, may-*
    - (i) *cause a particular risk to life, and*
    - (ii) *require the evacuation of people or other safety considerations.*
- (3) *Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development-*
  - (a) *will not affect the safe occupation and efficient evacuation of people in the event of a flood, and*
  - (b) *incorporates appropriate measures to manage risk to life in the event of a flood, and*
  - (c) *will not adversely affect the environment in the event of a flood.*
- (4) *A word or expression used in this clause has the same meaning as it has in the Considering Flooding in Land Use Planning Guideline unless it is otherwise defined in this clause.*
- (5) *In this clause-*
  - Considering Flooding in Land Use Planning Guideline**—see clause 5.21(5).
  - flood planning area**—see clause 5.21(5).
  - Floodplain Development Manual**—see clause 5.21(5).
  - probable maximum flood** has the same meaning as it has in the Floodplain Development Manual.
  - sensitive and hazardous development** means development for the following purposes-
    - (a) boarding house,
    - (b) caravan parks,

- (c) correctional centres,
- (d) early education and care facilities,
- (e) eco-tourist facilities,
- (f) educational establishments,
- (g) educational establishments,
- (h) group homes,
- (i) hazardous industries,
- (j) hazardous industries,
- (k) hospitals,
- (l) hostels,
- (m) information and education facilities,
- (n) respite day care centres,
- (o) respite day care centres,
- (p) sewerage systems,
- (q) tourist and visitor accommodation,
- (r) water supply systems.

Council also notes that the EIE proposes to update LEPs' of 11 councils listed in Table 1 of the EIE by a way of minor housekeeping amendment. As such, Council did not request any specific amendment to CLEP and has no feedback regarding this matter.

Furthermore, the EIE also indicates that in response to the recommendations of the independent 2022 NSW Flood Inquiry, the Department is seeking feedback from councils for inserting clause 5.22 into the Resilience and Hazards State Environmental Planning Policy (SEPP) or inserting the standards instrument clause 5.2 into all council LEPs.

In regards to the options above, the individual councils are best to share their opinion. However, Council strongly believes that inclusion of the 'Special flood consideration' clause into other council's LEP is better than including in the SEPP. The inclusion of clause in LEPs will give Councils more flexibility and control in amending their LEPs according to their circumstances that suits them.

If you require any further information, please do not hesitate to contact Council's Senior Strategic Planner, Arif Yasin Chohan on telephone 02 4993 4295 or via email [arif.chohan@cessnock.nsw.gov.au](mailto:arif.chohan@cessnock.nsw.gov.au).

Yours faithfully



Jenny Mewing  
Acting Manager Strategic Planning

Enc.

1. Annexure A – Council Report 20 October 2021
2. Annexure B – Minutes of Council meeting 20 October 2021
3. Annexure C - Council letter date 25 October 2021
4. Annexure D – Council Justification Form
5. Annexure E – Council Rational Form

## Report To Ordinary Meeting of Council - 20 October 2021

Planning and Environment

Report No. PE55/2021

Planning and Environment



**SUBJECT:** *LOCAL ENVIRONMENTAL PLAN OPTIONAL CLAUSE 5.22 - SPECIAL FLOOD CONSIDERATIONS*

**RESPONSIBLE OFFICER:** *Senior Strategic Planner - Iain Rush  
Strategic Planning Manager - Martin Johnson*

### **SUMMARY**

This report seeks Council's endorsement to advise the Department of Planning, Industry and Environment (DPIE) that it would like to 'opt in' to optional Local Environmental Plan (LEP) Clause 5.22 (optional cl.5.22) of the *Standard Instrument (Local Environmental Plans) Order 2006* (the Standard LEP). Optional cl.5.22 has been prepared by DPIE to assist councils to better regulate sensitive and hazardous development that is proposed between the Flood Planning Area (FPA) and the Probable Maximum Flood (PMF).

This report also seeks Council's endorsement to place an amended version of the Cessnock Flood Prone Land Development Control Plan (DCP) chapter on public exhibition for 28 days. The Flood Prone Land DCP chapter has been amended to ensure it is consistent with optional cl.5.22 and better align the plan with DPIE's Flood Prone Land Package.

### **RECOMMENDATION**

1. **That Council advises the Department of Planning, Industry and Environment that it would like to 'opt in' to optional clause 5.22 of the Standard Instrument (Local Environmental Plans) Order 2006, as set out in enclosure 1.**
2. **That Council pursuant to clause 18 of the Environmental Planning and Assessment Regulation 2000, exhibits the proposed amendments to the Flood Prone Land Development Control Plan Chapter for a period of 28 days.**
3. **That Council receives a further report following public exhibition of the Flood Prone Land Development Control Plan Chapter.**

### **BACKGROUND**

The NSW Government's new flood-prone land package commenced on 14 July 2021. The package introduced several new and amended guidelines and statutory documents to assist councils to better regulate development in the floodplain. The key documents and guidelines associated with the flood-prone land package include:

- a revised s9.1 Local Planning Direction regarding flooding;
- planning circular PS21-006, '*considering flooding in land use planning: guidance and statutory requirements*';
- DPIE Guideline, '*considering Flooding in Land Use Planning (2021)*';
- *Standard Instrument (Local Environmental Plans) Amendment (Flood Planning) Order 2021*, which includes a new mandatory LEP 'flood planning' clause (cl.5.21) and a new optional LEP 'special flood considerations' clause (cl.5.22) that councils can nominate to opt into;

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- *Environmental Planning and Assessment Amendment (Flood Planning) Regulation 2021*, which includes new s.10.7 planning certificate notations to advise of flood-related development controls up to the FPA, or between the FPA and the PMF; and
- *State Environmental Planning Policy Amendment (Flood Planning) 2021*, which revokes councils' existing flood planning LEP clause and replaces it with the mandatory Standard Instrument flood planning clause, cl.5.21.

On 14 July 2021, mandatory 'flood planning' clause 5.21 was inserted in the *Cessnock Local Environmental Plan 2011* (the LEP 2011) by DPIE. Mandatory cl.5.21 replaced cl.7.3, 'Flood planning', of the LEP 2011. Cl.5.21 relates to development within the FPA.

On 6 August 2021, DPIE commenced targeted engagement with councils regarding optional cl.5.22, 'special flood considerations'. The purpose of optional cl.5.22 is to enable councils to better regulate sensitive or hazardous development that is proposed between the FPA and the PMF. For the purpose of cl.5.22, 'sensitive or hazardous development' means any development from the following list that Council elects to include in sub-clause 5(a).

- boarding houses,
- caravan parks,
- correctional centres,
- early education and care facilities,
- eco-tourist facilities,
- educational establishments,
- emergency services facilities,
- group homes,
- hazardous industries,
- hazardous storage establishments,
- hospitals,
- hostels,
- information and education facilities,
- respite day care centres,
- seniors housing,
- sewerage systems,
- tourist and visitor accommodation,
- water supply systems.

**REPORT/PROPOSAL**

On 26 August 2021, DPIE wrote to Council seeking a formal resolution as to whether it would like to 'opt in' to optional cl.5.22 in the LEP 2011. For councils seeking to 'opt in' to the clause, DPIE has requested a formal resolution before each council's caretaker period begins.

Optional cl.5.22, as provided by DPIE, is outlined below:

**5.22 Special flood considerations**

(1) The objectives of this clause are as follows—

- (a) to enable the safe occupation and evacuation of people subject to flooding,

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- (b) to ensure development on land is compatible with the land's flood behaviour in the event of a flood,
  - (c) to avoid adverse or cumulative impacts on flood behaviour,
  - (d) to protect the operational capacity of emergency response facilities and critical infrastructure during flood events,
  - (e) to avoid adverse effects of hazardous development on the environment during flood events.
- (2) This clause applies to—
- (a) for sensitive and hazardous development—land between the flood planning area and the probable maximum flood, and
  - (b) for development that is not sensitive and hazardous development—land the consent authority considers to be land that, in the event of a flood, may—
    - (i) cause a particular risk to life, and
    - (ii) require the evacuation of people or other safety considerations.
- (3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development—
- (a) will not affect the safe occupation and efficient evacuation of people in the event of a flood, and
  - (b) incorporates appropriate measures to manage risk to life in the event of a flood, and
  - (c) will not adversely affect the environment in the event of a flood.
- (4) A word or expression used in this clause has the same meaning as it has in the Considering Flooding in Land Use Planning Guideline unless it is otherwise defined in this clause.
- (5) In this clause—

*Considering Flooding in Land Use Planning Guideline*—see clause 5.21(5).  
*flood planning area*—see clause 5.21(5).

*Floodplain Development Manual*—see clause 5.21(5).

*probable maximum flood* has the same meaning as it has in the Floodplain Development Manual.

*sensitive and hazardous development* means development for the following purposes—

- (a) [*list land uses*]

Direction—

Only the following land uses are permitted to be included in the list—

- (a) boarding houses,
- (b) caravan parks,

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- (c) correctional centres,
- (d) early education and care facilities,
- (e) eco-tourist facilities,
- (f) educational establishments,
- (g) emergency services facilities,
- (h) group homes,
- (i) hazardous industries,
- (j) hazardous storage establishments,
- (k) hospitals,
- (l) hostels,
- (m) information and education facilities,
- (n) respite day care centres,
- (o) seniors housing,
- (p) sewerage systems,
- (q) tourist and visitor accommodation,
- (r) water supply systems.

In accordance with sub-clause (5)(a) of optional cl.5.22, Council may specify the sensitive and hazardous land uses to which the clause applies. At this early stage, it is unclear what other councils in the Hunter Region intend to 'opt in' to optional cl.5.22. It is recommended that at this stage, Council opt into all land uses. DPIE has advised that it will establish an appropriate review mechanism, including seeking external views, to assist both Council and the Department evaluate whether the adoption of the clause in the LEP is appropriate and to further refine the sensitive and hazardous uses to which the clause applies.

Following the external review by DPIE and any feedback obtained, Council will have the opportunity to refine the list of sensitive and hazardous land uses. Furthermore, to remove the requirement for Council to prepare a separate planning proposal to adopt optional cl.5.22, DPIE has stated that it will prepare a separate amendment to update councils' LEPs. However, this is not anticipated to be completed by DPIE before the end of March 2022.

It is recommended that Council advise DPIE that it would like to 'opt in' to optional cl.5.22, as set out in the recommendation section of this report. Optional cl.5.22 applies more broadly to the Cessnock Local Government Area and is more flexible than the development standards in the Cessnock Development Control Plan 2010 (DCP 2010). Optional cl.5.22 also holds greater legislative weight to assist councils regulate sensitive and hazardous developments between the FPA and the PMF.

Electing to 'opt in' to optional cl.5.22 will allow Council to apply flood standards more fairly in places like Wollombi Valley, where there is a large difference between the 1% Annual Exceedance Probability (AEP) and PMF events. Optional cl.5.22 will enable Council to better protect the public against rare floods, which are likely to occur in greater frequency due to the impacts of climate change.

Opting in to optional cl.5.22 requires minor amendments to the Cessnock Flood Prone Land DCP chapter to ensure it is consistent with optional cl.5.22. The required amendments have been drafted and the updated DCP chapter is provided as an enclosure to this report. Staff have taken this opportunity to also make other minor amendments to the Flood Prone Land DCP chapter to better align the document with DPIE's Flood Prone Land Package. The amendments include minor changes in terminology and clarification that a 1 metre freeboard applies in

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respect of land to which the Cessnock City Wide Flood Study applies. The 1 metre freeboard is a response to the level of uncertainty in the flood study, as previously reported to Council.

Importantly, it is recommended that the amended Flood Prone Land DCP chapter is placed on public exhibition regardless of whether Council resolve to 'opt in' to optional cl.5.22 or not, as any further inconsistencies between the LEP and DCP are capable of being addressed prior to the matter being re-reported to Council following public exhibition.

**OPTIONS**

1. Support the recommendation to advise DPIE that Council would like to 'opt in' to optional cl.5.22, as set out in the recommendation section of this report and proceed to place the amended Cessnock Flood Prone Land Development Control Plan chapter on public exhibition for 28 days. ***This is the recommended option.***
2. Advise DPIE that Council would like to 'opt in' to optional cl.5.22, but that it should only apply to some of the sensitive and hazardous developments listed in sub-clause 5 (*to be provided by Council*), and proceed to place the amended Cessnock Flood Prone Land Development Control Plan chapter on public exhibition for 28 days.
3. Not support the recommendation to 'opt in' to optional cl.5.22 for the following reasons, but proceed to place the amended Cessnock Flood Prone Land Development Control Plan chapter on public exhibition for 28 days.

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*(To be provided by Council).*

**CONSULTATION**

In preparing this report, consultation occurred with Council's Strategic Planning, Development Services and Infrastructure sections. DPIE has advised that it will establish an appropriate review mechanism, including seeking external views, to assist both Council and the Department evaluate whether the adoption of the clause in the LEP is appropriate. As the draft clause will be progressed and implemented by DPIE it will not require public exhibition by Council.

**STRATEGIC LINKS****a. Delivery Program**

A Sustainable and Healthy Environment: Objective 3.1 Protecting and Enhancing the Natural Environment and the Rural Character of the Area.

**b. Other Plans**Cessnock Local Strategic Planning Statement

The report aligns with the following priorities of the Cessnock Local Strategic Planning Statement 2036 (the Cessnock LSPS):



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**Report To Ordinary Meeting of Council - 20 October 2021**


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- Planning Priority 21: Developments minimise environmental impacts and respond to site environmental characteristics and natural hazards.

**IMPLICATIONS****a. Policy and Procedural Implications**

This report has regard to the provisions of:

- *The Environmental Planning and Assessment Act 1979 and associated Regulations;*
- *Section 9.1 Local Planning Direction 4.3 – Flooding;*
- *Planning circular PS21-006, ‘considering flooding in land use planning: guidance and statutory requirements’;*
- *Standard Instrument (Local Environmental Plans) Amendment (Flood Planning) Order 2021; and*
- *Environmental Planning and Assessment Amendment (Flood Planning) Regulation 2021.*

**b. Financial Implications**

Nil

**c. Legislative Implications**

If Council elects to ‘opt in’ to optional cl.5.22 it will be relied upon to regulate sensitive and hazardous development within the floodplain.

**d. Risk Implications**

Including optional LEP clause 5.22 will reduce the potential risks associated with sensitive and hazardous development located within the floodplain.

**e. Environmental Implications**

Electing to ‘opt in’ to optional cl.5.22 will help to ensure developments minimise environmental impacts and respond to site environmental characteristics and natural hazards, in accordance with Priority 21 of the Cessnock LSPS.

**f. Other Implications**

Nil

**CONCLUSION**

Optional cl.5.22 has been prepared by DPIE to assist councils regulate sensitive and hazardous development that is proposed between the FPA and PMF. Optional cl.5.22 applies more broadly and is more flexible than the development standards in the Cessnock DCP 2010. The optional clause also holds greater legislative weight than the controls in the DCP relating to sensitive and hazardous development. It is recommended that Council advise DPIE that it would like to ‘opt in’ to optional cl.5.22, as set out in the recommendation section of this report, and place the amended Flood Prone Land DCP chapter on public exhibition for 28 days.

**Report To Ordinary Meeting of Council - 20 October 2021**

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***ENCLOSURES***

- 1** Optional Clause 5.22 Special Flood Considerations
- 2** Draft DCP Chapter - Development on Flood Prone Land

Draft

9/24/21, 9:59 AM

Standard Instrument—Principal Local Environmental Plan (2006 EPI 155a) - NSW Legislation



NSW legislation

## Standard Instrument—Principal Local Environmental Plan (2006 EPI 155a)

Current version for 14 July 2021 to date (accessed 24 September 2021 at 9:59)

[Part 5](#) > Section 5.22

### 5.22 Special flood considerations [optional]

- (1) The objectives of this clause are as follows—
  - (a) to enable the safe occupation and evacuation of people subject to flooding,
  - (b) to ensure development on land is compatible with the land's flood behaviour in the event of a flood,
  - (c) to avoid adverse or cumulative impacts on flood behaviour,
  - (d) to protect the operational capacity of emergency response facilities and critical infrastructure during flood events,
  - (e) to avoid adverse effects of hazardous development on the environment during flood events.
- (2) This clause applies to—
  - (a) for sensitive and hazardous development—land between the flood planning area and the probable maximum flood, and
  - (b) for development that is not sensitive and hazardous development—land the consent authority considers to be land that, in the event of a flood, may—
    - (i) cause a particular risk to life, and
    - (ii) require the evacuation of people or other safety considerations.
- (3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development—
  - (a) will not affect the safe occupation and efficient evacuation of people in the event of a flood, and
  - (b) incorporates appropriate measures to manage risk to life in the event of a flood, and
  - (c) will not adversely affect the environment in the event of a flood.
- (4) A word or expression used in this clause has the same meaning as it has in the Considering Flooding in Land Use Planning Guideline unless it is otherwise defined in this clause.
- (5) In this clause—
 

*Considering Flooding in Land Use Planning Guideline*—see clause 5.21(5).

*flood planning area*—see clause 5.21(5).

*Floodplain Development Manual*—see clause 5.21(5).

*probable maximum flood* has the same meaning as it has in the Floodplain Development Manual.

<https://legislation.nsw.gov.au/view/html/inforce/current/epi-2006-155a#sec.5.22>

1/2

9/24/21, 9:59 AM

Standard Instrument—Principal Local Environmental Plan (2006 EPI 155a) - NSW Legislation

*sensitive and hazardous development* means development for the following purposes—

(a) [list land uses]

**Direction—**

Only the following land uses are permitted to be included in the list—

- (a) boarding houses,
- (b) caravan parks,
- (c) correctional centres,
- (d) early education and care facilities,
- (e) eco-tourist facilities,
- (f) educational establishments,
- (g) emergency services facilities,
- (h) group homes,
- (i) hazardous industries,
- (j) hazardous storage establishments,
- (k) hospitals,
- (l) hostels,
- (m) information and education facilities,
- (n) respite day care centres,
- (o) seniors housing,
- (p) sewerage systems,
- (q) tourist and visitor accommodation,
- (r) water supply systems.

**PLANNING AND ENVIRONMENT NO. PE56/2021**

**SUBJECT: LOCAL ENVIRONMENTAL PLAN OPTIONAL CLAUSE 5.22 -  
SPECIAL FLOOD CONSIDERATIONS**

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**MOTION**      **Moved:** Councillor Doherty      **Seconded:** Councillor Suvaal  
1854  
**RESOLVED**

1. That Council advises the Department of Planning, Industry and Environment that it would like to 'opt in' to optional clause 5.22 of the Standard Instrument (Local Environmental Plans) Order 2006.
2. That Council pursuant to clause 18 of the Environmental Planning and Assessment Regulation 2000, exhibits the proposed amendments to the Flood Prone Land Development Control Plan Chapter for a period of 28 days.
3. That Council receives a further report following public exhibition of the Flood Prone Land Development Control Plan Chapter.

FOR	AGAINST
Councillor Olsen	
Councillor Doherty	
Councillor Dunn	
Councillor Fagg	
Councillor Stapleford	
Councillor Suvaal	
Councillor Fitzgibbon	
Councillor Gray	
Councillor Burke	
Councillor Sander	
Councillor Lyons	
Councillor Pynsent	
<b>Total (12)</b>	<b>Total (0)</b>

**CARRIED UNANIMOUSLY**



25 October 2021

Department of Planning, Industry & Environment  
Attention: Alexandra Bridle  
Locked Bag 5022  
PARRAMATTA NSW 2124

Contact: Iain Rush  
Our Ref: DOC2021/163307  
Your Ref: Optional LEP Clause 5.22 Special  
Flood Considerations

### **Local Environmental Plan Optional Clause 5.22 – Special Flood Considerations**

Dear Alexandra

I refer to your correspondence of 26 August 2021 regarding optional clause 5.22, Special Flood Considerations, of the *Standard Instrument (Local Environmental Plans) Order 2006* and your request for a resolution regarding Council's intention to 'opt in' to the optional clause. In response, I am able to advise that Council resolved the following at its ordinary meeting of 20 October 2021.

- 1. That Council advises the Department of Planning, Industry and Environment that it would like to 'opt in' to optional clause 5.22 of the Standard Instrument (Local Environmental Plans) Order 2006.**

We look forward to being provided further information regarding the optional clause following the Department's review process, which we understand will include seeking external views, to assist both Council and the Department evaluate whether the final adoption of the clause in the *Cessnock Local Environmental Plan 2011* is appropriate.

If you require any further information, please do not hesitate to contact Council's Senior Strategic Planning, Mr Iain Rush, on telephone 02 4993 4155, or by email at [iain.rush@cessnock.nsw.gov.au](mailto:iain.rush@cessnock.nsw.gov.au)

Yours faithfully

A handwritten signature in black ink, appearing to read "MJ", with a long horizontal flourish extending to the right.

Martin Johnson  
Strategic Planning Manager

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e: [council@cessnock.nsw.gov.au](mailto:council@cessnock.nsw.gov.au) w: [www.cessnock.nsw.gov.au](http://www.cessnock.nsw.gov.au)

ABN 60 919 148 928



# Optional 'special flood considerations' clause

## Council justification form

### What is the optional 'special flood considerations' clause?

The optional 'special flood considerations' clause (clause 5.22 of *Standard Instrument—Principal Local Environmental Plan*) was created in July 2021 as part of the [flood-prone land package](#) to apply controls specifically to land located between the flood planning area and the probable maximum flood. When adopted in a local environmental plan (LEP), the clause will apply to certain development identified as being sensitive or hazardous due to risk of life, evacuation of people or other safety considerations in the event of a flood.

### Role of the Department of Planning, Industry and Environment

The Department of Planning, Industry and Environment (the department) will lead a process to include clause 5.22 in relevant council LEPs through a state environmental planning policy (SEPP) amendment.

### Purpose of the justification form

The department has prepared a form for councils to provide reasons, and relevant supporting evidence, to adopt clause 5.22 in the council LEP. This information will support and enable the department to prepare an Explanation of Intended Effect for public exhibition to undertake a SEPP amendment to include clause 5.22 in the council LEP.

### Who is else is involved?

The department has engaged a reference group to support the process.

Reference Group includes industry peak groups, such as Floodplain Management Australia, Local Government NSW and the Urban Development Institute of Australia.

The reference group will be consulted on this form and will be briefed by the department on council responses to this form.

### Next steps

The department will use the information that council provides to prepare recommendations related to proceeding with the adoption of clause 5.22 in the council LEP. The department may request more information from council following feedback from the reference group.

### Questions for council

1. Is council aware of land subject to flooding in the local government area? **Yes**
2. Does council have an adopted Floodplain Risk Management Study and Plan (FRMS&P) to confirm the risk of flooding in the local government area? **Yes**

Please provide details of relevant studies and/or plans.

- **Information regarding flooding is available on Council's website, [here](#)**
- **Online flood mapping is available on Council's website, [here](#)**
- **The Cessnock City Wide Flood Study Report is available [here](#)**
- **Local flood studies are available on Council's website, [here](#)**

# Optional 'special flood considerations' clause

## Council justification form

- a. Does council's adopted Floodplain Risk Management Study and Plan contain any provisions recommending the application of management or mitigation measures beyond the flood planning area? **Yes**

Please provide details of the mitigation/management measures.

- **Chapter C.9 Development on Flood Prone Land of the Cessnock DCP 2010 can be found [here](#).**

3. **List** types of sensitive and hazardous development to be included in clause 5.22(5)(a). Note—refer to the Direction in clause 5.22 for land uses that are permitted to be included in the list.

**Council is seeking to 'opt-in' to all sensitive and hazardous land uses listed in optional cl.5.22, as follows:**

- boarding houses,
- caravan parks,
- correctional centres,
- early education and care facilities,
- eco-tourist facilities,
- educational establishments,
- emergency services facilities,
- group homes,
- hazardous industries,
- hazardous storage establishments,
- hospitals,
- hostels,
- information and education facilities,
- respite day care centres,
- seniors housing,
- sewerage systems,
- tourist and visitor accommodation,
- water supply systems.

4. Does council have a flood policy that would support the 5.22 clause? **Yes**

Please provide details

**Council's Flood Risk Management Policy 2020 is available [here](#). Clause 1.6 of the Flood Risk Management Policy supports the intent of optional cl.5.22.**

5. Has council considered evacuation considerations in its floodplain risk management study in the event of a flood? **Yes**

Please identify relevant documents that describe these evacuation considerations.

**Evacuation considerations are contained within the relevant floodplain risk management study and plans on Council's website (refer to the links provided in question 2) and in the Cessnock SES Flood Sub Plan, available [here](#).**





# Optional 'special flood considerations' clause

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## Council justification form

6. Outline the types of development measures that council, as the consent authority, may consider to be appropriate to manage risk to life in the event of a flood.

**Council considers the following types of development measures appropriate to manage risk to life in the event of a flood:**

- shelter in place provisions;
- flood warning systems;
- evacuation plans; and
- drainage measures to provide safe evacuation routes.

7. Has council had any Land and Environment Court proceedings that would support the inclusion of clause 5.22 into its LEP **Yes/No. Please provide details**

**While some appeals to the Land & Environment Court have included flooding as a consideration, the issue of flooding has never been a 'contention'.**

8. What outcomes does Council anticipate as a result of the application of this clause?

- **Appropriate development within the floodplain**
- **Reduced risk of consent conditions being challenged.**

9. Does Council anticipate any impacts/consequences on development as a broader application of this clause? **If so, please provide details**

**Inclusion of cl.5.22 in the LEP is likely to have implications for the expansion, or alterations and additions to, existing sensitive and hazardous development in flood prone areas.**

# Optional 'special flood considerations' clause

## Council rationale form

### What is the optional 'special flood considerations' clause?

The optional 'special flood considerations' clause (clause 5.22 of *Standard Instrument—Principal Local Environmental Plan*) was created in July 2021 as part of the [flood-prone land package](#) to apply controls specifically to land located between the flood planning area and the probable maximum flood. When adopted in a local environmental plan (LEP), the clause will apply to certain development identified as being sensitive or hazardous due to risk of life, evacuation of people or other safety considerations in the event of a flood.

A link to the clause can be found [here](#).

### Role of the Department of Planning, Industry and Environment

The Department of Planning, Industry and Environment (the department) will lead a process to include clause 5.22 in relevant council LEPs through a state environmental planning policy (SEPP) amendment.

### Purpose of Council Rationale Form

The department has prepared a form for councils to provide reasons, and relevant supporting evidence, to adopt clause 5.22 in the council LEP as per the [Considering flooding in land use planning Guideline July 2021](#).

This information will support and enable the department to prepare an Explanation of Intended Effect for public exhibition to undertake a SEPP amendment to include clause 5.22 in the council LEP.

The form and supporting information are to be completed and emailed back to the department by **11 February 2022** to [resilience.planning@planning.nsw.gov.au](mailto:resilience.planning@planning.nsw.gov.au)

If councils are experiencing difficulties in completing the form please contact the department at [resilience.planning@planning.nsw.gov.au](mailto:resilience.planning@planning.nsw.gov.au).

Those councils that are unable to provide the information and completed form by the above date can still update their LEPs with the clause at a later stage through the planning proposal process.

### Who else is involved?

The department has engaged a reference group to support the process.

The reference group includes the following peak groups: Floodplain Management Australia, Housing Industry of Australia, Insurance Council of Australia, Local Government NSW, Planning Institute of Australia, Property Council of Australia, the Urban Development Institute of Australia and Urban Taskforce.

The reference group was consulted in the development of this form and will be briefed by the department on council responses to this form.

### Next steps

The department will use the information that council provides to prepare recommendations related to proceeding with the adoption of clause 5.22 in the council LEP. The department may request more information from council following feedback from the reference group.

### Council contact

Please provide a council contact that the department can speak to if we need any further clarifications on the information submitted.



# Optional 'special flood considerations' clause

## Council rationale form

### Questions for council

Note: Pages 6 and 7 of the [Considering flooding in land use planning Guideline July 2021](#) provides additional information on the special flood consideration clause and areas it relates to, which may assist council in completing this form.

1. Is council aware of **land subject to flooding** in the local government area?

Yes     No

2. Does council have one or more adopted Floodplain Risk Management Study(s) and Plan(s) (FRMS&P) to confirm the risk of flooding in the local government area?

Yes     No

**If yes, please provide details** of relevant studies and/or plans including the names, dates and either a copy or a link to the documents.

- [Black Creek Floodplain Risk Management Study and Plan Report \(2016\)](#)
- [Wollombi Floodplain Risk Management Study & Plan \(2012\)](#)
- [Swamp Fishery Creek Floodplain Risk Management Study \(2014\)](#)

3. What flood planning level (FPL) or levels has Council adopted for the purposes of Clause 5.21 of its LEP?

#### *Flood planning levels:*

1. *Properties impacted by low risk overland flooding – 1:100 ARI flood event plus 0.3m freeboard*
2. *Properties to which the Cessnock City Wide Flood Study applies – 1:100 ARI flood event plus 1m freeboard. The 1m freeboard accounts for uncertainty in the Flood Study modelling.*
3. *Branxton Commercial Centre – 34.2m AHD (which includes 0.7m freeboard)*
4. *All other properties in the Cessnock LGA, which do not fall into category 1 to 3, above – 1:100 ARI flood event plus 0.5m freeboard.*

**Please provide details** of this including references of where this is adopted (eg in your DCP) and either a copy or link to the relevant sections.

- [Chapter C.9 Development on Flood Prone Land of the Cessnock DCP 2010](#)

4. Does council's adopted FRMS&P(s) contain any provisions recommending the application of land use planning measures beyond the flood planning area? (ie to the probable maximum flood)

Yes     No

**If yes, please provide details** of the land use planning measures (Eg/ DCP controls) including references/page numbers for this information in your studies and plans

- [Chapter C.9 Development on Flood Prone Land of the Cessnock DCP 2010](#)

5. Does Council have sections or clauses in its Development Control Plan (DCP) that relate to land beyond the flood planning area? (**ie to the Probable Maximum Flood**)

Yes     No

**If yes, please provide details** of this including references/page numbers of this information in your DCP and either a copy or link to the relevant sections.



# Optional 'special flood considerations' clause

## Council rationale form

- Chapter C.9 Development on Flood Prone Land of the Cessnock DCP 2010

Additionally, are these clauses justified by one or more of the FRMS&P above

**Yes**     **No**

If **yes**, please provide details of the FRS&P including page number

- *Swamp Fishery Creek Floodplain Risk Management Study – Section 3.3 p11, Section 11.2.5 p86-87; Section 11.4 p93-94*
- *Black Creek Floodplain Risk Management Study and Plan – Table 9.2 P47 Sections 9.3.1, 10.4 and 10.6 p44-45, p54 and 55*
- *Wollombi Floodplain Risk Management Study and Plan – Section 8.1 p47-53*

6. Does council have a flood policy or provisions that would apply when assessing land not covered by an adopted Floodplain Risk Management Study and Plan (ie. where extent and risk of flooding are uncertain/not mapped).

**Yes**     **No**

If **yes**, please provide details of relevant policy or other provisions including references/page numbers for this information in your documents and either a copy or link to the relevant document(s).

*Clause 1.6 of the Flood Risk Management Policy 2020 supports the intent of optional cl.5.22.*

7. Clause 5.22 part 5(a) lists sensitive and hazardous development land uses to which the clause could be applied to. **Is council wanting to remove any of these land uses?**

**Yes**     **No**

If **yes** please list which land uses council wants to remove from the list and outline the reasons as to why these land uses should not apply Note—refer to the Direction in clause 5.22 for land uses that are permitted to be included in the list.

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- a. Are any of these land uses specifically mentioned in any of the FRMS/s, FRMP/s or DCP's identified above? **if so please list**

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8. Has council considered evacuation considerations in its FRMS&P in the event of a flood? Note: Evacuation considerations do not include emergency services response plans such as flood sub-plans

**Yes**     **No**



# Optional 'special flood considerations' clause

## Council rationale form

**If yes, please identify** relevant documents that describe these evacuation considerations along with references/page numbers to specific sections and either a copy or link to the document.

*Evacuation considerations are contained within the relevant floodplain risk management study and plans on Council's website (refer to the links provided in question 2) and in the Cessnock SES Flood Sub Plan*

9. **Outline** the types of flood related development controls and/or development conditions that council, as the consent authority, may require proponents to address to manage risk to life in the event of a flood for lots/development located between the flood planning area and probable maximum flood. Please provide references to documents, relevant sections/pages and copies/links to documents as necessary.

*Council considers the following types of development measures appropriate to manage risk to life in the event of a flood:*

- *shelter in place provisions;*
- *flood warning systems;*
- *evacuation plans; and*
- *drainage measures to provide safe evacuation routes.*

10. Has council had any Land and Environment Court proceedings that would support the inclusion of clause 5.22 into its LEP?

Yes     No

**If yes, please provide details** including a brief summary (including development application reference), relevant documents and the case reference.

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11. Does Council anticipate any outcomes/impacts/consequences on development as a broader application of this clause?

Yes     No

**If yes, please provide details** (such as certain developed not occurring, or flood risk to life being reduced etc)

*Clause 5.22 may have implications for the expansion, or alterations or additions to, existing sensitive or hazardous development that is located on land between the Flood Planning Level and the Probable Maximum Flood.*

12. If clause 5.22 was introduced does Council know where it would apply in the LGA and would Council have mapping resources in place to identify this area?

Yes     No

Would these mapping resources be publicly available?

Yes     No



# Optional 'special flood considerations' clause

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Council rationale form

If yes, please provide details:

- *Cessnock City Council Online Flood mapping*