

Department of Planning and Environment

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Submissions report - Explanation of intended effect: Special flood considerations clause

Summary of submissions from public exhibition

November 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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Submissions report - Explanation of intended effect: Special flood considerations clause

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Introduction

Purpose of the report

This report outlines:

- Submissions received in response to the exhibition of the explanation of intended effect (EIE) for the special flood considerations clause (clause 5.22)
- the Department's response to key issues raised
- recommended next steps to implement clause 5.22 into the planning system

Background

The development of optional clause 5.22 of the Standard Instrument – Principal Local Environmental Plan (Special flood considerations) formed part of the flood-prone land package, which commenced in July 2021.

Clause 5.22 is intended to strengthen planning rules to protect and manage development in areas that could be at risk during flooding by applying additional planning controls. This will help reduce the extent of property damage and potential loss of life and build greater resilience into NSW communities.

The special flood considerations clause applies to:

- sensitive and hazardous development, such as caravan parks, hospitals, and seniors housing, on land between the flood planning area and the probable maximum flood level
- development that is not sensitive or hazardous, on land that the consent authority considers that, in a flood, may pose a particular risk to life and where people may need to evacuate, or where there are other safety concerns.

Consultation with councils on the inclusion of clause 5.22 into LEPs

In May 2021, the Department sought expressions of interest (EOI) from councils in NSW related to the inclusion of clause 5.22 in their local environmental plans (LEPs). 32 councils opted to include clause 5.22 in their LEPs (see Attachment A for the list of councils).

The Department undertook additional consultation with those councils that expressed interest, with each council providing their council resolution and the reasons why they wished to adopt clause 5.22 into their LEP. This also identified the land uses they wished the clause applies to.

2022 NSW Flood Inquiry

In 2022 the NSW Independent Flood Inquiry (flood inquiry), led by Professor Mary O’Kane AC and Michael Fuller APM, was undertaken into the preparation for, causes of, response to and recovery from the significant flood events experienced in NSW in 2021-2022.

The Flood Inquiry report, released in July 2022, included 28 recommendations and highlighted the importance of taking a more proactive, risk-based approach to flooding in planning decisions. Recommendation 21 identified the need to ensure the strategic land use framework and related controls create resilient settlement outcomes.

As a result of the flood inquiry the EIE also sought feedback on making clause 5.22 a mandatory LEP clause or placing it into the State Environmental Planning Policy (Resilience and Hazards) 2021.

Consultation

Exhibition of the Explanation of Intended Effect (EIE)

The Department prepared and exhibited an Explanation of Intended Effect which discussed options to implement clause 5.22.

The Department exhibited the EIE to gain feedback on:

- whether to include the clause in the 32 LEPs of the councils that opted in
- the proposed minor housekeeping amendments to 11 councils LEPs.

In addition, in response to recommendations of the flood inquiry, the Department sought feedback on applying the clause to all NSW councils by inserting clause 5.22 into either:

- all NSW council LEPs, or
- the State Environmental Planning Policy (Resilience and Hazards) 2021.

The EIE for the Special flood considerations clause was exhibited for 6 weeks from 17 January 2023 to 28 February 2023.

All NSW councils, targeted industry groups and government agencies were notified of the exhibition of the EIE.

Reference Group

The Department established a reference group to provide advice to the Department.

The reference group included representatives from 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 were:

- Consulted on the development of the council justification form
- asked to provide comment on the council's responses provided on the justification to include the clause in their LEPs.

Overview of submissions

49 submissions were received in response to the exhibition of the EIE. Of these submissions:

- 41 were from councils
- one was from a government agency
- seven were from industry/interest groups

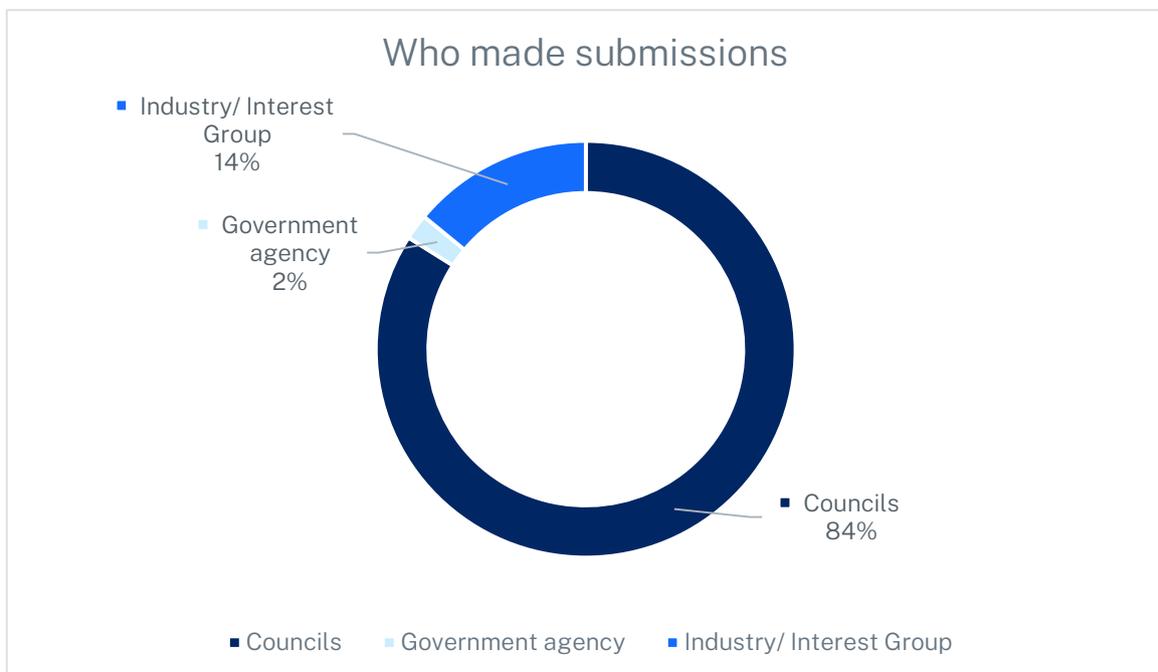


Figure 1. Who made submissions

The submissions received, excluding those requesting confidentiality, are available on the Department's website.

Preferred option of implementation

Submissions indicated support for implementing the clause into the LEPs of councils who had opted in. There was varied responses to implementing the clause as a mandatory LEP clause in the Standard Instrument or in the SEPP (Resilience and Hazards).

Implementation Option	Support		Object		No Response on preferred option	
	Count	Percentage	Count	Percentage	Count	Percentage
Clause in LEPs of councils that opted in	29	59%	2	4%	18	37%
Mandatory LEP SI Clause	23	47%	15	31%	11	20%
SEPP (Resilience and Hazards)	4	8%	26	53%	19	39%

Table 1. Implementation at Special flood considerations clause – submissions analysis

Implement the clause in LEPs of opt-in councils

Of the 49 submissions received, 31 submissions provided a response to this option. The majority of responses (96%) supported including the clause in the LEPs of the 32 councils who opted in. Two submissions, from industry/interest groups, objected to the clause.



Figure 2. Responses to including the clause in the LEPs of the councils who opted into the clause

Implement the clause in all council LEPs

Of the 49 submissions received from exhibition, 38 provided a response to including the clause in all council LEPs. Of this response 61% were supportive and 39% objected. If clause 5.22 was to be implemented statewide as a mandatory clause, this was the preferred implementation method.

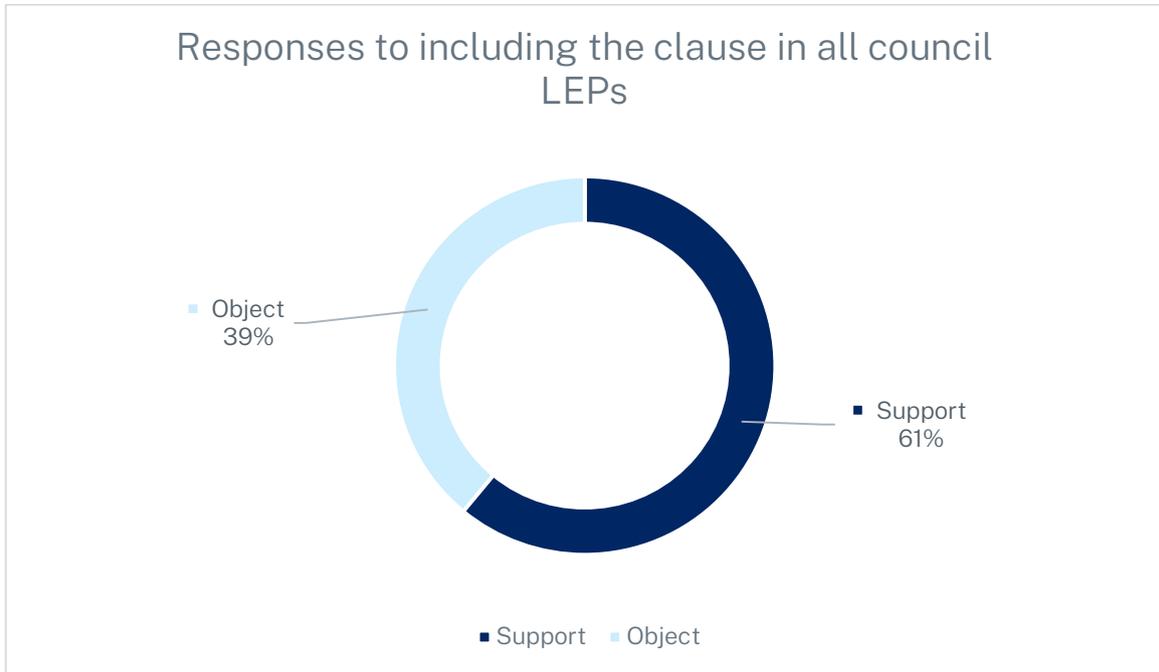
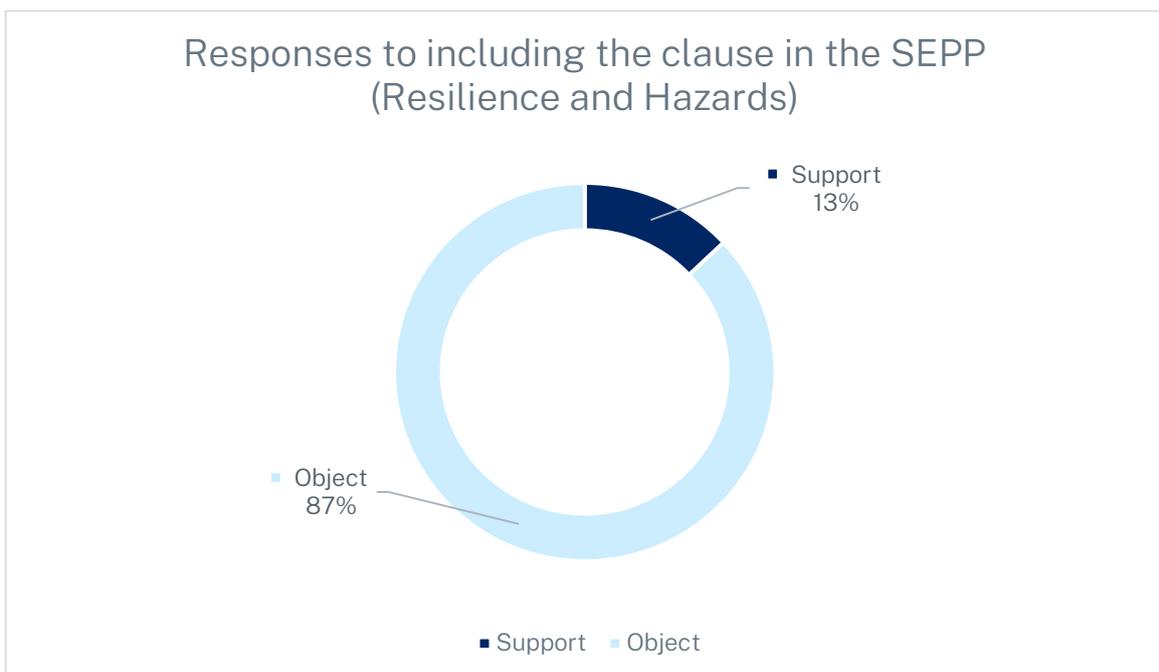


Figure 3. Responses to including the clause in all council LEPs

Implement the clause in the SEPP (Resilience and Hazards)

Of the 49 submissions received from exhibition, 30 provided a response to including the clause in the SEPP (Resilience and Hazards). The majority of responses (87%) objected to including the clause in the SEPP (Resilience and Hazards) with 13% of responses supportive.



Main submission themes

Supportive

The submissions that were supportive identified the following:

- the majority supported the inclusion of clause 5.22 in the 32 LEPs of the councils who opted in
 - some support was expressed for:
 - clause 5.22 to remain optional
 - consistent application of clause 5.22 statewide for clarity and to provide consistent planning approach to floodplain management.
-

Not supportive

The submissions that were not supportive identified the following:

- Objection to making clause 5.22 mandatory until flood studies and mapping are available statewide; as it is inflexible; restricting councils' ability to apply a merit-based approach to development decisions
 - concern about a 'one-size-fits-all' approach to NSW wide regulation regardless of regional or metropolitan location.
-

Other matters raised

The submissions identified the following matters:

- intent from councils to implement clause 5.22 once sufficient flood modelling and mapping of their LGA is available
 - minor changes needed to the housekeeping amendments proposed in the EIE
 - inquired whether the mandatory Standard Instrument – Principal Local Environmental Plan flood clause – clause 5.21 Flood planning, would also be transferred into the SEPP (Resilience and Hazards) if the implementation method was chosen for clause 5.22
 - request for further information about the legal ramifications of a mandatory clause in all council LEPs compared with the SEPP (Resilience and Hazards)
 - if clause 5.22 was mandatory for all councils, it was preferred to be included in councils LEP rather than the SEPP (Resilience and Hazards) as:
 - SEPPs are difficult to navigate and apply
-

- LEPs allow the selection of sensitive and hazardous land uses that would apply in each local government area (LGA) allowing consideration of local needs
- a suggestion to review all SEPPs for consistency with clause 5.22
- acknowledgement of the flood inquiry as an influence on views expressed in the submissions received.

Response to submissions

The Department has reviewed and considered the feedback and suggestions provided in submissions received from the exhibition of the EIE.

In response to the feedback received the Department proposes to:

- implement clause 5.22 in the 32 LEPs of the councils who opted in, via an amending SEPP
- keep clause 5.22 as an optional clause, so that councils that did not opt in can adopt it in their LEPs through the planning proposal process. This will also allow councils to identify applicable sensitive and hazardous land uses in response to local needs
- implement the minor housekeeping amendments, including the minor amendments relating to accuracy that were identified in the submissions
- not implement clause 5.22 as a mandatory clause in all council LEPs or the SEPP (Resilience and Hazards) due to the absence of flood studies and mapping for some NSW LGAs
- undertake further consultation if a mandatory approach to implementing the clause is pursued in the future. This will also include a review of state environmental planning policies for consistency with the clause
- insert clause 5.22 into the Central Coast LEP via the amending SEPP. Central Coast Council consolidated their LEPs between the EOI (2021) and the public exhibition of the EIE (2023) and requested that clause 5.22 be inserted into their 2022 consolidated LEP. Central Coast Council provided a council resolution to the Department and completed a justification clause which was sent to the Reference Group in a similar process to what was undertaken for the other 32 councils that opted in.

Attachment A

Local Environmental Plan's to have clause 5.22 inserted

Bega Valley Local Environmental Plan 2013

Byron Local Environmental Plan 2014

Canada Bay Local Environmental Plan 2013

Central Coast Local Environmental Plan 2022

Cessnock Local Environmental Plan 2011

Clarence Valley Local Environmental Plan 2011

Coffs Harbour Local Environmental Plan 2013

Coonamble Local Environmental Plan 2011

Eurobodalla Local Environmental Plan 2012

Fairfield Local Environmental Plan 2013

Goulburn Mulwaree Local Environmental Plan 2009

Inner West Local Environmental Plan 2022

Kempsey Local Environmental Plan 2013

Liverpool Local Environmental Plan 2008

Murray Local Environmental Plan 2011

Muswellbrook Local Environmental Plan 2009

Narromine Local Environmental Plan 2011

Newcastle Local Environmental Plan 2012

Local Environmental Plan's to have clause 5.22 inserted

Northern Beaches, which includes:

- Warringah Local Environmental Plan 2011
- Pittwater Local Environmental Plan 2014
- Manly Local Environmental Plan 2013

Orange Local Environmental Plan 2011

Port Macquarie-Hastings Local Environmental Plan 2011

Randwick Local Environmental Plan 2012

Richmond Valley Local Environmental Plan 2012

Shellharbour Local Environmental Plan 2013

Shoalhaven Local Environmental Plan 2014

Snowy Monaro, which includes:

- Bombala Local Environmental Plan 2012
- Cooma-Monaro Local Environmental Plan 2013
- Snowy River Local Environmental Plan 2013

Sutherland Local Environmental Plan 2015

Tweed Shire, which includes:

- Tweed Local Environmental Plan 2014
- Tweed City Centre Local Environmental Plan 2014

Upper Hunter Local Environmental Plan 2013

Upper Lachlan Local Environmental Plan 2010

Wagga Wagga Local Environmental Plan 2010

Willoughby Local Environmental Plan 2012

Wollongong Local Environmental Plan 2009