

14 February 2023

Contact: *Stuart Little*
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Our ref: *D2023/8058*

Department of Planning and Environment
Locked Bag 5022
PARRAMATTA NSW 2124

Dear Sir/Madam,

RE: Special Flood Considerations Clause EIE

I refer to the exhibition of the Explanation of Intended Effect (EIE) for the Special Flood Considerations Clause under clause 5.22 of the Standard Instrument – Principal Local Environmental Plan (Standard Instrument).

We note that the EIE seeks feedback on three matters:

1. inserting clause 5.22 into the LEPs of 32 designated Council areas
2. potential state-wide application of the clause including whether this should be facilitated by inserting clause 5.22 into the Resilience and Hazards SEPP or by inserting the clause directly into all Council LEPs
3. additional housekeeping amendments to 11 Council LEPs.

We also note that no changes are proposed to planning pathways and that clause 5.22 only applies to development that is permissible with consent.

WaterNSW has an interest in the EIE in terms of the interactions of flooding risk with water quality, particularly in the Sydney Drinking Water Catchment (SDWC). The EIE and implementation of the Special Flood Considerations Clause will also help improve safety and evacuation considerations for rural areas of the State before areas are developed. We previously indicated our support for the clause on 26 June 2020 in our response to the Draft Flood Prone Land Package (Our ref: D202/60937). The package was implemented in July 2021 that included clause 5.22 as an optional provision in the Standard Instrument. However, to date, no LEPs have been amended.

WaterNSW is supportive of the proposed EIE as clause 5.22 introduces additional extreme flooding risk considerations with respect to safety and the environment. It also introduces an additional preventative measure and consideration in the flood planning space.

Our strong preference is for the clause to be adopted state-wide. Currently only seven of the fifteen councils in the SDWC propose to adopt the clause. Proposed uptake across the rest of the rural areas in the State is sparse. It is of some concern that Wingecarribee and Wollondilly Councils do not propose to adopt the clause given these Council areas contain important catchment areas and include many of our key water storages including Warragamba Dam. Also, under the 32 Council scenario, the range of uses constituting 'sensitive and hazardous development' varies between each Council area. The approach seems 'ad hoc' and may result in some land uses being excluded despite presenting safety or environmental risks under extreme flooding events.

Our preference is for clause 5.22 to be housed under the individual LEPs rather than sitting separately under State Environmental Planning Policy (Resilience and Hazards) 2021 (the Resilience and Hazards SEPP). Given that LEPs already house flood planning considerations under clause 5.21, it makes logical sense to retain clause 5.22 as a LEP provision. This would also mean that the LEPs would systematically shift from Flood planning considerations for the flood planning area (FPA) (clause 5.21) to Special flood considerations for the land areas above the FPA up to the probable maximum flood (PMF) limit (clause 5.22). Introducing the clause 5.22 provisions into the Resilience and Hazards SEPP and separating it from clause 5.21 would split flood planning considerations between State and Local level planning instruments and unnecessarily complicate flood planning controls. If clause 5.22 is to be transferred to the Resilience and Hazards SEPP, then we believe that clause 5.21 'Flood Planning' of the Standard Instrument should be similarly transferred across.

The EIE is not clear as to how 'sensitive and hazardous' development would be defined under a state-wide application scenario. Currently, clause 5.22 allows Councils to individually select from 18 prescribed land uses to determine the definition of 'sensitive and hazardous development'. For the 32 individual Councils seeking to adopt the clause (see Appendix A of the EIE), the EIE clearly identifies the selected land uses proposed for each Council area. However, as indicated above, the number and types of uses varies between each Council. Importantly, the EIE is silent regarding what land uses would and would not be included in a state-wide application of the clause and how this would be determined. It is unclear whether Councils would be allowed to select the land uses for their areas or whether all or only a select number of the 18 land-uses would be mandated across the State. Our strong preference would be to see all 18 land uses mandated for state-wide application of the clause.

In preparing our comments on the EIE, we have become aware that the current structure of clause 5.22 limits environmental considerations (such as water quality risk) to extreme flooding events only (e.g. land between the FPA and PMF). Uses such as 'hazardous industries' and 'hazardous storage establishments' present a significant water quality risk in flood events for lower lying lands within the FPA, not just for areas between the FPA and PMF.

We strongly encourage the Department to re-examine the structure of clause 5.22 to extend the *environmental* consideration of 'sensitive and hazardous uses' to all flood risk areas including land within the FPA. Alternatively, we ask that consideration be given to amending clause 5.21 to strengthen consideration of water quality risks during flood events. We suggest that 5.21(2)(e) is expanded to refer to 'or a reduction in *water quality* or the stability of river banks or watercourses' and the provisions in 5.21(3) to require the consent authority to consider the impact of the development on water risk during a flood event.

Our detailed comments are provided in Attachment 1. We include a specific examination of the relationship of clause 5.22 to the SDWC Councils in Attachment 2 including application of the clause to the land uses most likely to be of water quality concern.

If you have any questions regarding the issues raised in this letter, please contact Stuart Little at stuart.little@waternsw.com.au.

Yours sincerely



DARYL GILCHRIST
Manager Catchment Protection

ATTACHMENT 1 - DETAIL

Background

The Special Flood Considerations clause is currently positioned as an optional provision under clause 5.22 of the Standard Instrument. It applies to 'sensitive and hazardous development' (which can include caravan parks, hospitals and seniors housing) that is proposed between the flood planning area (FPA) and the probable maximum flood (PMF) level. It also applies to development that is not 'sensitive or hazardous' but where the consent authority considers that, in a flood, may pose a particular risk to life and require evacuation or where there are other safety concerns.

The clause restricts the issuing of consent unless the consent authority is satisfied that the development addresses certain human safety issues (e.g. evacuation) and will not adversely affect the environment during flooding. The structure of clause 5.22 allows each Council to define what constitutes 'sensitive and hazardous development' by selecting from a predefined list of 18 land uses. The land uses selected by Council then define the scope of land uses where safety and environmental considerations apply. The environmental consideration would implicitly include water quality, but the extent of that consideration would be at the discretion of each Council.

The EIE does not intend to change any planning pathways. Clause 5.22 would only apply to development that requires development consent. Existing 'development without consent' planning pathways, such as those governed by the Transport and Infrastructure SEPP, remain unaltered and the application of clause 5.22 to Part 5 activities is not proposed.

Proposed written instrument amendments – 32 LEPs

The EIE identifies that 32 Councils are seeking adoption of the clause in their LEPs. We note that this affects 37 LEPs over the 32 nominated Council areas as Northern Beaches, Snowy Monaro and Tweed Council have multiple LEPs operating in their area. This equates to 25% of the 128 Councils in NSW. It is unclear why the 32 listed Councils have elected to adopt the clause and why 75% of NSW Councils have not. The reasons for this apparent reticence may need to be further explored if a state-wide adoption of the clause is pursued.

From a water quality risk perspective and in relation to the Sydney Drinking Water Catchment (SDWC), only 7 of the 15 SDWC Councils are proposing to adopt clause 5.22, these being Eurobodalla, Goulburn Mulwaree, Shoalhaven, Snowy-Monaro, Sutherland, Upper Lachlan and Wollongong. We note that Blue Mountains, Campbelltown, Kiama, Lithgow, Oberon, Queanbeyan-Palerang, Wingecarribee and Wollondilly do not intend to include the clause at this stage. The fact that Wingecarribee and Wollondilly do not intend to adopt the clause is of concern given that, significant waterways, catchment areas and WaterNSW water storages occur in these local government areas (LGAs). In the case of Wollondilly, this includes Warragamba Dam.

Inclusion of the clause across the nominated Council areas including the seven Councils in the SDWC will improve environmental considerations under extreme flood risk scenarios. This is an improvement on the current situation but does not present a unified approach for the SDWC or wider NSW.

Clause 5.22 allows each Council to define 'sensitive and hazardous development' individually by selecting from 18 different land uses. The applicable land uses selected by the 32 Councils are provided in a table in Appendix A of the EIE. The approach results in each LEP varying in terms of the number and types of land uses that are subject to the clause. This includes for the seven Councils in the SDWC seeking to adopt the clause. The approach is seemingly 'ad hoc' and may result some land uses being excluded despite presenting safety or environmental risks under extreme flooding events. The EIE does not sufficiently justify or explain how each Council determined its selected land uses and why other uses have been excluded.

Water Quality Risks and Land Use

Of particular interest to WaterNSW are the risks presented to water quality from particular land uses. While all development in the SDWC is required to have a neutral or beneficial effect (NorBE) on water quality, we identify 9 of the 18 uses as being of potential risk due to the particular pollutants they may generate or the unsewered environments in which they sometimes occur. Of particular concern are land uses such as hazardous industries, hazardous storage establishments (due to chemicals and fuels) and sewerage systems (due to nutrient, pathogen and human health risks). Seniors living and hospitals are also of potential concern given potentially higher concentrations of pharmaceuticals and other chemical-based products that may occur in these establishments. Uses such as caravan parks, ecotourist facilities and tourist and visitor accommodation can also be of concern where these occur in unsewered areas. Water supply systems may also include water treatment facilities which can include treatment ponds and chemicals.

In Attachment 2, we include an analysis of the uptake of these uses under the proposed adoption of Clause 5.22 by the Councils in the SDWC. This shows how uptake of the land uses is not consistent across the seven SDWC Councils proposing to adopt Clause 5.22. We note that all seven Councils apply the clause to land uses such as hazardous industries, hazardous storage establishments and hospitals. Goulburn-Mulwaree does not include 'seniors housing' under the clause and a number of LEPs do not apply the clause to 'caravan parks'. This leads us to conclude that the overall approach across the SDWC is 'ad hoc' and a more consistent approach to Clause 5.22 is desired (discussed below).

We acknowledge that there may be some resistance from Councils in applying the clause to 'sewerage systems' and 'water supply systems'. Inclusion of these land uses will not increase the risk of affectation to Councils or government agencies as there is no change to existing planning pathways. The 'development without consent' pathways under Divisions 18 and 24 of Part 2 of the Transport and Infrastructure SEPP remain available to Councils and government agencies. However, new private development for these uses would need to consider clause 5.22.

Proposed state-wide application of clause 5.22

WaterNSW supports state-wide adoption of clause 5.22. This would ensure a consistent application of the provision across the State and standardise environmental risk considerations in extreme flooding events. This is relevant to water quality in the SDWC and other rural water storages where they are used for town water supply. In this regard, we note that the clause is proposed in a limited number of rural areas where our rural dams occur (e.g. Bega Valley). Most of the Council areas that contain our rural dams and storages, and indeed the wider rural councils across the State, appear to have elected to not apply the clause.

The EIE is silent on clause 5.21 of the Standard Instrument and it is not clear whether both clause 5.21 and 5.22 would be transferred to the Resilience and Hazards SEPP. It reads as if the provisions would be separated although going back to Recommendation 21 of the 2022 Flood Inquiry, it appears that the intent is to keep the clauses together.

For consistency, we believe that the clause should be included under clause 5.22 of each LEP and issued as a mandatory provision of the Standard Instrument. This would then keep the flood-related considerations together under clauses 5.21 and 5.22 of Council LEPs. We are concerned if clause 5.22 is regulated by an amendment to the Resilience and Hazards SEPP, flood-risk considerations would be split between Local and State planning instruments increasing unnecessary complexity in the NSW planning system. Alternatively, we support transferring both clauses 5.21 and 5.22 to the Resilience and Hazard SEPP, although this may complicate LEPs where other LEP clauses call upon clauses 5.21 or 5.22 or concepts such as the FPA.

The EIE does not canvas whether the state-wide approach would apply the clause across all the 18 optional land uses presented under clause 5.22 with respect to the 'sensitive and hazardous

development' definition. Our strong preference is to see the clause applied consistently across all 18 land uses. Regardless, from an environmental perspective, we believe that as a minimum the clause should mandatorily apply to hazardous industries and hazardous storage establishments. Please see our comments above regarding other land uses of water quality concern.

Proposed additional housekeeping amendments

A number of additional housekeeping amendments are proposed (Table 1) to various LEPs. These generally relate to removing cross-references to flood maps where they are no longer referenced, removing existing flood risk management clauses from those councils that have opted into the special flood consideration clause and to correct inconsistencies in 11 LEPs. These amendments relate to the LEPs of several Councils in the SDWC including Shoalhaven, Wingecarribee and Wollongong. We have no objection to the proposed changes.

Other – Water Quality Risk Considerations Across all Flood Risk Areas

In preparing these comments, it has become apparent that the structure Clause 5.22 limits environmental considerations (such as water quality risk) to extreme flooding events only. This is because the 'sensitive and hazardous development' provision only applies to land between the FPA and PMF. The scope of this consideration is also limited by whatever uses Councils select to have included under the clause, although this risk is curtailed if all 18 land uses are mandated for the 'sensitive and hazardous development' definition (see above). Uses such as 'hazardous industries' and 'hazardous storage establishments' present a significant water quality risk in flood events for lower lying lands within the FPA, not just for areas between the FPA and PMF.

We appreciate that compulsory Clause 5.21 'Flood Planning' of the Standard Instrument applies to all Council LEPs and provides flood-related considerations for land within the FPA. However, while the concept of 'environment' is included, considerations related to the interactions of flood behaviour on water quality and associated risks to human health and the environment are not explicit. Together with the current structure of clause 5.22, there is little direct onus for consent authorities to consider water quality risks within the FPA.

In light of the above, we strongly encourage the Department to re-examine the structure of clause 5.22 to extend the *environmental* consideration of 'sensitive and hazardous uses' to all flood risk areas including land within the FPA.

Alternatively, we ask the Department to consider making some minor amendments to clause 5.21 to refer more directly to water quality. We request that clause 5.21(2)(e) be amended to read:

'will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in *water quality* or the stability of river banks or watercourses' (emphasis added to the proposed 'water quality' insertion).

We also request that the Department consider expanding the provisions in 5.21(3) for the consent authority to consider 'the impact of the development on water quality and the risk to human health and the environment in the event of a flood'.

ATTACHMENT 2 – RELATIONSHIP OF CLAUSE 5.22 TO SYDNEY DRINKING WATER CATCHMENT COUNCILS

Sydney Drinking Water Catchment (SDWC) Councils	Current Local Environmental Plan for SDWC	Proposed adoption of Clause 5.22	Land Uses of Potential Water Quality Concern – Included in 'sensitive and hazardous development' definition?								
			Caravan parks	Ecotourist facilities	Hazardous industries	Hazardous storage establishments	Hospitals	Seniors housing	Sewerage systems	Tourist and visitor accomm.	Water supply systems
Blue Mountains	Blue Mountains Local Environmental Plan 2015	No	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Campbelltown	Campbelltown Local Environmental Plan 2015	No	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Eurobodalla	Eurobodalla Local Environmental Plan 2012	Yes	No	No	Yes	Yes	Yes	Yes	No	No	No
Goulburn Mulwaree	Goulburn Mulwaree Local Environmental Plan 2009	Yes	Yes	No	Yes	Yes	Yes	No	No	No	No
Kiama	Kiama Local Environmental Plan 2011	No	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Lithgow	Lithgow Local Environmental Plan 2014	No	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Oberon	Oberon Local Environmental Plan 2013	No	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Queanbeyan-Palerang	Palering Local Environmental Plan 2014	No	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Shoalhaven	Shoalhaven Local Environmental Plan 2014	Yes	No	No	Yes	Yes	Yes	Yes	No	No	No
Snowy Monaro	Cooma-Monaro Local Environmental Plan 2013	Yes	No	No	Yes	Yes	Yes	Yes	No	No	No
Sutherland	Sutherland Shire Local Environmental Plan 2015	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Upper Lachlan	Upper Lachlan Local Environmental Plan 2010	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Wingecarribee	Wingecarribee Local Environmental Plan 2010	No	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Wollondilly	Wollondilly Local Environmental Plan 2011	No	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Wollongong	Wollongong Local Environmental Plan 2009	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
TOTAL	15	7	4	3	7	7	7	6	3	3	3