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Endorsed by LGNSW Board
in April 2023

NSW Department of Planning and Environment

By email: resilience.planning@planning.nsw.gov.au

LGNSW Submission – Special Flood Considerations Clause EIE

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general purpose councils and related entities. LGNSW facilitates the development of an effective, community-based system of local government in the State.

LGNSW welcomes the opportunity to make a submission on the *Explanation of Intended Effect: Special Flood Considerations Clause*. This is a draft submission until reviewed and endorsed by the LGNSW Board. Any amendments will be forwarded in due course.

It is noted that the Explanation of Intended Effect (EIE):

- Proposes to amend 32 councils' local environmental plans (LEPs) by inserting clause 5.22 of the Standard Instrument—Principal Local Environmental Plan (Standard Instrument).
- Seeks feedback on whether to apply the clause to all local government areas in NSW by inserting the clause in either:
 - all NSW Council LEPs, or
 - the State Environment Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP).

Opening statement

Councils have a central role in land use planning in flood prone areas, and despite limited means, are essential in providing support to local communities as they recover. However, they must be properly resourced, supported and fully consulted before blanket state-wide policies are imposed that could have significant unintended effects on their local land use controls.

Proposal to amend 32 identified LEPs

As noted in the EIE, the 32 selected councils self-nominated via resolution of the elected council in 2021 to include the 'special flood considerations' clause in their LEP.

This followed an expression-of-interest approach by the Department of Planning and Environment (DPE) in 2021 which provided councils with the option to consider the clause, tailor its applicability to the relevant local government area, and report to the elected council for formal approval. As a general principle, LGNSW considers this approach preferable to a one-size-fits-all approach being imposed. LGNSW therefore supports the proposal for these 32 self-nominated councils' LEPs to be amended to opt into this clause. LGNSW also

acknowledges the DPE's efforts to consider councils' limited time and resources by progressing this amendment via an amending SEPP rather than individual planning proposals.

Proposal for state-wide application of the clause

The EIE now proposes to go beyond DPE's original opt-in approach in 2021 and potentially mandate the controls state-wide. The EIE's justification for this proposal is that it will assist in fulfilling part of recommendation 21 of the NSW Independent Flood Inquiry¹.

LGNSW is concerned there is minimal if any evaluation and assessment in the EIE about the potential implications of this state-wide application. Initially, 32 councils resolved to adopt the clause, meaning that the remaining three-quarters of councils across the state chose not to. Yet the EIE does not evaluate or analyse the intended effects of moving this policy from an opt-in clause for 32 self-nominated councils to one that is imposed on all NSW councils.

In 2021 the process was subject to measured consideration and evaluation and supported with locally-specific information:

- The discretion offered to councils in 2021 to adopt the clause came with the proviso that 'they have appropriate information and justification to support the flood related development controls'².
- DPE committed to targeted engagement and established a reference group to assist in evaluating whether the adoption of the clause in each council's LEP was appropriate³.

By moving to adopt this clause state-wide, the EIE appears to deviate completely from this earlier consultation process. While 32 councils complied with this process to opt-in, the EIE now proposes to shift the goalposts by applying the clause to every council state-wide. The nature and risk associated with flooding varies from catchment to catchment and site to site and therefore needs to be considered in relation to the local context. However, the EIE lacks an evaluation of whether the application of this clause in all local areas is appropriate, and whether there may be any unintended consequences. For example, how would the list of affected land uses be tailored to reflect local conditions, does every council have access to accurate and up-to-date flood data necessary to apply the clause, what funding would be available to assist councils with relevant flood studies, and what may be the implications for local landowners in the affected areas?

Indeed, the NSW Government response to recommendation 21 of the NSW Independent Flood Inquiry was explicit in supporting the recommendation *in principle*, noting that:

*Further consideration needs to be given to the implications of this recommendation and the appropriate timeframes for delivery, in consultation with communities likely to be impacted.*⁴

These implications have not been adequately considered or analysed as part of the EIE.

¹ EIE, p 5

² [Considering Flooding in Land Use Planning Guidelines](#), July 2021

³ DPE's Flooding webpage noted in August 2021: *Following the expression of interest, we will undertake targeted engagement with relevant councils and develop an appropriate review mechanism, seeking external views, to assist both a council and the department in evaluating whether the adoption of the clause in the local environmental plan is appropriate.*

⁴ [NSW Government response to the NSW Independent Flood Inquiry](#)

For these reasons, LGNSW does not support the one size fits all approach unless it is subject to further evaluation and investigation and a roadmap of consultation with all councils. Prior to mandating a one-size-fits-all approach across the state, the DPE should give priority to finalising the clause for the 32 self-nominated councils. For the remaining three-quarters of NSW councils, rather than a blanket approach, LGNSW would like to see DPE taking a risk-based approach to determine the high-risk catchments and focusing on those with appropriate engagement with the relevant councils.

Conclusion

LGNSW acknowledges the recommendations of the 2022 NSW Independent Flood Inquiry and recognises the importance of considering the Probable Maximum Flood for the safety and resilience of communities and the protection of life. However, LGNSW is concerned that the proposal to introduce the 'special flood considerations' clause state-wide has been subject to minimal analysis and evaluation in the EIE and there is no clarity about further consultation with councils or communities prior to its proposed adoption state-wide. In its current form this proposal by the NSW Government is not supported.

Recommendations

1. For the 32 self-nominated councils, LGNSW recommends proceeding to finalise implementation of the clause, to provide certainty for development in those LGAs.
2. LGNSW recommends that any proposal to apply the 'special flood considerations' clause to all council LEPs must be subject to additional consultation with each council and a thorough evaluation of any potential unintended consequences.

Please contact Jane Partridge (T: 9242 4093; E: jane.partridge@lgnsw.org.au) should you wish to discuss.

Yours sincerely



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