Proposed EP&A Regulation 2021

Fact sheet

August 2021

Overview of proposed 2021 EP&A Regulation

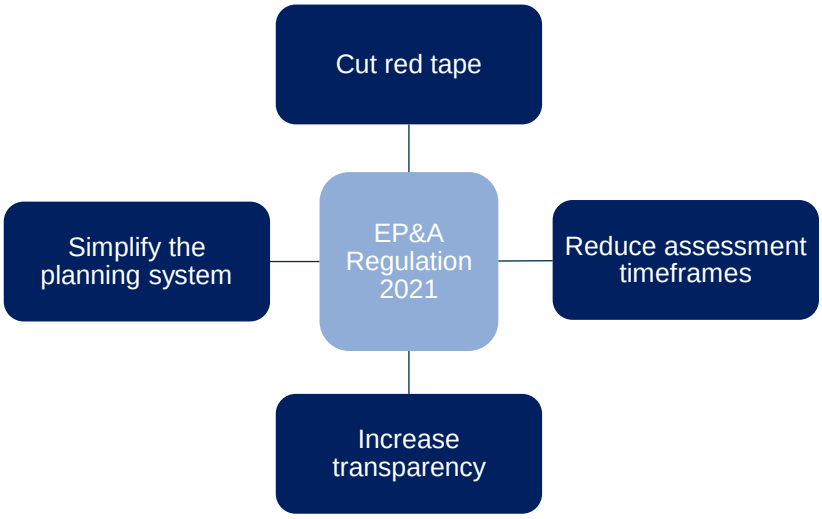
Summary of changes

The proposed Environmental Planning and Assessment Regulation 2021 (proposed 2021 Regulation) contains key provisions for the day-to-day operation of the NSW planning system. It will support the *Environmental Planning and Assessment Act 1979* (the Act).

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

Examples of the key changes are provided below. More information about the amendments are included in the section 'Summary of key amendments'.

What are the benefits of these changes?



The proposed 2021 Regulation will largely continue existing provisions, with targeted changes that:

Reduce administrative burden and increase procedural efficiency

- A range of changes will be made to reduce administrative burden in the processes and requirements for development applications (DAs) and modification applications. This includes updating application requirements and refining notification requirements.
- Improved 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communication processes through a broad shift to online publication and email correspondence, including removal of outdated requirements to make hard copies of documents available.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.

Simplify the planning system

- Improvements to DA processes will simplify the calculation of assessment and deemed refusal periods, stop the clock provisions, and concurrence and referral provisions.
- Requirements for planning certificates will be simplified to reduce complexity and remove unnecessary content.
- The Regulation will be restructured and renumbered, with definitions updated to support easier navigation and clarity.

Establish a modern and transparent planning system

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

Key amendments proposed in the proposed 2021 Regulation

A high-level summary of the key amendments included in the proposed 2021 Regulation is provided below. The full suite of proposed changes is outlined in the Regulatory Impact Statement (RIS) accompanying the exhibition draft of the proposed 2021 Regulation.

Existing use rights

- Replace the term ‘floor space’ with ‘gross floor area’ for the purpose of considering whether an existing use can be changed and adopt the Standard Instrument—Principal Local Environmental Plan (Standard Instrument LEP) definition of this term. This will deliver 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)

- Improve the quality of applications and reduce administrative burden
    - Update application requirements, including to simplify the provisions and remove/update outdated requirements.
    - Prescribe 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*.

- Remove 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.
- Clarify that the consent authority can reject a modification application in certain circumstances.
- Clarify that withdrawal provisions afforded to DAs also apply to all modification applications.
- Require a consent authority who approves a modification to provide the applicant with a modified development consent that complies with any requirements specified by the Planning Secretary. This will provide a consistent approach to modifying a development consent and ensure development consents are iteratively updated to reflect subsequent modifications.
- Require consent authorities to notify submitters of determinations on internal review applications.

Simplify stop the clock and concurrence and referrals provisions

- Simplify the drafting of stop the clock provisions to clarify complex rules and remove redundant provisions.
- Eliminate 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 (provided under cl 110(1)(a) and (b)), to reflect the use of emails and instant uploads of reports and to simplify the calculation of assessment periods.
- Remove unnecessary requirements to notify concurrence authorities and approval bodies, including by providing that modification applications under section 4.55(1) and (1A) of the EP&A 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.
- Provide greater certainty around the day that the clock stops when an information request has been issued.
- Reduce 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.
- Clarify when the clock restarts in circumstances when an application is amended.
- Provide 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.
- Facilitate 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.

Reduce administrative burden associated with post-determination notifications

- Distinguish between a notice of determination issued to an applicant and a notice issued to any other party. This will ensure 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).

- Clarify 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 proposed 2021 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 (see clause 24(1)). The consent authority will be able to reject any application that does not contain this information (see clause 36(1)(b)).

As part of the remake of the Regulation, the DA requirements that are currently set out in Schedule 1 of the 2000 Regulation will be transferred across to the approved form, which is located on the Planning Portal.

Once the new Regulation is made, 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

- Improve information provision and disclosure for CDC applications by:
  - Requiring the following to be included in CDC applications:
    - Details on site configuration and building envelope.
    - Detailed engineering plans for telecommunications or electricity works.
    - A site plan that is drawn to scale.
    - The maximum site coverage of the land.
  - Requiring 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.
  - Requiring 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.
  - Requiring disclosure of site plans in a pre-approval notice.
- Require a CDC application on land that is declared as contaminated under section 60 of the *Contaminated Land Management Act 1997* (CLM Act) to be accompanied by a site audit statement from an accredited auditor.
- Require that any CDC approved on land that is declared as contaminated under section 60 of the CLM Act must contain a condition that any site audit statement recommendations relating to the use of the land for the purpose of the CDC must be complied with.
- Remove duplicate requirements for neighbour notification before the issue of a modified CDC (where neighbours were notified of the original application).

NOTE: Other new application requirements for CDC applications: New clause 102(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). The form will be updated so that 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

- Retitle the relevant clause (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 an 'REF'). This will distinguish the process from the Environmental Impact Statements (EIS) process and give statutory recognition to a widely used phrase.
- Allow the Secretary to prescribe guidelines for the form of environmental assessment for activities that do not require an EIS.
- Require agencies to publish environmental impact assessment (EIA) reports (documenting their REFs) for activities that meet a specified threshold.
- Insert 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.
- Remove redundant clauses, including provisions relating to fisheries management and the Australian Rail Track Corporation Ltd.
- Update the requirements for publication of EIS decision reports.

Designated development

- Add new categories to capture emerging technologies.
- Remove lower risk photovoltaic solar energy generation and smaller scale poultry farms.
- Align 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.
- Vary the concrete works, intensive livestock agriculture, and breweries and distilleries categories based on industry specific changes.
- Alter location-based triggers to:
    - replace the ESA definition with an updated 'environmentally sensitive areas of State significance' (ESASS) definition. This change will improve 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 will help 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.
- Alter 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.
- Include 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

Amendments to:

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

The proposed 2021 Regulation will:

- Refine and reorder the list of matters in the planning certificates schedule (Schedule 3 of the proposed 2021 Regulation), to focus the content of section 10.7(2) certificates on land use and development controls essential to conveyancing. Relegate all other matters to 10.7(5) certificates.
- Retain the requirement to list all relevant planning instruments and development control plans (DCPs) and also require councils to include draft DCPs.
- Require councils to include information on all State Environmental Planning Policies (SEPPs) that zone land.
- Specify 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.
- Rename and reword the complying development clause to clarify the purpose of clause and the information it requires councils to provide. Expand it to include key land use classifications that affect the ability to undertake exempt development.
- Update 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. Currently this information is included on some planning certificates but not others, at the discretion of the relevant council.

- Require councils to indicate whether the land is in a special contributions area and to note whether any draft contributions plans apply to the land.
- Require 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. As mentioned above, the two types of fees applied in the Regulation are:

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

The proposed 2021 Regulation will amend 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 will allow fixed fees to gradually increase over time to better reflect the cost of providing planning services.

Under the proposed 2021 Regulation, the first increase to these fees will not be applied until 1 July 2023, which is the first full financial year after the intended commencement of the proposed 2021 Regulation.

The draft Regulation proposes to apply 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

- Remove 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.
- Clarify that clauses that require a document to be delivered or posted can be met through electronic methods.
- Allow publication requirements to be met through electronic communication methods.

Miscellaneous (including definitions)

- Amend the 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.
- Update the definition of urban release area so that maps can be published online.

When will these changes commence?

The proposed 2021 Regulation is expected to commence on 1 March 2022. Transitional arrangements may apply for certain provisions.

How can I have my say?

We invite you to make a submission on the proposed 2021 Regulation via our website during the exhibition period: www.planningportal.nsw.gov.au/EPA-regulation-review

If you would like to speak with us in a language other than English, call 131 450. Ask for an interpreter in your language and then request to be connected to our Information Centre on 1300 305 695.