Response to 2017 issues paper submissions

Your feedback has helped shape and refine the proposed Environmental Planning and Assessment Regulation 2021 (proposed 2021 Regulation).

In late 2017, we exhibited an issues paper to review the *Environmental Planning and Assessment Regulation 2000* (2000 Regulation), noting that the objectives of the review were to:

- reduce administrative burden and increase procedural efficiency
- reduce complexity
- establish a simpler, more modern and transparent planning system.

We received 85 submissions in total, and of these 39% came from councils.

The department reviewed and considered each submission made to the issues paper. This document summarises the key topics and sets out how the department proposes to respond to the issues and comments raised. The proposed 2021 Regulation and supporting materials detail the full suite of changes.

Development assessment

What you told us

Fifty-eight stakeholders made comments about procedures relating to development assessment and consent in their submissions. About 40% of these comments concerned notification, public exhibition, submission and consultation requirements. Most stakeholders emphasised the importance of balancing notification obligations with administrative efficiency, and supported efforts to harmonise exhibition requirements.

Other comments related to assessment processes and timeframes. Deemed refusal periods were the most commonly raised topic for stakeholders in this category. Many submissions advocated for greater transparency on assessment processing times and longer assessment periods for the purpose of deemed refusals. Feedback from stakeholders indicated that development application (DA) timeframes and advertising requirements are unclear because regulatory provisions are complex.

Other comments related to:

- improving the quality of DAs
- standard conditions of consent for development approvals
- support for enabling the withdrawal or rejection of modification applications.

How we are responding

The proposed 2021 Regulation will improve the quality of applications and reduce administrative burden. It will do this by:

- updating application requirements, and simplifying the provisions
- prescribing additional requirements for modification applications and proposed amendments to development applications that are still under assessment.

  This will improve the quality of information submitted with these applications.

Note: The amendments to application requirements as part the remake of the Regulation relate to **local development applications**. The amendments will not affect any changes to requirements for state significant development (SSD) and state significant infrastructure (SSI) that were made through the *Environmental Planning and Assessment Amendment (Major Projects) Regulation 2021* in July 2021.

The proposed 2021 Regulation will:

- 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 the calculation of assessment and deemed refusal periods and stop-the-clock provisions 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 assessment period, for example by removing the 2 concessional days occurring while the concurrence authority or approval body's request for additional information remains unanswered, 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
    - provide greater certainty about the day that the clock stops when an information request has been issued
    - reduce unnecessary delays and provide greater certainty about 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
        - 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.

Complying development

What you told us

Eighteen stakeholders made comments about complying development in their submissions. Almost half related to processes and procedures.

Submissions discussed:

- challenges associated with complying development that also require approvals under other legislation
- the need for a clearer explanation of the complying development pathway
- establishing restrictions for complying development on contaminated land
- making documents associated with complying development certificates (CDCs) available online
- the appropriateness of location-based restrictions on use of complying development
- the regulation-making power to list classes of complying development that an accredited certifier is not authorised to issue a CDC (Section 4.28(2)).

How we are responding

The proposed 2021 Regulation will improve information disclosure for CDC applications, approvals and notifications. This will make the approval pathway more transparent.

Changes include:

- Requiring CDC applications to include:
  - details of 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 used to determine the CDC application to be listed on the CDC, with enough guidance on how and where the documents can be accessed.
- Requiring pre-approval notices to identify the relevant State Environmental Planning Policy 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.
- Requiring 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.
- Requiring 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.
- Removing duplicate requirements for neighbour notification before a modified CDC (where neighbours were notified of the original application) is issued.

- Updating documents required for traffic generating complying development clause to reflect the fact that there is more than one roads authority.

Note on other new application requirements for CDC applications: New clause 102(1) provides that an application for a complying development certificate 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).

Electronic communication methods

What you told us

Most submissions about electronic communication methods expressed support for updates to processes to reflect advances in technology and communication methods. Some stakeholders suggested that:

- amendments should allow processes such as public exhibition, notification and notices of determination to use digital mechanisms, as a key method of reducing administrative costs and burdens for councils
- the ability to notify applicants and submission makers by electronic media would result in significant time, resource and cost saving for consent authorities. The ability to exhibit required documents electronically would also result in significant cost savings for applicants.
- there should be more emphasis on digital community engagement tools, not just development lodgement tools.

However, a number of stakeholders noted that the department would need to increase the functionality and services provided by the NSW Planning Portal to ensure the benefits of electronic improvements are fully realised (for example, process improvements, time and cost savings and a reduction in administrative burden). For example, stakeholders suggested that the delivery of online services and open data through the NSW Planning Portal would need to be supported by effective integration with councils' own information systems.

Stakeholders suggested the department increase awareness of the NSW Planning Portal and its functions.

Stakeholders also emphasised the importance of ensuring members of the public who do not have the internet have adequate access to planning information and are not disadvantaged by a move to online communication methods. In this regard, it was noted that:

- internet access in regional, rural and remote communities and locations is different to urban locations and a mix of media for communicating planning information may be necessary to ensure some stakeholder groups are not inadvertently excluded
- increased use of digital communication options, alongside other ways of engaging that meet diverse community needs and preferences, is supported. A guiding principle should be that digitisation provides increased opportunity for public involvement and participation, in keeping with the Act's objects.

How we are responding

The department has responded to submissions that expressed support for digital communication methods in the planning process. The *Environmental Planning and Assessment Amendment (Planning Portal) Regulation 2020* made changes to clarify and simplify DA process requirements. This involved making changes to the way that information, documents, and applications are lodged, submitted, notified, and determined. It removed outdated requirements that restricted the use of electronic methods. The changes reflect the expanded use of the NSW Planning Portal for lodging and processing DAs, CDCs, and other kinds of applications.

The *Environmental Planning and Assessment Amendment (Public Exhibition) Regulation 2020* also made changes to clauses that imposed requirements to publish notices in newspapers. These clauses have been updated to require online notification only, allowing planning/consent authorities the discretion to choose to publish in newspapers.

The proposed 2021 Regulation seeks to further update provisions to account for advances in technology, communication methods, and the NSW Planning Portal. The proposed 2021 Regulation will:

- consolidate provisions relating to public exhibition for DAs. This will simplify the public exhibition provisions and make them easier to understand and apply. See clause 53 ('Notice of development applications') of the proposed 2021 Regulation.
- remove certain provisions requiring hard copy documents to be made available free or for a fee (for example, at an office of the department or a council) and require that this information be made available electronically. See, for example, clauses relating to urban release area maps (see clause 252 'Definitions'), the inspection of modification applications (see clause 96 'Notice of modification applications for designated development, State significant development and other development') and practice notes for contributions plans (see clause 192 'Form of contributions plan').
- remove outdated terminology that restricts the use of electronic methods – including delivered notices or delivery of documents 'by hand' or 'by post'. See, for example:
    - clause 202 (formerly clause 269 - Proposal to constitute development area) which has been updated to remove requirements to post or deliver documents. The clause now only requires notice to be provided in writing.
    - clauses 65 (formerly clause 97 'Modification or surrender of development consent or existing use right') and 171 (formerly clause 197 'Surrender of approvals or existing use rights'), which have been updated to remove references to outdated terminology ('duly signed and delivered notices'). The updated clauses retain requirements for notice to be in writing and to be given to the consent authority. These requirements can be met electronically.
- 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. See clause 82 'Notice to approval bodies of determination of development application for integrated development' of the proposed 2021 Regulation, which now requires that a notice given under section 4.47(6) of the Act must be provided (rather than sent) to the approval body within 14 days after the date of the determination of the relevant DA. This new provision has been drafted to allow the notice to be provided by email or post or by lodging the notice on the NSW Planning Portal.

The proposals in the proposed 2021 Regulation align with the NSW Digital Government Strategy and acknowledge the capacity of current systems and the need to provide options for members of the community that are not digitally connected.

Infrastructure and environmental impact assessment

What you told us

Councils and NSW Government agencies supported the proposal to require publication of a review of environmental factors (REF). Stakeholders commented on the process, timeframes, and general requirements for activities by public authorities. These comments proposed a review of the factors to be considered when preparing a REF.

Some stakeholders suggested certain aspects of the state-significant infrastructure process, such as timeframes and the form and content of requirements for an Environmental Impact Statement (EIS), should be in the 2000 Regulation, instead of within the guidelines. Stakeholders also advocated for the introduction of a climate impact statement in the EIS requirements.

How we are responding

The proposed 2021 Regulation will:

- retitle the relevant clause (currently clause 228 'What factors must be taken into account concerning the impact of an activity on the environment?') to clearly reference a 'review of environmental factors'. This will distinguish the process from the EIS process and give statutory recognition to a widely used phrase.
- require certain reports that determine whether an activity is likely to have a significant environmental impact (that is,. REFs) to be published. Reports will need to be published on the determining authority's website or the NSW planning portal before the activity begins, but this requirement will only apply to activities meeting specified criteria.
- allow the Secretary of the department to prescribe guidelines for the factors that a determining authority needs to take into account when considering the likely impact of an activity, and the format of a REF.
- clarify that the current list of relevant factors is not exhaustive, and any other relevant factors must be considered
- clarify that only relevant factors need to be considered when assessing the likely impact of an activity on the environment
- require authorities to consider strategic planning documents under Part 3 of the Act (local strategic planning statements, regional strategic plans or district strategic plans)
- remove environmental assessment savings provisions for fishing activities that are no longer required
- amend Australian Rail Track Corporation (ARTC)-specific provisions, including removal of provisions that are no longer required for wetlands affected development and rail infrastructure facilities
- make minor housekeeping amendments to update an Act reference and delete of a redundant subclause related to EIS decision report publication requirements.

Designated development

What you told us

Thirty-four stakeholders made comments about designated development in their submissions. Stakeholder comments mostly responded to the issues identified in the issues paper.

Stakeholders were primarily concerned with the designated development definitions and thresholds and 43% of designated development comments related to the definitions in Schedule 3 of the 2000 Regulation. Twenty-five per cent of designated development submissions raised definitional issues related to livestock thresholds (Clause 21 – livestock intensive industries). Other Schedule 3 definitions and thresholds raised by stakeholders included aquaculture, turf farms, and port activities.

Thirty-one per cent of comments on designated development related to environmentally sensitive areas (ESAs). Stakeholders advocated for greater consistency in the definition of ESA across all environmental planning instruments and legislation, for the inclusion of new items such as State Heritage Register items and Aboriginal Places, and for harmonisation of designated development provisions with the *Biodiversity Conservation Act 2016*.

A small number of stakeholders commented on consistency between the 2000 Regulation (Schedule 3) and *Protection of the Environment Operations Act 1997* (POEO Act). A larger proportion of stakeholders supported harmonisation and consistency more generally.

How we have responded

The proposed 2021 Regulation will:

- 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 metres to 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) 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

What you told us

Comments focused on the role of planning certificates. Many stakeholders agreed certificates lack consistency, can be lengthy and overly complex, and include information of potentially little use to incoming purchasers.

Some stakeholders, including many councils, expressed support to standardise the formatting, language, and information in certificates. Subject to the department allowing sufficient flexibility to address local issues.

Other issues raised related to the:

- lack of clarity on what information must be included
- range of state-level information that must be included
- costs of producing certificates
- liability if a certificate is incorrect
- best way of maintaining data integrity
- lack of timely notification for legislative changes impacting certificates

The issues paper also asked if stakeholders would support an online system for planning certificates. Most stakeholders supported-in-principle a move to an online system through the Planning Portal, subject to suitable implementation measures being developed. However, many councils expressed reservations about how such a system would work in practice, including which organisation would take responsibility for ensuring data accuracy. Some councils opposed a centralised system due to revenue implications and concerns around data ownership, accuracy and liability issues.

Following the submissions received in response to the issues paper, a working group was established to workshop detailed amendments to the provisions in Schedule 4. The working group included stakeholders, including a range of regional and metropolitan councils who provided detailed feedback on the current provisions in their submissions to the issues paper.

How we have responded

The proposed 2021 Regulation will:

- refine and reorder the list of matters in Schedule 4 to focus the content of section 10.7(2) certificates on key planning matters and land use and development controls essential to conveyancing

- update the matters listed for inclusion on planning certificates, to provide greater clarity, address gaps, and remove information that is not useful to incoming purchasers or can be found elsewhere. Amendments include:
    - Retain the requirement to list all relevant planning instruments and development control plans (DCPs), but also require councils to include draft DCPs.
    - Require councils to include information on all SEPPs that zone land.
    - Specify that draft environmental planning instruments (EPIs) and draft DCPs that have not been made within 3 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 in particular 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.
- Make minor housekeeping amendments.

The department considered developing a prescribed form for planning certificates. We would, however, need to consult further to ensure any template is fit for purpose and allows sufficient flexibility for councils to address local matters. The department is planning to undertake further consultation with councils in 2022 to inform the development of a template that can be used to standardise planning certificates

Fees and charges

What you told us

40 stakeholders made comments about fees and charges in their submissions (47% of all submissions). Stakeholder comments covered a range of issues already identified by the department and within the scope of the review. However, a substantial proportion (19%) identified related to technical fee calculation and application questions on building and construction certification costs, fee recovery, fee reduction incentives, notification and advertising fees and the Sydney Region Development Fund (SRDF).

Stakeholders consistently raised concerns about the complexity of calculating section 4.55 (modification application) fees and risks that applicable fees are not reflective of the resources required to assess modification applications. Some stakeholders suggested that the cost structure for different modification applications was inconsistent and illogical.

Several stakeholders raised concerns with planning certificate fees falling far below the cost of providing this service, limitations with using estimated costs of works as a basis for setting fees and opportunities for the imposition of a compliance levy.

Most stakeholders commenting on fees and charges made submissions about how development application fees and charges should be calculated. Twenty-two stakeholders, including local councils, Regional Organisations of Councils and non-government organisations advocated that application and referral fees should be set on a cost recovery basis. On the other hand, 2 stakeholders expressly objected to fees being set on a cost recovery basis and argued for discretion in fee setting.

How we have responded

The 2000 Regulation sets the fees and charges for various planning related services offered by councils and other consent authorities. 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 fix 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 start 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.

Our response to other issues you raised

We considered all feedback we received on other aspects of the 2000 Regulation, including planning instruments, planning bodies and administration, development contributions, and miscellaneous provisions. The proposed 2021 Regulation includes minor amendments for some of these areas to increase transparency and modernise and simplify the planning system.

In addition to the amending regulations detailed under the electronic communication methods section above, some other changes have progressed separately to the review of the 2000 Regulation. These include amendments to provisions in the 2000 Regulation relating to development contribution provisions and major projects – see below.

Amendments to development contribution provisions

The Environmental Planning and Assessment Amendment (Development Contributions) Regulation 2021 made changes to development contributions provisions in the 2000 Regulation in February 2021. These amendments were made as part of a broader package of infrastructure contributions system improvements. The changes included introducing new reporting requirements for councils and planning authorities, to improve transparency about receipt and expenditure of infrastructure contributions received under local contributions plans and planning agreements.

Amendments to major projects provisions

On 1 July 2021, the *Environmental Planning and Assessment Amendment (Major Projects) Regulation 2021* made a number of amendments to increase the efficiency and transparency of major projects administration and assessment, ensure applications and reports are prepared to a consistently high standard, and introduce formal quality assurance measures for EISs.

These included amendments to Part 1, Part 6, Part 10, Part 17, and Schedule 2 of the 2000 Regulation. While some of these amendments began on 1 July, others will commence later in the year.

These amendments are not yet reflected in the proposed 2021 Regulation as they were made after we finalised the consultation draft, but we will incorporate them into the final 2021 Regulation before it is made.

Next steps

We are exhibiting the proposed 2021 Regulation until 22 September 2021. We will then consider feedback received and refine proposals where appropriate. After this, a final 2021 regulation will be made with sufficient transition time and guidance to help stakeholders adjust to the changes.

How you can have your 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.