



PLANNING SYSTEM

Act and regulation changes / Local planning

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New guideline and changes to section 117 direction and EP&A Regulation on flood prone land

This circular provides an overview of a new guideline to the Floodplain Development Manual and changes to the Environmental Planning and Assessment Regulation 2000 and section 117 Direction on flood prone land.

Introduction

The NSW Government's *Floodplain development manual: the management of flood liable land*, April 2005 (the Manual) sets out the Government's Flood Prone Land Policy.

This circular provides advice on a package of changes concerning flood-related development controls on residential development on land above the 1-in-100 year flood and up to the Probable Maximum Flood (PMF). These areas are sometimes known as low flood risk areas.

The package includes an amendment to the Environmental Planning and Assessment Regulation 2000 in relation to the questions about flooding to be answered in section 149 planning certificates, a revised ministerial direction regarding flood prone land (issued under section 117 of the *Environmental Planning and Assessment Act 1979*) and a new Guideline concerning flood-related development controls in low flood risk areas.

The changes follow community concern over notations about low flooding risk being included on section 149 planning certificates and the appropriate development controls that should apply to residential development in low flood risk areas.

The changes will provide additional guidance on how the Manual is to be applied in relation to development controls in low flood risk areas and the questions to be answered in section 149 planning certificates.

Guideline on development controls on low risk flood areas—Floodplain Development Manual

A new *Guideline on development controls on low risk areas—Floodplain Development Manual* (the Guideline) has been issued to provide additional guidance on matters dealt with in the Manual. The Guideline should be read as part of the Manual. The purpose of the Guideline is to assist councils in determining the appropriate flood planning level (FPL) for residential development as well as to determine what are appropriate flood-related development controls on residential development in low flood risk areas.

The Guideline confirms that, unless there are exceptional circumstances, councils should adopt the 100-year flood as the FPL for residential development. In proposing a case for exceptional circumstances, a council would need to demonstrate that a different FPL was required for the management of residential development due to local flood behaviour, flood history, associated flood hazards or a particular historic flood.

The Guideline also notes that, unless there are exceptional circumstances, councils should not impose flood related development controls on residential development on land above the residential FPL (low flood risk areas).

Justification for variations to the above should be provided in writing to, and agreed by, the Department of Natural Resources and the Department of Planning prior to exhibition of a

draft local environmental plan or a draft development control plan that proposes to introduce flood-related development controls on residential development.

However, the Guideline does acknowledge that controls may need to apply to critical infrastructure (such as hospitals) and consideration given to evacuation routes and vulnerable developments (like nursing homes) in areas above the 100 year flood.

Section 733 of the *Local Government Act 1993* (the LG Act) protects councils from liability if they have followed the requirements of the Manual. The Minister has notified that the Guideline should be considered in conjunction with the Manual under section 733(4) and (5) of that Act.

Councils will need to follow both the Manual and the Guideline to gain the protection given by section 733 of the LG Act.

Amendment to Regulation on section 149 certificates

Schedule 4 of the Environmental Planning and Assessment Regulation 2000 (the Regulation) has been amended in relation to flooding by the Environmental Planning and Assessment Amendment (Flood Related Development Controls Information) Regulation 2007. The amendment will require councils to distinguish between the situation where there are flood-related development controls on nominated types of 'residential development' and all other development. The nominated types of residential development are dwelling houses, dual occupancies, multi-dwelling housing and residential flat buildings (but not group homes or seniors living).

For ease of reference, words and expressions used in the new provision have the same meaning as in the Standard Instrument for local environmental plans, which councils are required to adopt as part of the NSW Planning Reform process.

Flood-related development controls are not defined but would include any development standards relating to flooding applying to land, that are a matter for consideration under section 79C of the *Environmental Planning and Assessment Act 1979* (the EP&A Act).

Clause 7A(1) of the Regulation means that councils should not include a notation for residential development on section 149 certificates in low risk areas if no flood-related development controls apply to the land. However, a notation for all residential development below the flood planning level would be appropriate if council has adopted flood-related development controls for this area. Under clause 7A(2), councils could include a notation for critical infrastructure or vulnerable development on

section 149 certificates in low risk areas but only if flood related development controls apply to such development.

The amendment to the Regulation will commence on 16 February 2007 to allow councils time to change the formation of their 149 certificates.

Section 117 Ministerial Direction No. 15—Flood Prone Land

Draft local environmental plans are required to be consistent with directions issued under section 117 of the *Environmental Planning and Assessment Act 1979*. Direction No. 15—Flood Prone Land requires draft plans to be consistent with the principles of the Manual. Direction No. 15 has been revised to make it clear that consistency with the Guideline will also be required when Councils are preparing draft local environmental plans. The revised Direction will apply to draft local environmental plans that have not been issued with a section 65 certificate under the Environmental Planning and Assessment Act.

Further information

The Guideline and the revised section 117 Direction are attached. They are also available on the Department's website at www.planning.nsw.gov.au/planning_reforms. The Regulation is available from the Parliamentary Counsel's Office website at www.legislation.nsw.gov.au in the 'As Made' section.

The NSW Government's Floodplain Development Manual (2005) is available online at www.dnr.nsw.gov.au/floodplains/manual.shtml.

For more information, please contact the relevant Department of Planning local planning team. Office contact details are available at www.planning.nsw.gov.au/aboutus/contactus.asp.

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Important note

This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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To: All councils in New South Wales

GUIDELINE ON DEVELOPMENT CONTROLS ON LOW FLOOD RISK AREAS— FLOODPLAIN DEVELOPMENT MANUAL

This Guideline provides advice to councils on appropriate flood related controls for residential and non-residential development in areas of flood prone land above the FPL for residential development (sometimes known as low risk areas) and associated advice on section 149 certificate notifications.

Introduction

The NSW Government's Flood Prone Land Policy and Floodplain Development Manual support the wise and rational development of flood prone land, the area inundated by the probable maximum flood (PMF).

This is achieved by the strategic consideration of a number of key issues relating to protecting existing and future occupants of flood prone land from the ramifications of flooding. These key issues are:

- safety of people;
- management of the potential damage to property and infrastructure; and
- management of the cumulative impacts of development.

Local councils are responsible for managing the flood risk in their local government areas. The Manual outlines the floodplain risk management (FRM) process which assists councils in making informed decisions on managing flood risk to existing and future development through the development and implementation of FRM plans.

The Policy acknowledges that flood prone land is a valuable resource that should not be sterilised by unnecessarily precluding its development and that development should be treated on its merits rather than through the imposition of rigid and prescriptive criteria.

This Guideline should be read as part of the Floodplain Development Manual.

Categories of Flood Prone Land

To balance protection of existing and future inhabitants from flood hazard and the potential danger and damage associated with use of the flood prone land, the Manual promotes the appropriate use of flood prone land by breaking it down into areas dependant upon frequency of inundation, their hydraulic function (floodways in which floodwaters are conveyed, flood storage areas where flood waters are temporarily stored during flood events, and flood fringe areas) and flood hazard (a minimum of two categories, high and low). These categories assist councils in determining appropriate development limits and controls to reflect the variation in flood risk across flood prone land and the associated consequences on residents and their property. Key categories are:

1. **Floodways:** Floodways are the areas of the floodplain which are essential to convey flood waters. Development of these areas would have significant adverse impacts upon flood behaviour which in turn may result in adverse affects on other development and the community. Development of floodways would also expose occupants and their property to significant levels of flood danger and damage.
2. **Below the residential FPL:** The area of the floodplain where residential development is subject to flood related development controls, i.e. below the residential FPL (as determined in accordance with the Floodplain Development Manual). These are the areas of the floodplain where development limits and controls are used to reduce the frequency of exposure of people and property to flood risk and the associated danger and damage. Development controls in this area need may limit the area that can be developed and may include minimum fill levels, minimum floor levels, the requirement to use flood compatible building materials and need to address emergency management issues as outlined in (3) below.
3. **Above the residential FPL:** The area of flood prone land above the residential FPL and therefore these are areas where residential development is not subject to flood related development controls. These areas generally have a low risk of flooding and are sometimes known as low flood risk areas. As such, they are areas where no development controls should apply for residential development but the safety of people and associated emergency response management needs to be considered and may result in:
 - Restrictions on types of development which are particularly vulnerable to emergency response, for example developments for aged care.
 - Restrictions on critical emergency response and recovery facilities and infrastructure. These aim to ensure that these facilities and the infrastructure can fulfil their emergency response and recovery functions during and after a flood event. Examples include evacuation centres and routes, hospitals and major utility facilities.

Standards for Flood Controls for Residential Development

Councils are responsible for determining the appropriate flood planning levels for land within their local government area. Whilst the flood used to determine the residential FPL is a decision of the local council, the Manual highlights that FPLs for typical residential development would generally be based around the 100 year flood plus an appropriate freeboard (typically 0.5m).

This Guideline confirms that, unless there are exceptional circumstances, councils should adopt the 100 year flood as the FPL for residential development. In proposing a case for exceptional circumstances, a Council would need to demonstrate that a different FPL was required for the management of residential development due to local flood behaviour, flood history, associated flood hazards or a particular historic flood.

Unless there are exceptional circumstances, councils should not impose flood related development controls on residential development on land with a low probability of flooding, that is, land above the residential FPL (low flood risk areas).

Justification for variations to the above should be provided in writing to, and agreed by, the Department of Natural Resources and the Department of Planning prior to exhibition of a draft local environmental plan or a draft development control plan that proposes to introduce flood related development controls on residential development.

Advice on Section 149 Certificates

Schedule 4 of the Environmental Planning and Assessment Regulation 2000 (the Regulation) has been amended in relation to flooding by the Environmental Planning and Assessment Amendment (Flood Related Development Controls Information) Regulation 2006. The amendment will require councils to distinguish between the situation where there are flood related development controls on nominated types of 'residential development' and all other development. The nominated types of residential development are dwelling houses, dual occupancies, multi dwelling housing and residential flat buildings (but not group homes or seniors living).

For ease of reference, words and expressions used in the new provision have the same meaning as in the Standard Instrument which councils are required to adopt as part of the NSW Planning Reform process.

Flood related development controls are not defined but would include any development standards relating to flooding applying to land, that are a matter for consideration under section 79C of the *Environmental Planning and Assessment Act 1979* (the EP&A Act).

Clause 7A(1) of the Regulation means that councils should not include a notation for residential development on section 149 certificates in low risk areas if no flood related development controls apply to the land. However, a notation for all residential development below the flood planning level would be appropriate if council has adopted flood related development controls for this area. Under clause 7A(2) councils could include a notation for critical infrastructure or vulnerable development on section 149 certificates in low risk areas but only if flood related development controls apply to such development.

Section 149(5) of the EP&A Act also provides that council can include 'such other relevant factors affecting the land that the council may be aware'. Therefore a council may include additional information in a section 149 certificate it believes is relevant to the land.

Section 117 Ministerial Direction No. 15—Flood Prone Land

Draft local environmental plans (LEPs) are required to be consistent with directions issued under section 117 of the EP&A Act. Direction No.15—Flood Prone Land requires draft plans to be consistent with the principles of the Manual. Direction No. 15 has been amended to make it clear that consistency with this Guideline will also be required when Councils are preparing draft LEPs. The amended Direction will apply to draft local environmental plans that have not yet been issued with a section 65 certificate under the EP&A Act.

Legal Responsibility and Indemnities

Section 733 of the *Local Government Act 1993* (LG Act) protects councils from liability if they have followed the requirements of the Manual. Under section 733 (4) and (5), the

Minister has given notification that this Guideline should be considered in conjunction with the Manual.

Further Information

Please contact the relevant regional offices of the Department of Natural Resources (www.dnr.nsw.gov.au) or the Department of Planning (www.planning.nsw.gov.au).

Direction No. 15 – Flood Prone Land

Objective

- To ensure that development of flood prone land is consistent with the NSW Government's Flood Prone Land Policy and the principles of the Floodplain Development Manual, 2005.
- To ensure that the provisions of an LEP on flood prone land is commensurate with flood hazard and includes consideration of the potential flood impacts both on and off the subject land.

Where this direction applies

This direction applies to all councils that contain flood prone land within their LGA.

When this direction applies

This direction applies when a council prepares a draft LEP that creates, removes or alters a zone or a provision that affects flood prone land.

What a council must do if this direction applies

- (1) A draft LEP shall include provisions that give effect to and are consistent with the NSW Flood Prone Land Policy and the principles of the Floodplain Development Manual, 2005 (including the *Guideline on Development Controls on Low Flood Risk Areas*).
- (2) A draft LEP shall not rezone land within the flood planning areas from Special Area, Recreation, Rural or Environmental Protection Zones to a Residential, Business, Industrial or Special Area Zone.
- (3) A draft LEP shall not contain provisions that apply to the flood planning areas which:
 - (a) permit development in floodway areas,
 - (b) permit development that will result in significant flood impacts to other properties,
 - (c) permit a significant increase in the development of that land,
 - (d) are likely to result in a substantially increased requirement for government spending on flood mitigation measures, infrastructure or services, or
 - (e) permit development to be carried out without development consent except for the purposes of agriculture (not including dams, drainage canals, levees, buildings or structures in floodways or high hazard areas) or exempt development.
- (4) A draft LEP must not impose flood related development controls above the residential flood planning level for residential development on land, unless a council provides adequate justification for those controls to the satisfaction of the Director-General (or an officer of the Department nominated by the Director-General).
- (5) For the purposes of a draft LEP, a council must not determine a flood planning level that is inconsistent with the Floodplain Development Manual 2005 (including the *Guideline on Development Controls on Low Flood Risk Areas*) unless a council provides adequate justification for the proposed departure from that Manual to the satisfaction of the Director-General (or an officer of the Department nominated by the Director-General).
- (6) A draft LEP may be inconsistent with this direction only if council can satisfy the Director-General (or an officer of the Department nominated by the Director-General) that any particular provision or area should be varied or excluded having regard to the provisions of section 5 of the Environmental Planning and Assessment Act, and
 - (a) the rezoning is in accordance with a floodplain risk management plan prepared in accordance with the principles and guidelines of the Floodplain Development Manual, 2005, or
 - (b) the rezoning is, in the opinion of the Director-General (or an officer of the Department nominated by the Director-General), of a minor significance.

Note: “flood planning area”, “flood planning level”, “flood prone land” and “floodway area” have the same meaning as in the Floodplain Development Manual 2005