

Department of Planning and Environment


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Guideline for drafting conditions for State significant projects

June 2023





Acknowledgement of Country

The Department of Planning and Environment acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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While this guideline provides general information about the approach the department will take in drafting conditions for State significant projects, the decision maker's conditions for each State significant development or State significant infrastructure application should be considered on a case-by-case basis. This guideline should not be relied on as a substitute for legal advice and an applicant, or a proponent should seek their own legal advice in relation to any conditions attached to the consent or approval.

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1 Introduction

The NSW Department of Planning and Environment (the department) assesses projects that are deemed to be of State significance under the *Environmental Planning and Assessment Act 1979* (EP&A Act) due to their size, economic value or potential impacts. These projects include:

- State significant development (SSD)
- State significant infrastructure (SSI)
- Critical State significant infrastructure (CSSI).

The decision-maker (for example, the Minister for Planning and Public Spaces, or delegate) can grant consent to SSD applications or approve SSI applications, with such modifications or on such conditions as the decision-maker may determine.¹ The decision-maker can also refuse consent or disapprove the application for approval.²

1.1 Purpose of this guideline

This guideline outlines the department's best-practice approach to drafting conditions of consent for SSD applications and conditions of approval for SSI applications when the department recommends a project for approval.

The guideline provides information for applicants, stakeholders and the community, and sets out:

- the roles and responsibilities that the department, other regulatory agencies and the Independent Planning Commission have when preparing and enforcing conditions
- the purpose of conditions
- a framework for drafting effective conditions.

The department is committed to drafting conditions that stakeholders can understand. This guideline aims to make conditions more consistent and give applicants, the community and regulatory agencies greater certainty.

1.2 Scope of this guideline

The department will use the framework in this guideline when drafting conditions for all State significant projects.

The department will also apply the principles outlined in this guideline if we need to draft conditions for applications to modify an existing SSD consent or SSI approval.

¹ EP&A Act - [Sections 4.17, 4.55](#) and [4.38\(1\)\(a\)](#) for SSD and [Sections 5.19\(1\) and \(3\)](#) for SSI.

² EP&A Act - [Section 4.38\(1\)\(b\)](#) for SSD and [Section 5.19\(1\)](#) for SSI.

For the purposes of this guideline:

- The term **'consent'** includes the:
 - granting of consent for SSD projects
 - approval of SSI projects
 - modifications to those consents and approvals.
- The term **'applicant'** includes:
 - applicants for SSD projects
 - proponents for SSI projects.

Other terms are defined in the glossary at the end of the guideline.

1.3 Roles and responsibilities

1.3.1 Role of the department

The department coordinates the whole-of-government assessment of State significant projects. We complete assessments in accordance with the objects of the EP&A Act, and any relevant government legislation, plans, policies and guidelines.

The department prepares an assessment report that provides a record of the assessment and evaluation of the project. The report gives the decision-maker clear reasons for any recommendation to help them make an informed decision about approving or refusing the project.

We also prepare recommended conditions of consent for the decision-maker to consider if the project is approved. The assessment report includes the reasons for imposing the proposed conditions.

Once the decision-maker determines the project, the department publishes the decision and conditions online. We also give public notice of the reasons for the decision.

If a decision-maker grants consent to the application, the department monitors compliance with any conditions. We take regulatory action if the applicant does not comply.

1.3.2 Role of government agencies

The department often asks government agencies that administer or regulate the impacts of State significant projects to provide us with advice. We may ask for this advice at various stages of the project life cycle. This includes during the assessment of the project, when preparing conditions and for post-approval activities.

1.3.3 Role of the Independent Planning Commission

The Independent Planning Commission (the commission) is the consent authority for any of the following development that is SSD (unless the application is made by or on behalf of a public authority or unless the development is declared to be SSI related development³):

- the local council has objected to the application, or
- there are at least 50 submissions by way of objection (other than from a council) to the application, or
- the proponent has disclosed a reportable political donation⁴.

The commission is also the consent authority for SSD modification applications:

- if the proponent has disclosed a reportable political donation⁵, or
- where it granted development consent for the original development application⁶.

When an application is referred to the commission for determination, the department gives the commission the department's assessment report, along with draft recommended conditions of consent. The commission then determines the application and issues conditions of consent (if the project is approved). The conditions imposed by the commission may differ from, or go beyond, those that the department recommended in its assessment report.

1.3.4 Role of the applicant

If the decision-maker grants consent for a project, the applicant is responsible for carrying out the project in accordance with the conditions of consent. It is an offence to fail to comply with, or breach any conditions.

³ [State Environmental Planning Policy \(Planning Systems\) 2021 – Section 2.7\(1\) and s 2.7\(2\)](#)

⁴ [State Environmental Planning Policy \(Planning Systems\) 2021 – Section 2.7\(1\)](#)

⁵ [State Environmental Planning Policy \(Planning Systems\) 2021 - Section 2.7\(3\)](#)

⁶ [EP&A Act – Section 4.55](#)

2 The purpose of conditions

The conditions set out the terms by which a development may be undertaken.

Conditions give the applicant, the community and the department a clear understanding of what the decision-maker has granted consent for, and what requirements or restrictions apply. The purpose of conditions is to:

- ensure the permitted extent of the development is clearly defined
- set out the limits of the development, what activities can be undertaken, and when
- specify mitigation measures to avoid, minimise, manage or offset the potential impacts of the development
- ensure commitments made in the application are delivered as part of the development
- outline the monitoring, reporting and auditing for different stages of the project life cycle, and any other requirements, including when these actions must be undertaken
- set out any consultation requirements in the post-approval phase
- provide administrative arrangements that allow the department to oversee the development.

In some cases, the decision-maker can use a condition to make minor changes to the proposed development, such as redesigning minor aspects of the proposal. If more extensive design changes are required, the department may request further information, and/or suggest the applicant amend their application.

3 Framework for drafting effective conditions

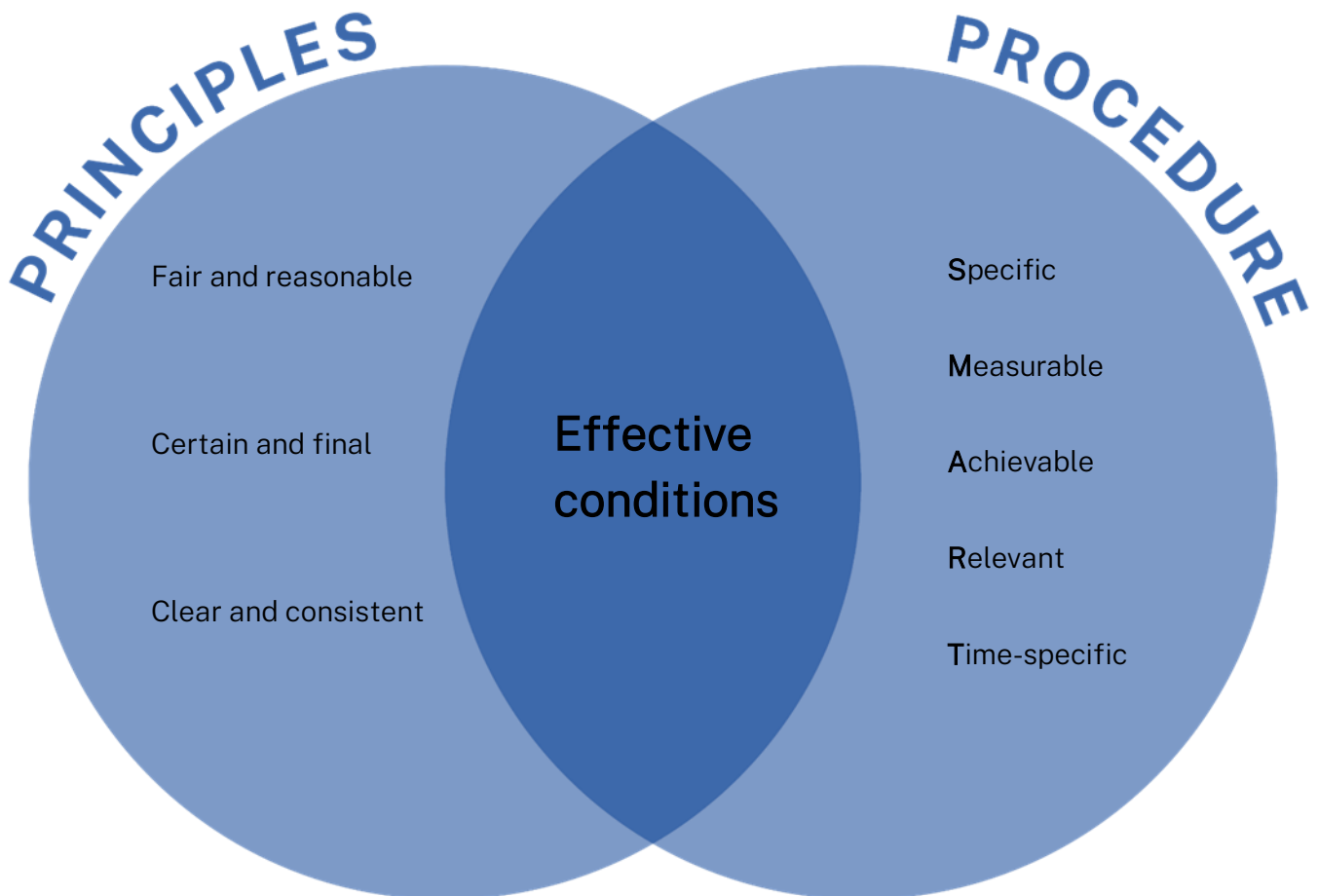
Effective conditions are **valid** and **easy to understand**. They are also easier to comply with and enforce. The department has developed a framework for drafting effective conditions for State significant projects. This is underpinned by key guiding principles and an associated procedure (refer to

Figure 1).

Under the framework, conditions must be:

- fair and reasonable
- certain and final
- clear and consistent.

Drafting conditions using the SMART procedure (specific, measurable, achievable, relevant, and time-specific), will help to achieve these outcomes.



3.1 Guiding principles

3.1.1 Fair and reasonable

The applicant should be able to achieve compliance with conditions in a fair and reasonable way.⁷

A condition must:

- be imposed for a **planning purpose**
- **fairly and reasonably relate to the development** that is the subject of the development application
- not be so **unreasonable** that no planning authority would have imposed it.

Imposed for a planning purpose

Every condition must have a planning purpose, meaning it must be related to a matter either expressly permitted or implied in the EP&A Act. For example, a condition may relate to a matter that the decision-maker must consider under:

- section 4.15 of the Act when determining an SSD application, or
- sections 5.14 to 5.19 of the Act when determining an SSI application.

Fairly and reasonably relates to the development

Conditions should have a nexus to the subject of the application. This means there must be a reasonable connection between the condition and the impact that it aims to mitigate. For example, if the development will create noise near a residential area beyond an acceptable limit, it is reasonable to impose a condition that the applicant must reduce the noise (e.g. by building a sound barrier).

The relationship between the condition and the subject development will be different for each application, so the department will tailor its conditions to the project and its impacts.

Not unreasonable

A condition is generally determined to be unreasonable if it does not satisfy the first 2 points of the Newbury Test. The condition must be for a planning purpose and should have a nexus to the development.

⁷ The guiding principle of 'fair and reasonable' is underpinned by the Newbury Test, which is a set of principles established in [Newbury District Council v Secretary of State for Environment \[1981\] AC 578](#).

3.1.2 Certain and final

Conditions must be certain and final. They should consider and address all issues raised through the assessment of the application and must not defer consideration of any significant matters.

Avoid deferral of decisions to another time or a third party

The decision-maker has a duty to consider the likely impacts of a development. The department will work with the applicant and key stakeholders, such as the local council or other government agencies, to resolve key matters during the assessment of the application.

As required in the [State Significant Development and State Significant Infrastructure Guidelines](#),⁸ any residual uncertainties associated with the project's impacts must be identified in the environmental impact statement (EIS). For example, there may be:

- a lack of baseline data
- uncertainty about the effectiveness of the proposed mitigation measures
- a lack of agreed criteria for evaluating impacts.

These uncertainties must be identified in the EIS along with actions that will be undertaken to address those uncertainties. In some cases, resolving uncertainties may need to be deferred to a condition. In such cases, the condition should require the uncertainty to be resolved as early as possible in project delivery.

3.1.3 Clear and consistent

Clear and consistent conditions are easier to understand, comply with and enforce. The department will draft conditions to identify precisely what development is permitted, and which documents we have relied on to make the determination. This allows the person(s) acting on the condition to understand what they must do. We also improve transparency for other stakeholders.

The following approaches will be used by the department to support clarity and consistency.

Use plain language

The department will write conditions using plain language. We will be explicit so the reader can understand the intent of the condition and the required outcomes. We will use specific and clear language and avoid jargon.

In some circumstances technical terminology is unavoidable. To address this, the department will include a detailed glossary or table of definitions in the consent.

Use defined terms

The department will define specific terms in conditions if we are using them to explain the parameters of where and/or how a condition should be applied.

⁸ See [State Significant Development Guidelines \(Appendix B - preparing an environmental impact statement\)](#) and [State Significant Infrastructure Guidelines \(Appendix B - preparing an environmental impact statement\)](#).

Use definitive wording

The department will use definitive wording such as ‘must’ or ‘will’ (instead of ‘should’, ‘such as’ or ‘may’) to assist in the enforcement of conditions.

Where possible, the department will avoid expressions like ‘generally in accordance with’ or ‘the applicant should take all reasonable steps’, as this allows some variance in compliance.

Avoid re-stating legislative requirements

To reduce the length and complexity of conditions and avoid potential transcription errors, the department will avoid restating legislative or regulatory requirements in conditions. Instead, we will consider using advisory notes to draw the consent holder’s attention to relevant legal responsibilities. Below is an example of an advisory note:

Example note:

Unless an environment protection licence authorises otherwise, the proponent must comply with section 120 of the *Protection of the Environment Operations Act 1997* (POEO Act). Section 120 of the POEO Act makes it an offence to pollute any water.

Adopt a consistent format

The department will structure conditions in a logical format that is easy to follow. The structure of a consent will reflect the nature of the development and the way the applicant must carry it out.

The department will avoid duplicating conditions for the same issue.

3.2 Procedure for writing conditions

3.2.1 SMART (specific, measurable, achievable, relevant and time-specific)

Conditions should have a clear intent. They should nominate specific actions, roles, responsibilities, outcomes and timeframes with which the applicant must comply. The SMART criteria (Figure 2) outlines how the department will draft conditions to achieve specific, measurable, achievable, relevant and time-specific outcomes.

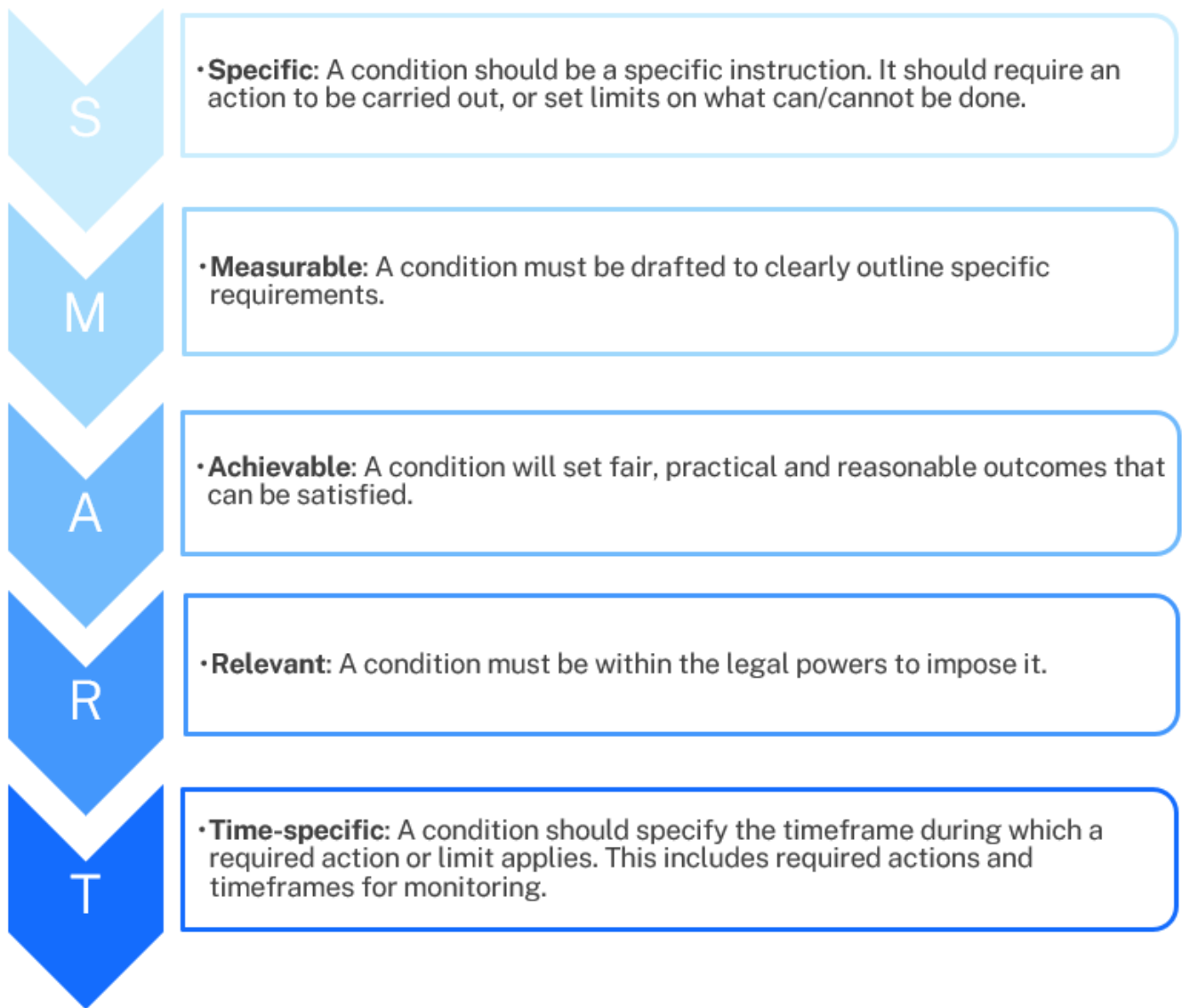


Figure 2. The SMART procedure

4 Glossary

Term	Definition
Applicant	<p>The entity seeking development consent for a State significant development application.</p> <p>For the purposes of this guideline, we have also used ‘applicant’ to refer to the entity seeking approval for a State significant infrastructure application (that is, the proponent).</p>
Conditions of consent	<p>The terms by which a State significant development may proceed.</p> <p>For the purposes of this guideline, we have also used ‘conditions of consent’ to refer to ‘conditions of approval’ for an SSI application.</p>
Critical State significant infrastructure (CSSI)	<p>Any State significant infrastructure may also be declared to be critical State significant infrastructure if it is of a category that, in the opinion of the Minister, is essential for the State for economic, environmental or social reasons.</p>
Decision-maker	<p>The decision-maker includes the:</p> <ul style="list-style-type: none"> • consent authority for a State significant development application (that is, the Independent Planning Commission or its delegate, or the Minister for Planning and Public Spaces, or delegate) • approval authority for a State significant infrastructure application (that is, the Minister for Planning and Public Spaces, or delegate) • approval authority for a critical State significant infrastructure application (that is, the Minister for Planning and Public Spaces).
Department	<p>The Department responsible for administering the EP&A Act.</p>
Determination	<p>A decision to:</p> <ul style="list-style-type: none"> • grant or refuse consent for a State significant development application, subject to modifications or conditions, or • approve or disapprove a State significant infrastructure application subject to modifications or conditions.
EIS	<p>Environmental impact statement.</p>
EP&A Act	<p><i>Environmental Planning and Assessment Act 1979.</i></p>

Term	Definition
Independent Planning Commission (the commission)	An independent statutory body established under the EP&A Act to: <ul style="list-style-type: none"> • make independent and objective decisions on certain State significant development applications • provide advice to the Minister for Planning and Public Spaces.
Matter	An element of the environment (for example, air quality, amenity, biodiversity, economic values, social values) that a State significant development or State significant infrastructure project may affect.
Minister for Planning and Public Spaces	The minister responsible for administering the EP&A Act.
Mitigation	Actions or measures to reduce the predicted impacts of a project.
Newbury Test	A series of principles to test if planning conditions are valid, established in the judgement in the case of <i>Newbury District Council v Secretary of State for the Environment</i> [1981] AC 578.
Nexus	A connection linking 2 or more things. In planning, there should be a nexus between the proposed conditions and the development for which consent or approval is granted.
Planning purpose	In the context of drafting conditions, a planning purpose is a matter either expressly permitted or implied in the EP&A Act.
Proponent	The entity seeking approval for an SSI. For the purposes of this guideline, we have used the term ‘applicant’ when also referring to proponents.
Reportable political donation	A reportable political donation is defined under the Electoral Funding Act 2018. A political donation of or more than A\$1000 must be disclosed under that Act and in accordance with s10.4 of the EP&A Act.
State significant development (SSD)	Development that is declared to be SSD under section 4.36 of the EP&A Act.
State significant infrastructure (SSI)	Development that is declared to be SSI under section 5.12 of the EP&A Act.
State significant projects	State significant development, State significant infrastructure and critical State significant infrastructure projects.