

3 March 2014

Ms Santina Camroux
Coastal and Natural Resources Policy Branch
NSW Department of Planning and Infrastructure
GPO Box 39
Sydney NSW 2001

Dear Ms Camroux,

Draft planning circular: Coastal hazard notations on s 149 planning certificates

As an independent community legal centre specialising in public interest environmental law, EDO NSW welcomes the opportunity to comment on the Department's draft planning circular on *Coastal hazard notations on Section 149 planning certificates (draft circular)*.

The draft circular aims to guide local councils on section 149 planning certificate notations relating to coastal hazards. This guidance relates to both mandatory notations under s 149(2)¹ and advisory notations under s 149(5)² of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.³

Current and future hazards categories require further clarification and guidance

We note that, in broad terms, the circular advises clearer separation between *current* and *future* exposure to coastal hazards,⁴ and sets out a form of notation for each. The former regulatory scheme which categorised coastal land according to risk has been discontinued.⁵

If this approach is adopted, **we recommend** that the Department provide more guidance in the planning circular (and via further background information) on the meaning of and interaction between current and future hazards.

For example, a coastal erosion or inundation risk (or range of risks) projected to materialise in 40 years may be noted as a 'future exposure' under the draft circular. However, this 'future risk' may be a *current consideration* for landowners and other prospective users, if the expected life of a building or land use is 40 years or more. Similarly, would a risk projected to materialise in five years still be a 'future exposure'? Or would such a risk be sufficiently imminent as to be considered a 'current' risk?

¹ Section 149(2) '...specifying such matters relating to the land to which the certificate relates as may be prescribed (whether arising under or connected with this or any other Act or otherwise).' Under subs 149(4), the regulations may provide form and manner of the information.

² Section 149(5): 'A council may, in a planning certificate, include advice on such other relevant matters affecting the land of which it may be aware.'

³ Schedule 4 of the *EP&A Regulation 2000* sets out requirements for the contents of s 149(2) certificates. These requirements were changed in 2013 under the *Coastal Protection Amendment Act 2012*.

⁴ The draft circular indicates that hazards include coastal erosion, tidal inundation, coastal inundation and coastal flooding.

⁵ The *Coastal Protection Regulation 2011*, prior to recent amendments, established risk categories 1-3 (current; 2050; 2100).

We recommend that before the draft circular is finalised, the Department should survey and report on the range of equivalent coastal hazard property title notations (current and proposed) in other Australian and overseas common law jurisdictions. As the most populous state with Australia's largest coastal city, NSW should aim to be a leader in current and future coastal hazard notification. This is consistent with *Coastal Protection Act* objects.⁶

Draft guiding principles should include a precautionary approach

The draft circular also sets out three guiding principles when considering s 149(5) advisory notations for land that may be exposed to future coastal hazards. In brief:

1. Information should only be included in s 149(5) certificate if the information is 'sufficiently accurate, complete and reliable, as supported by a competent process of assessment';
2. If the information is sufficiently reliable then a notation should be included that alerts the reader to the known information;
3. '[I]f the information is sufficiently reliable then council should adopt a policy or planning instrument that manages development on the land', in turn 'requir[ing] disclosure of the policy on the section 149(2) certificate.'

The absence of reference to the precautionary principle is a notable omission from these draft principles. We agree with the Department that a competent process of scientific assessment is necessary, and that the information should be accurate and reliable. The precautionary principle gives useful guidance in assessing information:

...if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:
(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
(ii) an assessment of the risk-weighted consequences of various options.⁷

We recommend that the guiding principles clarify that councils should adopt a precautionary approach in determining whether coastal hazard information is 'sufficiently accurate, complete and reliable'. A precautionary approach is consistent with the objects of the EP&A Act, the standard instrument, the *Coastal Protection Act* and *Local Government Act* charter.⁸

The circular should operate to encourage proactive climate change disclosures

The draft circular draws attention to the 'indemnity of liability afforded them by the EP&A Act if they provide advice in "good faith".⁹ (p 2) At the same time, it suggests councils seek their own legal advice on specific wording to be included in s 149(2) and 149(5) certificates (p 3).

EDO NSW has previously commented on council indemnity of liability provisions in NSW. We have argued that good faith liability provisions should be framed to encourage and protect proactive climate change responses from local councils (rather than indemnity that

⁶ Section 3(h) 'to encourage and promote plans and strategies for adaptation in response to coastal climate change impacts, including projected sea level rise'.

⁷ *Protection of the Environment Administration Act 1991* (NSW), s 6(2)(a). This definition is cross-referenced in the EP&A Act and *Coastal Protection Act* definitions of 'principles of ecologically sustainable development'.

⁸ See EP&A Act, s 5(a)(vii); standard instrument LEP clause 5.5; *Coastal Protection Act 1979*, s 3(b); and *Local Government Act 1993*, s 8.

⁹ See EP&A Act, s 149(6): 'A council shall not incur any liability in respect of any advice provided in good faith pursuant to subsection (5).' See also *Local Government Act 1993* (NSW), subsections 733(1)-(3).

encourages inaction).¹⁰ Notwithstanding the various forms of statutory indemnity, the circular itself should also *encourage* disclosure of coastal hazards in planning certificates, and not act as a disincentive to proactive disclosure. Concerns in the draft circular about adverse property market impacts due to ‘disclosure of information prematurely’ (p 2) does not, in our view, reflect an appropriate precautionary approach.

We recommend the draft circular be phrased to encourage proactive climate change disclosures, based on up-to-date scientific information.

Coastal Hazards Policy Development requires further information

The draft circular effectively describes s 149(5) notations as an interim measure for councils ‘to advise of a known hazard’ in between ‘coming into sufficiently reliable knowledge’ about the coastal hazard, and ‘having the opportunity to develop and implement a policy or planning instrument to manage that hazard’ (p 2).¹¹

The draft circular sets out three ‘essential’ requirements that councils are expected to satisfy in developing coastal policies or planning instruments to manage coastal hazards (particularly for future exposure). Councils are to:

1. Use evidence based data and information
2. Consider current research and any technical advice from the Climate Change Adaptation Research Hub and
3. Comply with the relevant section 117 Direction.

This aspect of the draft circular is difficult to comment on without further information, particularly in relation to the contents of any forthcoming section 117 Direction.¹² Nevertheless, we note the relevance of State Plan Goal 23 and its target to “Minimise impacts of climate change in local communities.” Actions under this target are directly relevant to this circular.¹³

We also note the Productivity Commission’s finding, in 2012, that state governments must ensure local governments are adequately resourced and properly guided to provide the public with accurate and sufficient information on current and future climate change risks.¹⁴

We recommend the Department seek early input from local councils and consult publicly on any draft section 117 Direction on coastal hazards.

We recommend the Department report on the delivery of State Plan targets on climate risk.

¹⁰ See for example, Australian Network of Environmental Defenders Offices, *Submission to Productivity Commission inquiry into barriers to climate change adaptation* (2012), pp 3-5, at <http://edo.org.au/120608Productivity Commission Climate adaptation barriers.pdf>. We note however that indemnities in (for example) sections 43-43A of the *Civil Liability Act 2002* (NSW) and s 733 *Local Government Act 1993* (NSW) do refer to acts or omissions.

¹¹ The draft encourages ‘clear and full information’ on noted coastal hazards, such as ‘extent of exposure’ and ‘time period’ for the hazard arising; this ‘may be contained in policies, plans or maps or the council website.’

¹² According to the draft circular (p 3), the Government will issue a s 117 Direction to ensure councils adopt evidence based approaches and consistency in coastal hazard notations.

¹³ See NSW Government State Plan, *NSW 2021* (2011), available at www.2021.nsw.gov.au, Goal 23, target 3:

- ‘Complete fine scale climate change projections for NSW and make available to local councils and the public by 2014’
- ‘Work with NSW government agencies and universities to deliver improved climate change projections for NSW and the ACT’

¹⁴ Productivity Commission, *Barriers to Effective Climate Change Adaptation* (2012), Chapter 7, p 117.

We recommend the NSW Government ensure local governments are adequately resourced and guided to provide accurate, sufficient information to the public on climate change risks.

Clarify interaction with coastal law reforms

In January 2013 the NSW Government's Stage 1 coastal law reforms came into operation.¹⁵ The interaction between the draft circular and the stages of these reforms could be clarified.

Yours sincerely,
EDO NSW



Rachel Walmsley
Policy and Law Reform Director

¹⁵ The *Coastal Protection Amendment Act 2012* (NSW) amended a series of legislation, including the *Coastal Protection Act 1979* (NSW), the *Coastal Protection Regulation 2011* (NSW), the *EP&A Act 1979* (NSW) and the *Local Government Act 1993* (NSW). The main changes in the Stage 1 Reforms include:

- a) the removal of state-wide SLR benchmarks (40cm rise from 1990-2050; 90cm rise from 1990-2100);
- b) the removal of coastal hazard risk category notations on planning certificates issued under s 149(2);
- c) the introduction of mechanisms allowing greater flexibility for landowners to construct coastal protection works such as sand bag sea walls, and the substantial reduction of associated penalties.