



environmental defender's office new south wales

Submission to the NSW Department of Planning on the Draft NSW Coastal Planning Guideline: Adapting to Sea Level Rise

11th December 2009

The EDO Mission Statement

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services around NSW*

Contact Us

Environmental Defender's
Office Ltd

Level 1, 89 York Street
Sydney NSW 2000

Freecall 1800 626 239

tel (02) 9262 6989

fax (02) 9262 6998

email: edonsw@edo.org.au

website: www.edo.org.au

For further inquiries on this matter contact rachel.walmsley@edo.org.au

Submitted to: innovation@planning.nsw.gov.au

Executive Summary

The Environmental Defender's Office of NSW (*EDO*) welcomes the opportunity to comment on the NSW Department of Planning *Draft NSW Coastal Planning Guideline: Adapting to Sea Level Rise* ('Draft Guideline'). The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law. The EDO has been extensively involved in law reform and litigation relating to the impact of climate change on coastal communities in NSW. We have also commented extensively on a variety of other state and federal climate change law and policy issues.¹

The EDO strongly supports the preparation of a Planning Guideline by the NSW Government to provide greater guidance for decision-makers in relation to strategic planning and development assessment in coastal risk areas. The EDO has consistently called for a more prescriptive approach to be taken to addressing coastal hazards and has identified a need for government guidance to assist decision-makers undertaking strategic planning and assessing proposed development, especially in light of the significant sea level rise projections for the NSW Coast.

However, in our view the Draft Guideline does not go far enough for two key reasons.

First, the NSW Government has made it clear that the intent of the NSW Sea Level Rise Policy Statement and the Planning Guideline is not to restrict or prohibit development, even in high risk areas. Indeed, one of the stated objectives of the Sea Level Rise Policy Statement is in fact to '**encourage** appropriate development on land projected to be at risk from sea level rise'. As EDO NSW submitted on behalf of the Australian Network of Environmental Defender's Offices (*ANEDO*) to the House of Representatives Inquiry into Climate Change and Environmental Impacts on Coastal Communities, the key principle that should inform all future coastal planning is "first, do no more harm". It is therefore important not to compound the significant problems already faced by coastal communities by making further inappropriate planning decisions which ignore impending biophysical realities.² The Government, by failing to articulate a clear legal and policy position for controlling and limiting development in coastal risk areas (in fact actively *encouraging* further development in these areas) has missed a key opportunity to address the significant social, environmental and economic impacts of inappropriate development in coastal areas of NSW.

Second, the Draft Guideline does not clarify legal requirements in relation to strategic planning and development assessment. It simply adds another layer on to the current framework that relies heavily on subjective discretion and ad hoc decision-making. As has been observed, the Policy Statement "does nothing in real terms to revise the framework for decision-making for development in coastal zones".³ It is clear that the existing framework is insufficient, especially in light of continuing significant erosion events, further large-scale developments in coastal risk areas and significant wrangling about legal liability. We therefore recommend amending existing legislation, including

¹ In particular, the EDO contributed significantly to a submission made on behalf of the Australian Network of Environmental Defender's Offices (*ANEDO*) to the Inquiry into Climate Change and Environmental Impacts on Coastal Communities. Please refer to the EDO's website for further detail, at <http://www.edo.org.au/edonsw/site/policy.php>

² *Ibid*, p25.

³ Kirston Gerathy, "Where planning meets the sea – issues arising from development of the Coastal Zone" (2008). Paper delivered to Environmental and Planning Law Association conference in October 2008, p9.

the *Environmental Planning and Assessment Act 1979 (EPA Act)*, and the Standard LEP, to introduce a robust and ecologically sustainable coastal framework that operationalises the 6 principles in the Draft Guideline.

Our comments on the Draft Guideline relate to the following 5 areas:

1. The Policy context of the Guideline
2. Guideline principles
3. Identifying coastal risk areas
4. Strategic land use planning in coastal areas
5. Development assessment in coastal areas
6. Technical Guides

Our key comments and recommendations are:

- The Planning Benchmark should be revised in accordance with the latest scientific information, and there should be a clear process established setting out how the government intends to revise the Planning Benchmark;
- The use of investigation areas by local councils is supported. The identification of investigation zones for planning and development purposes is consistent with the precautionary principle and will make it easier for councils and the community to transition to finalised controls and standards once all studies are complete;
- The NSW Government should introduce a set measure for identifying investigation areas. This will assist councils, especially in LGAs where coastal hazard and flood studies that incorporate projected sea level rise have not commenced or are in preliminary stages;
- The proposal to provide information to landowners through council rate notices is supported. However, the provision of information should be complemented by education programs and consultative forums where the community can engage with the various level of government and to better understand the impacts of sea level rise;
- Section 149 of the *EPA Act* should be amended to require councils to inform potential buyers whether the land is within a coastal risk area even where development controls have not yet been applied;
- All further development should be prohibited by legislation for areas identified as being seaward of an immediate hazard line. Such an approach is consistent with the precautionary principle, will protect high risk communities from future social and economic impacts and potentially addresses liability issues;
- Specific coastal protection zones should be introduced into the Standard LEP to recognise the unique qualities of coastal areas and the specific pressures faced in coastal areas;
- Principles 3 & 4 should be the overarching considerations for strategic land use planning in coastal areas. Councils must avoid intensifying land use in coastal areas and must reduce existing land use intensity where feasible; with the overarching consideration being the magnitude of the risks posed in a particular area;
- Councils should assess the various protective work mechanisms available to address sea level rise impacts when preparing Coastal Zone Management

plans. Only 'soft' protection options should be considered as 'hard' engineering options have unacceptable impacts;

- The *Environmental Planning and Assessment Regulation 2000* should be amended to specify that the expansion and intensification provisions in Part 5 of the Regulation do not apply to existing uses in coastal risk areas;
- Councils should be required to consider the implications of climate change on coastal and estuarine environments when evaluating their comprehensive LEPs in light of the Planning Benchmarks;
- The Minister for Planning should ensure that proposed plans are consistent with Principles 3 & 4. This may involve the Minister rejecting proposed plans that seek to intensify land use in coastal areas or requiring plans to reduce land use intensity in existing urban and residential areas before they may be approved;
- The Director-General of Planning should issue an updated direction under section 55(3) of the *EPA Act* to require relevant planning authorities to assess the potential impacts of coastal processes when preparing a planning proposal;
- The NSW Government should develop state-wide mandatory building controls and standards that will apply to coastal areas of NSW. This could be accommodated either through a State Environmental Planning Policy (SEPP) or the Standard LEP. There should however be an ability for councils to impose more stringent obligations through localised controls in a DCP;
- The *EPA Act* should be amended to broaden Clause 8N in application to all identified coastal risk areas. Moreover, the power for the Minister to directly amend an LEP for a Part 3A development should be removed for coastal risk areas;
- A mandatory clause should be inserted into the Standard LEP that applies to all coastal risk regions in NSW, including the areas of Sydney currently excluded from the Coastal Zone. Coastal risk regions should be defined as all land seaward of the updated 2100 hazard line;
- The mandatory clause should require the *refusal* of all development applications for proposed new developments that are located seaward of the area that is identified as being at immediate risk. The mandatory clause should also adopt all the planning criteria proposed on p13 of the Draft Guideline to make them legally enforceable;
- The mandatory clause should require the consideration of the cumulative impacts of coastal development; and
- Applicants should conduct their own studies of coastal hazards in preparing development applications in the coastal zone (and coastal areas of Sydney City and Botany Bay). This requirement should be for all developments regardless of size and/or monetary value

1. The policy context of the Guideline

The EDO has previously analysed various instruments relevant to coastal planning in NSW, and has identified an urgent need for a clear and consistent approach.⁴ Our main concern is that the Draft Guideline adds another policy document to the existing pile without clarifying or imposing the necessary legal requirements, considerations and standards. There is an urgent need for certain and clear legal requirements for Councils and the community.

The Draft Guidelines lists, first and foremost, the **NSW Sea Level Rise Policy Statement** as providing the context for the Draft Guideline. The EDO, in its submission to the Department of Environment, Climate Change and Water, recently expressed concerns about the draft Policy statement, including that:

- The Planning Benchmark figures should be amended to reflect the latest science which indicates that sea level rise may occur faster than previously thought;
- The Draft SLR Policy should clarify where it sits within the plethora of other NSW coastal legislation and policy documents, as well as the NSW Government's forthcoming Climate Change Action Plan;
- The Draft SLR Policy should clarify that it applies to all land that may be affected by sea level rise, and is not limited to the 'coastal zone' as defined by the Coastal Protection Act 1979, which excludes parts of certain councils;
- The Draft SLR Policy should clarify the procedures by which the Government proposes to amend the Planning Benchmark in the future;
- Amendments to the EPA Act are required to strengthen consideration of climate change impacts in all decision-making processes relating to development applications (including Part 3A projects) and the making of local environmental plans (LEPs).
- The Draft SLR Policy should establish a hierarchy of planning options for local councils to adopt in their local environmental plans 'Policy principle 3' should be amended to reflect that a 'business as usual' or 'accommodation' approach is not promoted;
- The mere provision of information on sea level rise to communities and Councils is not an adequate response. The Draft SLR Policy should establish that communities must be consulted about sea level rise, and education programs be provided; and that
- The focus in the Draft SLR Policy on liability is inappropriate and the comments throughout the Draft SLR Policy purporting to limit the Government's liability should be removed.

These concerns may be addressed in part by consistent application of the Planning Guideline, but we submit that to achieve a more robust scheme, the legal status of the various policy documents and guidelines must be referred to, and made enforceable by, relevant planning legislation.

⁴ NSW Environmental Defender's Office, *Coastal Councils and Planning for Climate Change: An Assessment of Australian and NSW Legislation and Government Policy Provisions Relating to Climate Change Relevant to Regional and Metropolitan Coastal Councils* (2008). A copy of this report can be obtained by emailing info@sydneycoastalcouncils.com.au

2. Guideline principles

The draft Guideline proposes to adopt the following six coastal planning principles for sea level rise adaptation:

- 1. Assess and evaluate coastal risks taking into account the NSW sea level rise planning benchmarks*
- 2. Advise the public of coastal risks to ensure that informed land use planning and development decision-making can occur*
- 3. Avoid intensifying land use in coastal risk areas through appropriate strategic and land-use planning*
- 4. Consider options to reduce land use intensity in coastal risk areas where feasible*
- 5. Minimise the exposure to coastal risks from proposed development in coastal areas*
- 6. Implement appropriate management responses and adaptation strategies, with consideration for the environmental, social and economic impacts of each option.*

In relation to Principle 1, the EDO submits that the Draft SLR Policy should clarify how the government intends to revise the Planning Benchmark, as proposed in ‘policy principle 1’. The EDO acknowledges that given the predictions of the rates of future sea level rise will almost undoubtedly change over time, and therefore flexibility to change the Planning Benchmark is essential. Further details should be provided on how the NSW Government intends to ‘periodically review’ the Planning Benchmark. This could include details such as:

- The procedures to be followed in reviewing and amending the Planning Benchmark (which should include proposed timeframes for reviewing the adequacy of the figures, and indicate relevant expert bodies to be involved);
- The consultation process the NSW Government will undertake if it proposes to alter the Planning Benchmark; and
- The technical assistance intended to be provided to local councils to regularly amend their planning documents to reflect the revised Planning Benchmark.

We provide comment on principles 2 to 6 through our responses to the consultation questions below.

3. Identifying coastal risk areas

1. In the absence of completed coastal hazard and flood studies which take the NSW sea level rise planning benchmarks into consideration, should councils be able to use investigation areas for planning or development assessment purposes?

The EDO supports the use of investigation areas by local councils as an appropriate and proactive response to the risks posed by sea level rise to NSW the coastal zone and as a response to the Planning Benchmarks. Indeed, given the urgency of the situation in some areas, it is imperative that immediate measures are implemented prior to the completion of coastal hazard and flood studies.

The identification of investigation zones for planning and development purposes in this manner is consistent with the precautionary principle and will demonstrate that councils are taking ‘good faith’ measures to address coastal risks. In addition, the introduction of appropriate development controls and planning measures in investigation areas will make

it easier for councils and the community to transition to finalised controls and standards once all studies are complete.

2. Should the NSW Government propose a set measure incorporating the sea level rise planning benchmarks for identifying investigation areas across the State?

The EDO submits that the NSW Government should introduce a set measure for identifying investigation areas in Local Government Areas and that this measure should incorporate the Planning Benchmarks. This will assist councils in identifying investigation areas, especially in LGAs where coastal hazard and flood studies that incorporate projected sea level rise have not commenced or are in preliminary stages.

This interim measure should be based on a combination of the measures outlined on page 5, including coastal erosion and recession distances, projected tidal inundation and coastal areas below a set elevation in metres. Such a measure will ensure that immediate action can be taken throughout the NSW Coastal Zone and will especially assist resource-deficient councils to implement interim measures prior to the finalisation of updated risk assessments.

3. Should council rate notices or other mechanisms be used to advise or remind landowners if their properties are located in coastal risk areas?

The EDO has consistently submitted that community engagement and the provision of information to the general public regarding the risks posed by sea level rise is a critical element of the NSW Government's adaptation response. This is consistent with a recommendation of the recent House of Representatives Inquiry into Climate Change and Environmental Impacts on Coastal Communities which recommended the introduction of 'mechanisms to ensure mandatory risk disclosure to the public about climate change risks and coastal hazards'.⁵ Transparent and open information will allow landowners to make informed choices about the future of their properties

We therefore strongly support the proposal to provide information to landowners through council rate notices in order to keep the community informed as to current and future risks to their properties. We also welcome the recent amendment of s149 of the *EPA Act* that requires s149 certificates to outline whether land is within a coastal risk area where a public authority has adopted a policy that restricts development of certain parcels of land. However, we propose that s149 be amended to require councils to inform potential buyers whether the land is within a coastal risk area even where development controls have not yet been applied. We note that the finalisation of new controls may take some time, but this should not prevent notice being given. The early provision of information in this manner will highlight to landowners that the land may be subject to development restrictions in future.

As we have previously submitted, the provision of information must be complemented by education programs and consultative forums where the community can engage with the various levels of government and to better understand the impacts of sea level rise and how it may affect them.⁶

⁵ House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts. 'Managing our Coastal Zone in a Changing Climate' October 2009, Recommendation 23, p xx.

⁶ EDO NSW, *Submission on the NSW Department of Environment and Climate Change on the Draft Sea Level Rise Policy Statement*, 9 April 2009, p11. Found at: <http://www.edo.org.au/edonsw/site/policy.php#1>

4. Strategic land use planning in coastal areas

4. If land is subject to immediate coastal risks, should further development in these areas be prohibited?

The EDO strongly submits that all further development should be prohibited in areas identified as being seaward of an immediate hazard line (as determined by updated council coastal hazard and flood studies in light of the Planning Benchmarks). Although we understand that there is significant growth expected in coastal communities, we do not believe that there are any practical, ecologically sustainable, long-term means of avoiding or minimising exposure to coastal processes in those areas at imminent threat from coastal processes. The Draft Guideline's approach, which suggests assessing the risks of particular types of development in high risk areas instead of a blanket prohibition is therefore not supported.

The EDO submits that prohibiting future development in immediate coastal risk areas is consistent with the precautionary principle, will protect high risk communities from future social, environmental and economic impacts from sea level rise and potentially addresses liability issues that may arise in relation to new developments approved in areas of imminent threat.

In light of the above, we submit that planning legislation should be amended to stipulate that no development applications for proposed new developments located seaward of the identified 'immediate hazard area' will be accepted in the NSW Coastal Zone. This must be a legally enforceable clause, not simply a 'guideline' which councils are advised to follow. This requirement should apply regardless of whether the development is assessed under Part 4, 5 or 3A or whether the consent authority is a local council, a public authority, the Minister for Planning, Joint Regional Planning Panels or the Planning Assessment Commission.

We discuss areas landward of the immediate hazard line but seaward of the updated 2100 hazard line below.

5. How should consideration be given to potential coastal risk areas when zoning land in LEPs? i.e. areas that may be at risk in the future due to sea level rise and other climate change parameters.

Principles 3 & 4

The EDO has consistently submitted that appropriate action at the strategic planning stage is needed to address the potential impacts of climate change in the coastal zone. Robust and legally enforceable environmental planning instruments that adequately incorporate sea level rise projections through mechanisms such as building standards, planning controls, prohibitions of development will help to avoid difficulties at the development assessment stage and provide greater certainty to landowners who currently face considerable confusion. Given that the Government has now finalised its Planning Benchmarks, the EDO submits that all councils within the NSW Coastal Zone (which should be broadened to include Sydney City and Botany Bay) must re-evaluate zonings to incorporate these benchmarks. Most councils are currently in the process of re-making their LEPs in accordance with the Standard Instrument which provides a good opportunity to accommodate this process.

The EDO supports Principles 3 & 4 as the overarching considerations for strategic land use planning in coastal areas. Councils must avoid intensifying land use in coastal areas and must reduce existing land use intensity where feasible. We note that the Draft Guideline requires 5 factors to be considered in order to implement Principle 3 and 4. We discuss these in turn.

Incorporating coastal and flood-related risk studies into strategic planning

The EDO strongly supports the proposal for each council to conduct coastal and flood-related risk studies and to update hazard lines (both immediate and 2100) in light of the Planning Benchmarks. Once complete, these studies must underpin all strategic planning in Local Government Areas (LGAs) and must inform zoning and planning controls in new Standard LEPs. The Minister should issue a section 117 direction requiring councils to incorporate these coastal risk studies in preparing LEPs.

As noted above, for areas seaward of the immediate hazard line no new development should be permitted. For areas seaward of the 2100 hazard line, robust planning controls should be introduced. We discuss this in more detail below.

Considering the effects of protection works on land use capability

As part of the Coastal Reform package, the Minister has resolved to issue a direction to all councils to make a Coastal Zone Management Plan under the *Coastal Protection Act 1979*.

The EDO submits that a key stage in the implementation of these plans should be an assessment of the various protective work mechanisms available to address sea level rise impacts in particular LGAs, in consultation with the community. Indeed, this is a mandatory requirement under section 55 of the Act. Coastal Zone Management Plans must made provision for emergency actions during periods of beach erosion “including the carrying out of related works, such as works for the protection of property affected or likely to be affected by beach erosion, where beach erosion occurs through storm activity or an extreme or irregular event.”

The EDO submits that only soft protections options which build the resilience of natural systems and that do not have off-site social and environmental impacts should be considered. ‘Hard’ measures such as sea walls and groynes are problematic as they can have deleterious impacts on private properties, can interfere with natural coastal systems or may simply deflect coastal erosion to other areas. Appropriate resilience building measures include dune revegetation, dune and coastal wetland buffer zones, revegetated corridors, and in some circumstances, beach nourishment. In relation to beach nourishment this should only be undertaken if steps are taken to minimise the impacts of such activities on the environment. This would include undertaking comprehensive environmental impact assessment and imposing conditions to recognise that “impacts of beach nourishment can be reduced by limiting activities to the colder months when recruitment of beach fauna is often the lowest.”⁷

Once finalised Coastal Zone Management Plans must inform strategic coastal planning processes. This will assist councils in determining appropriate zonings for particular areas

⁷ Frank, G. 2001, ‘Yelverton Corps of Engineers’ views of environmental impacts of beach nourishment’, *Abstracts with Programs - Geological Society of America*, vol. 33, no. 2, p. 11.

by assessing whether there are any feasible and environmentally sustainable soft protection measures that can ameliorate the risks in particular areas.

Accommodating new growth in coastal communities

Population projections clearly demonstrate that there will be significant growth in coastal communities in New South Wales over the next 30 years. However, given the risks posed by rising sea levels, we submit that there is a clear need for future development in the NSW Coastal Zone to be managed in a proactive and precautionary manner. Thus, the accommodation of population growth must be undertaken in the context of Principles 3 and 4.

As discussed above, we submit that new development should be prohibited in areas seaward of the immediate hazard line (once finalised). For such areas, councils should therefore adapt the zoning to recognise this limitation.⁸ An Environmental Conservation zone may be most appropriate. We note however that there is no specific coastal protection zone in the Standard LEP. This should be introduced to recognise the unique qualities of coastal areas and the specific pressures faced by coastal areas.

Managing existing developed areas in coastal communities

The EDO acknowledges that the implementation of Principle 4 – which is to consider options to reduce land use intensity in coastal risk areas - will be a challenging process, especially in high density urban areas. However, the difficulty of the situation should not deter councils from taking proactive measures to plan for the future despite the short-term obstacles. A failure to undertake strategic planning assessment in developed areas now will likely lead to significant issues in future when impacts occur, including potential disputes as to legal liability, community dislocation and increased management and maintenance costs for councils. We therefore agree with the Draft Guideline that ‘appropriate planning now is needed to minimise the social and economic impacts of inappropriate development in the long term’. Thus, given the risks posed by sea level rise and associated climate change impacts, it is imperative that councils plan for the future in order to minimise coastal risks to residents and the environment. Councils should therefore ‘down-zone’ areas at particular risk, which is consistent with Principle 4 of the Draft Guideline. An alternative way to address this issue would be to prohibit up-zonings in the 100 year erosion and flood zones.

The Draft Guideline proposes that where councils consider reducing land use intensity they must consider land tenure, current land uses and existing use rights, environmental and planning constraints on development and the risk of requiring land acquisition. The EDO submits that the overarching consideration should be the magnitude of the risks posed in a particular area, and that issues such as land tenure and existing use rights should be of secondary consideration. Moreover, we do not support the requirement for councils to consider the risk of requiring land acquisition when determining whether to reduce land use intensity. ‘Back zoning’ of particular areas would not activate a right to compensation under the *Land Acquisition (Just Terms Compensation) Act 1991*. That Act only applies where there has been an ‘acquisition’ of property. The attribution of a particular zoning to an area does not involve an appropriation of property but simply regulates how that property may be used. Hence, this should not be a relevant consideration.

⁸ Existing uses would be given some measure of protection as is currently the case under the *EPA Act*.

An important issue that needs to be addressed is existing use rights in coastal risk areas. Where a council resolves to reduce land intensity and adopts new zones to accommodate this, existing use rights subsist and have the potential to thwart positive amendments. This is exacerbated by the fact that the *Environmental Planning and Assessment Regulation 2000* allows existing uses to enlarge expand and intensity.⁹ We submit that the Regulation should be amended to specify that the expansion and intensification provisions in Part 5 of the Regulation do not apply to existing uses in coastal risk areas.

Maintaining foreshore access, amenity, and open space and protecting coastal environments

EDO NSW recently contributed to a submission by the Australian Network of Environmental Defender's Offices (ANEDO) to the House of Representatives Inquiry into Climate Change and Environmental Impacts on Coastal Communities where we highlighted the important role that estuarine systems - including wetlands, seagrass beds, lagoons, mangroves, coastal lakes, and salt marshes - play in maintaining both healthy marine and terrestrial ecosystems. For example they assist in providing climate buffering, trapping and removal of pollutants, storm protection, cycling of nutrients and organic matter and stabilisation to shorelines.¹⁰

Given the above, the EDO submits that it is imperative that councils be required to consider the implications of climate change on coastal and estuarine environments when evaluating their comprehensive LEPs in light of the Planning Benchmarks. We therefore agree with the Draft Guideline that strategic planning should address the effects of sea level rise on natural areas and coastal assets by accommodating the long term protection of coastal and estuarine ecology and the landward migration of wetland, mangroves and salt marsh communities. This may include, for example, providing buffer zones around impact lines.

Role of Minister for Planning at 'gateway'

The Minister for Planning will play a vital role in ensuring that local councils adequately address risks in the Coastal Zone when making new LEPs. The Minister approves LEPs under the 'old' process for all Councils who resolved to implement a Standard LEP by 1 July 2009. For proposed LEPs beyond that date, the Minister undertakes an initial assessment of whether planning proposals should process through the new 'gateway' process. We submit that the Minister for Planning should play a 'gatekeeper' role and ensure that Principles 3 & 4 have been adequately incorporated. This may involve the Minister rejecting draft LEPs or planning proposals that seek to intensify land use in coastal areas unless there are robust measures in place such as strong planning controls, building standards and resilience measures that minimise the risks of coastal processes. The Minister should ensure that appropriate consideration has been given to reducing the land use intensity of existing urban and residential areas.

Moreover, under the new process councils are required to complete a Justification Report as part of the planning proposal which addresses 4 key areas including the environmental impacts of the proposal plan. Currently, the requirements do not specifically require an assessment of coastal processes and sea level rise in coastal areas. We therefore submit

⁹ Part 5, *Environmental Planning and Assessment Regulation 2000*.

¹⁰ Natural Resource Management Ministerial Council, 2006, 'National Cooperative Approach to Integrated Coastal Zone Management. Framework and Implementation Plan'. Available at: www.deh.gov.au/coasts/iczm/index.html.

that the Director-General should issue an updated direction under section 55(3) of the *Environmental Planning and Assessment Act 1979 (EPA Act)* to require relevant planning authorities to assess potential the impacts of coastal processes when preparing a planning proposal.

Role of Building standards

The Draft Guideline acknowledges the important role of building standards and development controls such as height of buildings, minimum lot sizes and floor space ratios in addressing coastal risks. The EDO agrees but submits that relying on the discretion of local councils to do this through additional LEP provisions, overlays and Development Control Plans (DCPs) is insufficient.

Councils are limited to a significant extent by the Standard LEP in imposing additional planning controls because LEP clauses must be consistent with the intent and objectives of the underlying land use zone and the compulsory provisions of the Standard Instrument.

As a result, EDO submits that the NSW Government should develop state-wide mandatory building controls and standards that will apply to coastal risk areas of NSW. This could be accommodated through amending the Standard LEP, with the ability for councils to impose more stringent obligations taking into account their localised risks.

If implemented, standardised planning controls would ensure that a consistent approach is taken throughout NSW and will provide certainty to landowners, councils and other stakeholders. We note that the House of Representatives Inquiry into Climate Change and Environmental Impacts on Coastal Communities has acknowledged the need for consistent building standards by recommending that the Building Code of Australia be revised.¹¹

Part 3A

LEPs, Coastal Zone Management Plans and DCPs are not determinative for Part 3A projects, and as a result the Minister for Planning can disregard these instruments in assessing and approving Major Projects. Although Clause 8N of the Environmental planning and Assessment Regulation prohibits approval being granted to a Part 3A project in 'sensitive coastal locations' this is insufficient for two reasons. First, the definition of 'sensitive coastal location' is not broad enough to capture all coastal risk areas. Second, the Minister has the power to amend any environmental planning instrument to facilitate a Part 3A development simply through publishing an order in the Gazette.¹²

The consequence of this is that even where councils have undertaken robust strategic planning to identify risk areas and introduce restrictions and new standards for development, their LEPs will not apply to developments likely to have the biggest impacts. This is a significant impediment and should be addressed as a matter of urgency.

¹¹ House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts. 'Managing our Coastal Zone in a Changing Climate' October 2009, Recommendation 22, p xx.

¹² Section 75R(3A), *EPA Act*.

The *EPA Act* should be amended to broaden Clause 8N in application to all identified coastal risk areas. Moreover, the power for the Minister to directly amend an LEP for a Part 3A development should be removed for coastal risk areas.¹³

6. Should a model clause be developed for councils to use in LEPs to identify coastal risk areas using maps and to apply specific development controls to that identified land?
7. Should consideration be given to expanding the application of any coastal risk clause in SEPP 71 to also apply more broadly to the Sydney coastal region?
8. Should consideration be given to expanding the application of any coastal risk clause in SEPP 71 to also apply more broadly to the Sydney coastal region?

The EDO has previously identified that there is very little prescription for decision-makers in the coastal zone and that this is a significant impediment to addressing climate change risks in NSW. The current approach is ad hoc and predicated on aspirational provisions in objects clauses and matters for consideration, rather than a focus on robust principles and clear legal requirements.¹⁴ The EDO therefore supports the introduction of a *mandatory* clause to be inserted into the Standard LEP that applies to all coastal risk regions in NSW, including the areas of Sydney currently excluded from the Coastal Zone. Coastal risk regions should be defined as all land seaward of the updated 2100 hazard line.

We submit that the example provided on page 12 of the Draft Guideline is a good blueprint for a mandatory clause as it goes beyond simply requiring the consideration of sea level rise impacts to necessitating a level of satisfaction in the consent authority before development can be approved in coastal risk areas. This is a more robust response to sea level rise as requires councils to have, among other things, clear evidence that a development appropriately avoids or minimises exposure to coastal processes before it may be approved.

However, the example clause provided is insufficient in three respects.

First, clause 3(d) must be amended. This clause currently requires a council to be satisfied that any development proposed seaward of the immediate hazard line will avoid or minimise exposure to coastal processes before it may be approved. Consistent with our comments above, the EDO submits that any mandatory clause should require the *refusal* of all development applications for proposed new developments that are located seaward of the area that is identified as being at immediate risk (through an immediate hazard line). Hence, the mandatory clause should expressly require consent authorities to refuse new development in immediate risk areas. This is consistent with the approach set out in Figure 4 of the Draft Guideline which identified that all land seaward of the immediate hazard line is not suitable for future development.

Second, the mandatory clause should adopt all the planning criteria proposed on p13 of the Draft Guideline (subject to our comments above) including a requirement to ensure

¹³ The EDO has broader concerns with Part 3A but our comments here are restricted to Part 3A in the context of coastal risk areas.

¹⁴ NSW Environmental Defender's Office, *Coastal Councils and Planning for Climate Change: An Assessment of Australian and NSW Legislation and Government Policy Provisions Relating to Climate Change Relevant to Regional and Metropolitan Coastal Councils* (2008). A copy of this report can be obtained by emailing info@sydneycoastalcouncils.com.au

that coastal ecosystems and residents are protected. This is a means of operationalising the criteria into a legally enforceable requirement rather than a non-statutory guideline.

Third, the clause does not address the cumulative impacts of development in coastal risk areas. Whilst a particular applicant may be able to demonstrate that their project will not of itself adversely impact on coastal processes, the cumulative effect of many applications will have a negative social, environmental and economic impact on the coast. Thus, we recommend that the mandatory clause require councils to consider the cumulative impacts when assessing individual developments.

5. Development assessment in coastal areas

9. If a relevant coastal hazard or flood study has not been completed or council has not identified an investigation area, should applicants be required to undertake their own coastal risk assessment as part of the DA requirements?
10. Should this requirement only be restricted to large-scale or medium to high risk coastal developments?

The EDO notes that the NSW Government will soon commence reforms requiring a Statement of Environmental Effects (SEE) for all development applications. As part of this process, the Department of Planning has issued guidelines ahead of a new regulation to provide some prescription as to what an SEE should address. The guidelines stipulate that a key aspect of an SEE should include an outline of any environmental constraints (site analysis) such as flood, slope, bushfire or **coastal hazards**, native vegetation, conservation or heritage values, etc.¹⁵ Thus applicants are already required to address coastal hazards as part of the preparation of their SEE. Where councils have not yet identified investigation areas or completed coastal risk studies in light of the Planning Benchmarks, the applicant would therefore need to undertake comprehensive studies of their own.

We submit that this requirement should be for all developments in the Coastal Zone (including Sydney City and Botany Bay) regardless of size and/or monetary value. Indeed the coastal risks posed to particular development can only be determined once an assessment has been done because the potential impacts of a proposed development are not necessarily commensurate with its scope and size.

11. Should new development be prevented in coastal risk areas that are already subject to coastal risks (as identified by an immediate hazard line)?

As we have reiterated throughout this submission, new development should be prohibited in land seaward of an identified immediate hazard line. We therefore strongly support Figure 4 (as above) but again stress that the prohibition should be introduced as a legally enforceable requirement for all decision-makers and categories of development.

For other coastal risk areas seaward of updated 2100 line we support a requirement for robust merits assessment. The merits assessment undertaken should be consistent with our recommendations in this submission and would therefore comprise:

¹⁵ Department of Planning, Part B- Toolkit for Applicants- the Development Proposal, Statement of Environmental Effects and Standard Development Application Form. Found at: <http://www.planning.nsw.gov.au/LinkClick.aspx?fileticket=wEShFW1HPOM%3d&tabid=339>.

1. The mandatory prohibition on new development seaward of immediate hazard line;
2. The application of Principle 5 – *minimising the exposure to coastal risks from proposed development in coastal areas* – and Principle 6 – *implementing appropriate management responses and adaptation strategies* – as overarching considerations;
3. The introduction of a mandatory clause in the Standard LEP applying to the coastal zone requiring councils to be satisfied of certain matters before development approval can be granted. These would include considering whether the development will significantly alter coastal processes, whether it provides for the safety of residents and whether coastal ecosystems will be protected; and
4. The implementation of state-wide building standards in the Standard LEP that prescribe mandatory standards that proposed developments in the coastal zone must comply with or they will be refused.

Such an approach, combined with the legislative amendments recommended throughout this submission, would be a significant improvement on the ad hoc and inconsistent approach to development assessment taken at present and will provide legislative guidance to councils.

6. Technical Guides

The EDO has previously called for Government guidance to assist councils in undertaking coastal hazard assessments and we therefore welcome the release of the Technical Guides- *Draft Coastal Risk Management Guide: Incorporating the sea level rise benchmarks in coastal hazard assessments (DECCW 2009)*, and *Draft Flood Risk Management Guide: Incorporating the sea level rise benchmarks in flood risk assessments (DECCW 2009)*.

While we do not make comment on the technical content of the guides in this submission, we note that a key issue is to ensure that the guides are reviewed and updated regularly according to best available IPCC predictions. The EDO notes that the most recent science coming from the International Scientific Congress on Climate Change (ISCCC) on 10 – 12 March 2009 in Copenhagen indicates that the worst case IPCC scenario trajectories are being realised, and that there ‘is a significant risk that many of the trends will accelerate, leading to an increasing risk of abrupt or irreversible climatic shifts’.¹⁶ We note that the ISCCC intends to develop its preliminary conclusions from the congress into a synthesis report to be published in June 2009, and to be presented at the United Nations Climate Change Conference (COP15) in Copenhagen in December 2009.

In these circumstances, the EDO submits that it is now appropriate to revise the Planning Benchmark, in accordance with this latest scientific information, and to ensure that the *current* ‘worst case scenario’ are considered. This will ensure that the precautionary principle is applied, which is an overarching consideration in the context of the ongoing uncertainty of climate change impacts including sea level rise.¹⁷

¹⁶ See ‘Key messages from the Congress’ released by the ISCCC:

http://climatecongress.ku.dk/newsroom/congress_key_messages, 12 March 2009; see also <http://www.smh.com.au/environment/global-warming/beautiful-one-year-flooded-the-next-20090322-95mg.html> (23/3/09)

¹⁷ The EDO acknowledges and is grateful for the advice and assistance provided by Milton Speer, Research Fellow at the Climate Change Research Centre, School of Mathematics and Statistics, University of NSW, in commenting on the Sea Level Rise Planning Benchmarks.