

NSW Maritime

Obtaining Permission to Lodge a Development Application

(Clauses 8F and 49(1)(b) of the
Environmental Planning and Assessment Regulation 2000)

As amended April 2009

Sydney Harbour and Tributaries – Botany Bay – Newcastle Harbour – Port Kembla

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FOREWORD

This policy is a guide for applicants seeking permission from NSW Maritime to lodge development applications for proposed development on or over NSW Maritime land, as required by Clauses 8F or 49(1)(b) of the *Environmental Planning and Assessment Regulation 2000*.

With the commencement of the *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005*, the consent authority under that instrument is required to exercise many of the environmental planning assessment functions which have until now been exercised by NSW Maritime as part of the land owner's consent process.

As a result, land owner's consent processes have been reviewed to ensure that there is no unnecessary process duplication. The Policy should be considered in conjunction with planning instruments such as the *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* and the *Sydney Harbour Foreshores and Waterways Area Development Control Plan 2005*.

The right of the public to use land in public ownership is an important component of this Policy. This is balanced against the need for appropriate and sustainable development on lands owned by NSW Maritime. The foreshores and the submerged lands under NSW Maritime's stewardship must be maintained and improved for the benefit of the present and future generations.

PERMISSION TO LODGE A DEVELOPMENT APPLICATION DOES NOT IMPLY THAT DEVELOPMENT CONSENT WILL BE GRANTED, NOR DOES IT RESTRICT NSW MARITIME IN MAKING SUBMISSIONS ON THE DEVELOPMENT APPLICATION.

In applying to NSW Maritime for permission to lodge a development application (land owner's consent), applicants are reminded that:

- Where the Minister for Ports and Waterways is not the consent authority for that development, NSW Maritime reserves the right to make any submission supporting or opposing the development application, regardless of the prior granting of landowner's consent.
- Where the Minister for Ports and Waterways is the consent authority for that development, the Minister may still refuse development consent regardless of the prior granting of land owner's consent.
- Granting of permission (land owner's consent) by NSW Maritime to the lodgement of a development application, does not of itself authorise a person to enter NSW Maritime's land and act on any development consent granted. Access to NSW Maritime's land must be in accordance with a lease, licence or other arrangement made between NSW Maritime and the applicant, or a party related to the applicant.

Steve Dunn
Chief Executive
NSW Maritime

SECTION 1 INTRODUCTION

1.1 BACKGROUND

The bed of Sydney Harbour and its tributaries, Botany Bay, Newcastle Harbour and Port Kembla Harbour is publicly owned land. NSW Maritime is the government agency that owns these harbour beds or more specifically, 'submerged lands' which are below the mean high water mark, in addition to parcels of reclaimed land, dry land and intertidal zones forming part of the foreshore area of these bodies of water.

Proponents of development for which development consent is required, on land to which the Policy applies, will need to comply with the following steps to secure the necessary statutory approvals for that development:

1. permission (land owner's consent) from NSW Maritime for the applicant to lodge a development application, as required under clauses 8F or 49(1)(b) of the *Environmental Planning and Assessment Regulation 2000*;
2. development consent from the relevant consent authority (such as local council, Minister for Planning or Minister for Ports and Waterways, as applicable) in accordance with the *Environmental Planning and Assessment Act 1979*, and applicable environmental planning instruments; and
3. construction and occupation certification.

Land owner's consent is not required for developments which do not require development consent.

Other statutory approvals may also be required, depending on the nature of the development in question. Proponents should satisfy themselves as to the need for any other statutory approvals for such development.

This Policy sets out NSW Maritime's requirements in relation to step 1 above. In particular, it sets out the criteria which NSW Maritime will apply in order to determine whether or not permission will be granted to a proponent to lodge a development application in relation to land to which this Policy applies.

1.2 LAND TO WHICH THE POLICY APPLIES

This Policy applies to the following lands:

- the land comprising the beds of Sydney Harbour, Botany Bay, Newcastle Harbour and Port Kembla Harbour, as shown in Figure 1; and
- reclaimed lands, dry lands and intertidal zones which are owned by NSW Maritime, and adjacent to or in the vicinity of these bodies of water.

1.3 APPLICATION OF THIS POLICY

This Policy will be applied by NSW Maritime in assessing applications for land owner's consent, unless the Chief Executive determines that circumstances exist which justify a departure from the Policy in the public interest.

In addition, development applications by certain public authorities will be dealt with in accordance with clause 49(2) of the *Environmental Planning and Assessment Regulation 2000* instead of the provisions of this Policy if, as required by that clause, before making the development application, the public authority serves a copy of the application on NSW Maritime as owner.

1.4 TRANSITIONAL PROVISIONS

Subject to section 1.3, this Policy will apply to all applications for land owner's consent lodged with NSW Maritime on or after 3 August 2007.

The document titled *Land Owner's Consent Manual – Policies for Granting Land Owner's Consent - Sydney Harbour and its Tributaries* (Marine Ministerial Holding Corporation, July 1998) ceases to apply to applications lodged on or after that date.

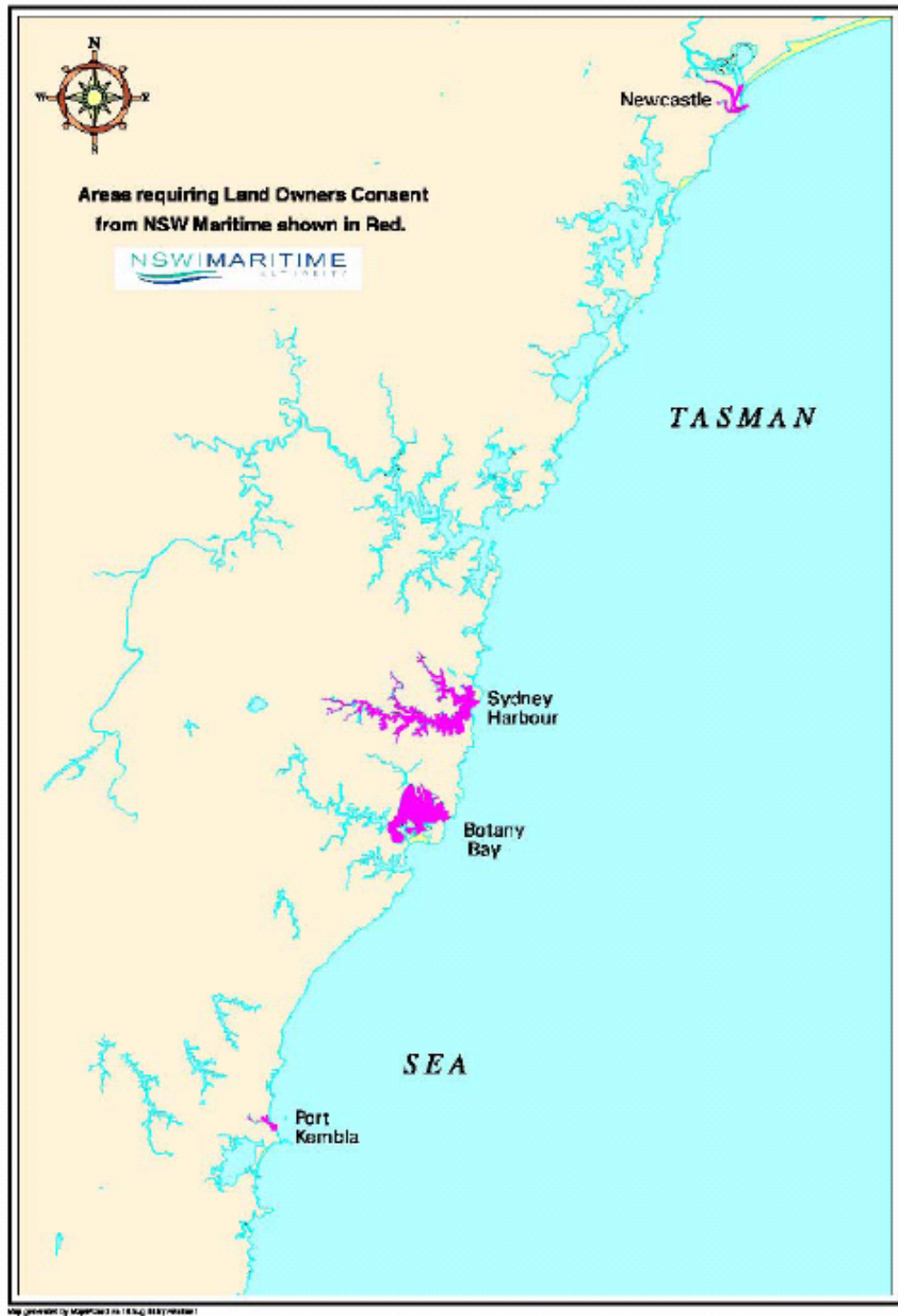
Applications for land owner's consent lodged with NSW Maritime prior to 3 August 2007 will continue to be governed by the *Land Owner's Consent Manual – Policies for Granting Land Owner's Consent - Sydney Harbour and its tributaries* (Marine Ministerial Holding Corporation, July 1998).

1.5 DEFINITIONS

Terms used in this Policy are defined as set out in the Glossary in Appendix A.

In particular, the terms "permission to lodge" and "land owner's consent" have the same meaning and have the effect of granting consent for the lodgement of a development application in accordance with clauses 8F or 49 of the *Environmental Planning and Assessment Regulation 2000*.

FIGURE 1



SECTION 2

ROLES OF NSW MARITIME

2.1 NSW MARITIME'S FUNCTIONS

NSW Maritime is a statutory authority established under the *Ports and Maritime Administration Act 1995*. The functions of NSW Maritime are described in Division 2 of Part 4 of the Act and relevantly include:

- regulation of navigation safety, including providing safe and sustainable ports and waterways in NSW; and
- management of property owned by or vested in it, including the beds of the major ports in New South Wales as well as some reclaimed lands, dry land and intertidal zones.

2.2 LEGISLATION UNDER WHICH NSW MARITIME ACTS

In relation to its role as land owner and manager of the beds of Sydney Harbour and tributaries, Botany Bay, Newcastle Harbour and Port Kembla Harbour, NSW Maritime principally acts under the following legislation:

- *Ports and Maritime Administration Act 1995*;
- *Marine Safety Act 1998*
- *Maritime Services Act 1935*;
- *Management of Waters and Waterside Lands Regulation 1972*;
- *Environmental Planning and Assessment Act 1979*; and
- *Rivers and Foreshores Improvement Act 1948*.

There is a range of other legislation which may be relevant to this role from time to time, including:

- *Contaminated Land Management Act 1997*;
- *Heritage Act 1977*;
- *Fisheries Management Act 1994*;
- *National Parks and Wildlife Act 1974*;
- *Protection of the Environment Operations Act 1997*
- *Threatened Species Conservation Act 1995*;
- *Water Management Act 2000*; and
- *Commonwealth Environment Protection and Biodiversity Conservation Act 1999*.

In addition, there are a number of environmental planning instruments (EPIs), planning policies and guidelines as well as non-statutory Government directives, guiding principles and policies which are relevant to the exercise of NSW Maritime's property asset management and leasing decisions. These relevantly relate to:

- promoting and ensuring navigation safety,
- the appropriate use of land,
- promoting and maintaining water recreation and sport, including recreational boating, paddling, rowing, sailboat racing and rowing regattas,
- achieving a return to Government from the use of its land,
- the promotion of public access to the foreshores,
- greening the foreshore and conserving heritage,
- achieving high quality design, and
- maintaining the working harbour.

Some of the legislation listed above incorporate appeal provisions. NSW Maritime is bound by these provisions.

2.3 NSW MARITIME'S ROLE IN THE DEVELOPMENT, USE AND OCCUPATION OF LAND

Property management is a principal function of NSW Maritime under the *Ports and Maritime Administration Act 1995*. The Act relevantly provides that NSW Maritime may:

- for the purpose of exercising its functions, acquire, use, lease or dispose of land and other assets, and
- develop and manage land transferred to it under the Act, or otherwise acquired by it.

In this context, NSW Maritime carries out a broad range of activities in relation to the use, management and development of the land which it owns. These include but are not limited to:

- working with other NSW Government agencies to achieve integrated planning and management of the beds and foreshores of major NSW ports;
- considering and deciding upon applications for permission (land owner's consent) to lodge development applications in relation to development proposed to be located on land to which this Policy applies;

- acting as the consent authority for water-based development under Part 4 of the *Environmental Planning and Assessment Act 1979*, on behalf of the Minister for Ports and Waterways, under the regional environmental plans for the Sydney Harbour catchment and Homebush Bay;
- undertaking environmental assessments under Part 5 of the *Environmental Planning and Assessment Act 1979*; and
- leasing, licensing and management of land to which this Policy applies, for private, public and/or commercial maritime-related purposes.

2.4 INTERACTION WITH THE PLANNING PROCESS

In the case of development where NSW Maritime is the consent authority (whether under delegation from the Minister for Ports and Waterways or otherwise), applicants for land owner's consent should note that no decision by NSW Maritime to grant permission to lodge a development application (land owner's consent) in relation to particular development should be interpreted as an approval or endorsement of that development. NSW Maritime will assess any development application made in accordance with the applicable statutory requirements.

In the case of development where NSW Maritime is not the consent authority, the grant of permission to lodge a development application (land owner's consent) by NSW Maritime to the lodgement of a development application on land to which this Policy applies does not limit or prevent NSW Maritime from making a submission to the relevant consent authority in relation to that development.

SECTION 3 DEVELOPMENT POLICIES

The following development policies relevantly apply in relation to the development, use and occupation of land to which this Policy applies.

Applicants should note that these do not comprise the considerations which a consent authority will apply to determine a development application. These are set out separately in the *Environmental Planning and Assessment Act 1979*, and related planning instruments.

3.1 NAVIGATION SAFETY

Development proposed on land to which this Policy applies must not, in the reasonable opinion of NSW Maritime, present:

- a danger or obstruction to the safe navigation of vessels, particularly in navigation channels, fairways and mooring areas, or
- a significant risk of a marine accident.

In particular, for proposals on submerged land, NSW Maritime may consider the extent to which:

- the proposed development constitutes a potential hazard to navigation in terms of obstruction, visibility or lighting; and
- the wind, wave and current regime and water depth suitability may impact on the safety of any moored vessel and any person using the proposed development.

3.2 RELATIONSHIP TO ADJOINING LAND

Except where section 3.3 applies, proposed development on NSW Maritime's submerged lands must be a waterside structure with a functional relationship to the use of the adjacent dry or reclaimed land.

Access to proposed structures located below MHW from the adjoining land must be provided in a safe manner.

3.3 ADJOINING PUBLIC LAND

Permission to lodge a development application for proposed development comprising private use facilities over NSW Maritime land, in cases where the adjoining dry land is in public ownership and is accessible to the general public, may not be granted unless:

- the applicant proposes an overall community, public recreational or other public use (for example, a club which is open to public membership, such as a sailing club, sea scouts or rowing club); or
- the development proposal seeks modifications to existing approved developments.

SECTION 4

ASSESSMENT CRITERIA

Subject to section 1.3 of this Policy, NSW Maritime will apply the criteria set out in this Section in evaluating applications for permission (land owner's consent) to lodge development applications in relation to land to which this Policy applies.

Applicants should note that in evaluating applications for land owner's consent, NSW Maritime will not assess whether the proposed development is permissible under the environmental planning instruments which apply to the relevant land. This is a matter for the consent authority under the *Environmental Planning and Assessment Act 1979*. NSW Maritime assumes no responsibility to advise applicants as to whether the proposed development is permissible or not, and applicants should satisfy themselves as to the application of the environmental planning regime to the proposed development.

The evaluation criteria for permission to lodge development applications (land owner's consent) are as follows:

4.1 CONSISTENCY WITH DEVELOPMENT POLICIES

Any development which is the subject of an application for land owner's consent must be consistent with section 3 of this Policy.

4.2 LEASE OR LICENCE ARRANGEMENTS

Subject to this Policy, permission to lodge a development application (land owner's consent) will only be granted by NSW Maritime if the application relates to development which is proposed on land which is the subject of:

- a lease or agreement to lease, or
- a licence or agreement to licence, or
- any similar arrangement that is acceptable to and at the discretion of NSW Maritime in the circumstances of a particular case

which has been made between the applicant (or a party related to the applicant) and NSW Maritime, or between NSW Maritime and a third party, if the applicant has obtained written permission of that third party to make the application, and evidence of this is provided to NSW Maritime.

The proposed development which is the subject of the application for land owner's consent must be for the purpose(s) defined by the relevant lease, agreement to lease, licence or agreement to licence.

For the purpose of this Section 4.2, NSW Maritime may in its sole discretion accept a lease, agreement to lease, licence or agreement to licence which has been agreed 'in principle' by NSW Maritime, but not executed by all or any of the parties.

4.3 COMPLIANCE WITH EXISTING LAND TENURE ARRANGEMENTS

Subject to 4.4 below, in the case where development is proposed on land which is the subject of an existing lease or licence to the proponent of that development or a related entity, permission to lodge a development application will only be considered by NSW Maritime if it is satisfied that, at the time the application is made, there are no subsisting material non-compliances with the terms of the lease or licence.

For the purpose of this Section, “material non-compliance” includes:

- any failure to pay rent due and payable under the terms of the lease or licence,
- any other non-compliance with an essential term of the lease,
- any work or activity which is being carried out on the land without permission from NSW Maritime, where such permission is required under the lease or licence,
- any use of the land by the lessee or licensee which is not a permitted use under the lease or licence, and
- any event of default under the lease or licence.

4.4 UNAUTHORISED WORKS AND STRUCTURES

NSW Maritime may choose to accept an application for permission (land owner’s consent) to lodge a development application on land to which the Policy applies, in relation to the continued use, or future modification of any work or structure which:

- exists on the land at the time the application for land owner’s consent is made; and
- has not previously been the subject of a valid development consent.

The decision whether to accept or reject applications in these circumstances is at the discretion of NSW Maritime.

4.5 MINOR MODIFICATIONS

The assessment criteria in Section 4 of this Policy do not apply to requests for permission to lodge an application under clause 96(1) of the *Environmental Planning and Assessment Act 1979*, and no permission to lodge application fee is payable. Permission to lodge applications of this kind is granted upon determination by NSW Maritime that the development application meets the criteria for assessment under clause 96(1) of the Act.

SECTION 5 THE APPLICATION PROCESS

5.1 INFORMATION TO ACCOMPANY APPLICATIONS

Applications for land owner's consent to lodge a development application must contain sufficient information to enable NSW Maritime to satisfy itself as to:

- the precise location of the land to which the application relates, and
- the nature and extent of the development for which consent is sought.

For the purpose of determining land owner's consent applications only, it will not generally be necessary for NSW Maritime to be furnished with financial documents or documents which assess the impacts of development (such as statements of environmental effects, or environmental impact statements).

Applicants must note that should NSW Maritime decide to grant land owner's consent to lodgement of a development application for any particular development, that consent will be granted only to a development of that nature, extent and specific location. Subsequent modifications to the nature, extent or precise location of the development may result in NSW Maritime requiring that the applicant reapply for land owner's consent in relation to any land or development not covered by the original consent.

Appendix B outlines the information which should form part of any application to NSW Maritime for land owner's consent to lodge a development application in relation to land to which this Policy applies.

An application for land owner's consent will only be accepted by NSW Maritime if it includes all of the information specified in Appendix B.

5.2 ACKNOWLEDGEMENT OF RECEIPT

NSW Maritime will generally acknowledge receipt of an application for land owner's consent in writing within 14 days of the date on which it accepts the application.

5.3 MEETINGS BETWEEN THE APPLICANT AND NSW MARITIME'S OFFICERS

Prior to formalising and submitting any application for land owner's consent, the prospective applicant may meet with officers of NSW Maritime to discuss likely future leasing requirements and arrangements, as relevant to the proposal.

Once any such discussions have concluded NSW Maritime may agree to meet again with a prospective applicant for land owner's consent prior to an application being lodged, however any such meeting will be limited to checking whether a draft application for land owner's consent meets the requirements specified in Appendix B, and that the description of the proposed development in this documentation is sufficiently clear for assessment of that application to be made.

Should the proposal reach the development application stage any meetings between the applicant and NSW Maritime, as delegate of the consent authority, shall relate to the planning merits of the proposal.

5.4 APPROACH TO ASSESSMENT

Applications made to NSW Maritime for land owner's consent in accordance with this Policy will, upon acceptance, be evaluated by reference to the criteria listed in Section 4 by the General Manager, Policy & Strategy Division, or delegate(s).

The decision by NSW Maritime to grant or refuse land owner's consent will be authorised by the General Manager, Policy & Strategy Division, or delegate(s).

5.5 TIMING FOR DETERMINATION OF APPLICATION

If an application for land owner's consent relates to minor development only, NSW Maritime will generally decide whether to grant permission for the lodgement of the development application within 30 days of acceptance of a complete application for such permission.

For the purpose of this Section, minor development means any development included in Schedule 3 of the *Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005*.

For all other applications for land owner's consent, where feasible, NSW Maritime will assess and determine whether to grant land owner's consent within 60 days of acceptance of a completed application.

Any applications that exceed those timelines will be brought to the attention of the General Manager, Policy & Strategy Division or the Chief Executive, NSW Maritime.

5.6 LAND OWNER'S CONSENT CONDITIONS

No condition may be imposed upon or in association with the granting of land owner's consent which requires the applicant:

- To dedicate land (or any interest in land) to NSW Maritime, the Crown or some other public authority; or
- To perform any activity on any land other than the land in relation to which the consent is given, unless NSW Maritime commits to arrange access to that land on mutually acceptable terms between NSW Maritime and the applicant.

5.7 REVIEWS

An applicant who is aggrieved by a NSW Maritime decision relating to an application lodged in accordance with this Policy may request in writing that the decision be reviewed. Requests should be made within 28 days and show cause as to why the decision should be reviewed. At its discretion, NSW Maritime may determine to review the decision in light of material provided by the applicant or other parties. Any such review will be conducted by the Chief Executive, whose decision will be final.

Appendix A

GLOSSARY OF TERMS

This appendix defines the key terms used throughout the Policy, including the Appendices.

Channel	An unobstructed waterway which allows the movement of vessel traffic.
Development	As defined in Section 4 of the <i>Environmental Planning and Assessment Act 1979</i> .
Development application	<p>An application for consent under Part 3A or Part 4 of the <i>Environmental Planning and Assessment Act 1979</i> to carry out development but does not include an application for a complying development certificate.</p> <p>For the purposes of this Policy any reference to “development application” also includes a “project application” as defined in the <i>Environmental Planning and Assessment Act 1979</i>.</p>
Development consent	As defined in Section 4 of the <i>Environmental Planning and Assessment Act 1979</i> .
Environmental planning instrument	As defined under the <i>Environmental Planning & Assessment Act 1979</i> , includes a local environmental plan (LEP), regional environmental plan (REP) and a state environmental planning policy (SEPP).
Fairway	An unobstructed waterway between rows of berths which allows vessel movement between interior channels and individual berths.
Former mean high water mark (FMHWM)	The position where, formerly, the plane of the mean high water mark intersected the foreshore and subsequent reclamation or filling or excavation has altered the position of the mean high water mark.
Intertidal zone	The area between the highest astronomical tide and zero tide.
Land Owner’s Consent	Consent by the land owner for the making of a development application, as prescribed by clauses 8F or 49 of the <i>Environmental Planning and Assessment Regulation 2000</i> . For the purposes of this Policy “land owner’s consent” and “permission to lodge” have the same meaning.

Mean high water mark (MHWM)	The position where the plane of the mean of all ordinary local high tides intersects the foreshore. For Sydney Harbour and Botany Bay this is presently 1.48 metres above the zero of the Fort Denison Tide Gauge (FDTG) being 0.555 metres Australian Height Datum (AHD).
Minister	Unless otherwise stated, the Minister administering the <i>Ports and Maritime Administration Act 1995</i> .
Mooring	A detached or freestanding apparatus to which a vessel is moored and which is subject to a licence issued by NSW Maritime.
Mooring pen	An arrangement of freestanding mooring piles or other restraining device within which a vessel is permanently berthed.
NSW Maritime	The Maritime Authority of NSW, as constituted under Part 4 of the <i>Ports and Maritime Administration Act 1995</i> .
Permission to Lodge	Permission by the land owner for the making of a development application, as prescribed by clauses 8F and 49 of the <i>Environmental Planning and Assessment Regulation 2000</i> . For the purposes of this Policy “permission to lodge” and “land owner’s consent” have the same meaning.
Private landing facility	A structure (such as a wharf, jetty or pontoon) used to enable the landing or embarking of passengers or the loading or unloading of goods to or from a vessel and which gives access to the shore and is not generally available for public use. Private landing facilities do not include private landing steps.
Private landing steps	Steps used for launching and retrieving vessels and are not generally available for public use.
Private marina	An apparatus or structure located on, or in, the waterway and used for restraining two or more vessels, but does not include a commercial marina or mooring pen.
Private use facility	A facility that is not open to the general public, including a private landing facility or private marina but not including a commercial marina or maritime commercial or industrial facility.
Project application	An application for development which is declared to be a “major infrastructure or other project” by Section 75B of the Environmental Planning and Assessment Act 1979.

In this document the term “development application” includes a project application.

Reclamation

An area of land previously submerged but now artificially raised above high water mark.

Skid

An inclined ramp used for the manual launching of small vessels, but does not include a slipway.

Slipway

Any structure, usually in the form of two supported parallel rails, on which a wheeled cradle is run to draw a vessel out of the water by means of a powered or manual winch, a block and tackle or the like.

Submerged land

Land which lies below the MHWL.

Vessel

Has the same meaning as in Section 2 of the *Maritime Services Act 1935* which at the time of adoption of this Policy includes any ship, lighter, barge, boat, raft, craft and any floating object or apparatus used wholly, or in part, for the conveyance of persons or things by water, of whatsoever description and howsoever navigated, and includes amphibious vehicles, seaplanes, hydroplanes, hydrofoils, hovercraft, sunken or stranded vessels and the wreck or remains of any vessel but does not include a floating boatlift.

Waterside structure

A structure, the primary function of which makes it essential that it is located in, or in close proximity to, tidal waters.

Wharf

A structure on, and parallel to, the foreshore alongside which vessels may lie to load or unload cargo, passengers and the like.

Works

As defined under Part 3A of the *Rivers and Foreshores Improvement Act 1948*, includes the removal of vegetation or the removal of soil, silt, rock or other material.

Appendix B

INFORMATION TO ACCOMPANY APPLICATIONS

This appendix outlines the information that should be submitted as part of an application for permission to lodge a development application for the development, use and/or occupation of NSW Maritime's land.

Lesser requirements may be appropriate for some types of applications (eg office fitouts). In these circumstances please contact NSW Maritime for clarification.

1. Application

The appropriate application form obtained from NSW Maritime, fully completed and signed by the applicant.

2. Site Plan

A site plan (4 copies) signed by the applicant and indicating:

- title block, border, north point, scale, key, reduced levels datum and contours;
- real property description;
- the position of Mean High Water Mark (MHWM) and Former Mean High Water Mark (FMHWM) if relevant;
- the proposed development in relation to the adjacent land above MHWM;
- boundaries of the adjoining land and relevant Divisions of Waterway.

NB All plans should indicate levels relative to Zero Fort Denison Tide Gauge.

3. Proposal Plan

A fully dimensioned proposal plan (4 copies) indicating:

- plans, cross sections and all elevations of the proposed structure and uses, and details of proposed land-side access arrangements.

NB All plans should indicate levels relative to Zero Fort Denison Tide Gauge.

4. Associated documentation

- a full description of the proposed development which is sufficient for NSW Maritime to satisfy itself regarding paragraphs 5.1 (a) and (b);
- a boating activity statement indicating access to/from, and use of, the facility or structure;
- photographs of the site, relative to its landscape setting, taken in good light from the water at low tide;
- a hydrographic survey prepared in accordance with relevant NSW Maritime guidelines.

5. Application Fee

The appropriate application fee as indicated on the application form.