

SSD 3846 – WEST CULBURRA CONCEPT PROPOSAL – MOD 1

APPENDIX C – PROPOSED MODIFICATIONS TO CONDITIONS

SUBMISSION OBJECTING TO APPLICATION TO AMEND CONDITIONS OF CONSENT

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INTRODUCTION

The following submission is made in support of Culburra Residents and Ratepayers Action Group (CRRAG) regarding the development being pursued by Sealark Pty Ltd as set out in the SSD 3846 West Culburra Concept Proposal. Objection is made to the application to modify conditions of consent attached to the development approval granted by the Land and Environment Court to the Applicant's Concept Proposal. These objections relate primarily to the application to

- amend the definition of baseline
- amend condition A9 requiring an approved future DA.

Attention is drawn to the fact that this development is highly controversial and of great community interest to South Coast residents. Approval of the Concept Plan was granted by the Land and Environment Court (LEC) after considerable deliberation.

Some of the requested amendments do not flow from a change in the development itself but rather seek to interfere with the way the conditions were originally drafted by the LEC. Unless there is an error or something that needs correction or clarification in the conditions they should not be tampered with. These conditions were prepared after much thought and many submissions by the affected community.

The current conditions are an integral part of the approval and should not be altered without the same level of thorough investigation as was initially carried out by the LEC. At the time of granting consent, all the conditions were thought necessary to protect the community's interests as well as the sensitive coastal environment.

These conditions should not be altered for the convenience of the Applicant. The same level of rigour should be applied to considering this modification application as was applied in granting the original consent. This application should not serve as a way for the Applicant to circumvent conditions that were considered necessary at the time of granting consent.

INTEGRATION WITH EPBC ACT CONDITIONS

The Applicant was required to seek approval from the Federal Minister for the Department of Climate Change, Energy, the Environment and Water under section 130(1) and 133(1) of the *Environment Protection and Biodiversity Conservation Act 1999*

(EPBC Act). The controlling provision requiring the Minister to consider approval of the taking of the Action related to listed threatened species and communities – section 18 and 18A.

Whilst approval was granted by the Minister to Sealark on 23 May 2025 to construct the residential development and associated infrastructure (EPBC Act referral 2023/09524), the approval was granted subject to 45 conditions. Any application to alter the original conditions in the grant of consent to the Concept Proposal should be considered in light of the conditions attached to the approval by the Federal Minister.

Importantly, any amendment of the conditions should not undermine the Minister's conditions. Indeed, this application provides an opportunity to incorporate the definitions, intent and procedure set out in the Minister's conditions into the conditions attached to the approval of the Concept Proposal.

In the LEC's conditions the following is stated:

STATUTORY REQUIREMENTS

A5. The Applicant must ensure that all licences, permits, and approvals/consents are obtained as required by law and maintained as required throughout the life of the Concept Proposal. No condition of this consent removes the obligation for the Applicant to obtain, renew or comply with such licences, permits or approvals/consents.

This condition puts the onus on the Applicant to comply with the EPBC Act and does not clarify the role of state government in ensuring compliance. It is well-known that achieving compliance with the EPBC Act is a weak aspect of Federal environmental law enforcement. At the very least, reference should be made to the Minister's approval and the Applicant's request for changes to the consent should be considered with a view to also implementing the Minister's conditions. There should be no room for uncertainty as between the two sets of conditions and they should form an integrated whole.

DEFINITIONS

Proposal to change definition of 'baseline' – replace 'works' with 'construction'

Baseline is currently defined as

Data obtained in regard to the biological, physical and chemical environment at the Site and in the vicinity of the Site in the period between granting of Consent and **commencement of works** (emphasis added).

The Applicant seeks to distinguish between 'commencement of works' and 'construction' and asks that the word 'works' in the definition be replaced by 'construction' on the basis that the need for a baseline assessment be triggered at an 'appropriate stage'. However, there is no full explanation as to why the condition as currently drafted is inappropriate.

The word ‘works’ is a term in planning law that should not be abandoned lightly. It is broader than ‘construction’ as it relates to ‘*any physical activity in relation to land that is specified by a regulation to be a work*’ (emphasis added). It is framed in this way to ensure that the results do indeed provide baseline data – that is, an assessment of the original conditions. The adjustment sought by the Applicant could mean that it is less than a baseline.

In the Applicant’s justification, it is stated that ‘early works’ such as service realignment (‘potentially undertaken years before ‘construction’) should not be delayed for the baseline assessment. However, if this amendment is granted, it will not be clear as to when the baseline study is actually required. For example, how does the use of the word ‘works’ in the current definition of baseline differ from the requirement in C16 that ‘prior to construction of *any stage* of the Concept Proposal’, the Applicant must prepare a water quality monitoring program for baseline monitoring, construction monitoring and post-construction monitoring of surface waters?

Issues that arise in current DAs before Council

Two recent development applications have been presented to Shoalhaven City Council as early works being undertaken in the implementation of the Concept Proposal. Those development applications are as follows:

- DA2024/1732 – Construction of Utility Connections and Mitigation Measures Associated with SSD 3846
- DA2025/1608 – Construction of a Low-Pressure Sewer Rising Main to service subdivision approval under SSD 3846

These proposed developments are likely to be the context to the Applicant’s application to amend the definition of baseline. The Applicant could be trying to find a way around providing baseline data before this work can commence.

Approval of these DAs does not comply with the Minister’s approval conditions regarding the steps that need to be completed before the Applicant commences the Action. However, Council has advised that this is not their concern so long as the Applicant complies with the LEC’s conditions. In effect, enforcement of the EPBC Act conditions is a matter for the state or federal government.

As defined in the Minister’s approval, ‘Commence the Action or commences the Action’ means the *first instance of any on-site clearing, construction or other physical activity* associated with the Action’ (emphasis added).

The Applicant’s request to amend the definition of baseline conflicts with the definition in the Minister’s approval which does not only cover construction but also the ‘first instance’ of construction as well as the ‘first instance’ of ‘on-site clearing’ and ‘other physical activity associated with the Action’.

Important procedural steps follow from the Minister's definition. As a result, prior to the commencement of the Action the approval holder must submit a Construction Environmental Management Plan and a Vegetation Management Plan to the department for the Minister's approval. The approval holder must not commence the Action unless the Minister has approved the Construction Environmental Management Plan and Vegetation Management Plan in writing (condition 4).

In addition, prior to the commencement of the Action, the approval holder must implement Biodiversity Stewardship Site Management Plans for the Stewardship Sites that are providing ecosystem credits for the Gang-gang Cockatoo, Grey-headed Flying-Fox and Yellow-bellied Glider (condition 9).

The key role of baseline data

Preparation of baseline data is the foundation stone to the conditions in the Concept Proposal Consent. As mentioned above, any alteration to the definition would lead to uncertainty. The current use of the concept of 'baseline' can be seen in environmental protection conditions regarding water quality, aquatic ecology and oyster aquaculture as set out below (emphasis added) and those conditions would become uncertain should the definition of baseline be changed.

WATER QUALITY MONITORING

C2. Pre-construction monitoring of surface waters, groundwater, shellfish sites and photo monitoring sites shall:

- (a) occur at a minimum frequency of once a month for a minimum period of 18 months prior to construction work commencing on site;
- (b) include at least two wet weather events, prior to commencement of construction works.

*Note: The Applicant is encouraged to complete more frequent monitoring over a longer period to provide a robust **baseline** data set.*

C9. The Applicant shall submit to Council, updated trigger values for approval as part of the development application for Stage 1. The trigger values for surface waters, groundwater and shell fish sites will also include reference to **collected baseline data** (for example, a Total Nitrogen concentration in excess of the lower of 0.6 mg/L or the 80th percentile of the baseline concentration).

C10. The updated trigger values **shall be further reviewed prior to the commencement of construction** to reflect the additional **baseline water quality monitoring** completed subsequent to the development application being prepared and approval obtained with respect to any change to the update trigger values.

RECEIVING WATER QUALITY

C16. **Prior to construction of any stage of the Concept Proposal**, the Applicant must prepare a water quality monitoring program for **baseline** monitoring, construction monitoring and post-construction monitoring of surface waters in the Crookhaven River estuary and in the catchment of Lake Wollumboola and sections of lake fringe at appropriate locations. The program must:

- (b) include **baseline monitoring** of surface waters for a period of **no less than 18 months prior to commencement of construction**. Sampling should at minimum every two months, with **additional sampling for a minimum of three wet weather events**;

(e) the catchment of Lake Wollumboola, namely Wattle Creek and associated fringing lake habitats must be sampled **over a baseline period of 18 months**. Water quality must be ...

(f) during the **baseline period** a progress report must be prepared when the final methodology for the baseline has been determined and approved by the independent expert, and then at 6-monthly intervals **until the end of the baseline period**;

(g) upon **completion of the baseline period** a report must be prepared including methods, rigorous statistical analyses comparing temporal and spatial factors and recommendations for further work. The findings of the **baseline** must be presented to NSW DPI (Fisheries, NSW DPI, NSW EPA, the oyster industry and as part of the Community Engagement Strategy and made available on website established by the Applicant; and

(h) the design of ongoing monitoring during and post-construction for oyster aquaculture must be determined on the basis of the information acquired for the **baseline** and be subject to the review and endorsement of the independent expert.

AQUATIC ECOLOGY

C17. Prior to construction of **any stage of the Concept Proposal**, the Applicant must prepare an aquatic ecology monitoring program for **baseline** monitoring, construction monitoring and post-construction monitoring of aquatic ecology in the Crookhaven River estuary and in the catchment of Lake Wollumboola and sections of lake fringe at appropriate locations. The program must:

(b) include **baseline** monitoring for aquatic ecology for a period of no less than 18 months prior to commencement of construction. Sampling must occur at a minimum frequency of every two months, with additional sampling for a minimum of three wet weather events;

(e) within the catchment of Lake Wollumboola, habitat descriptions and surveys of macroinvertebrates and fish must be undertaken in locations or permanent or semi-permanent water within Wattle Creek ... Sampling must occur once in each season and following at least 2 wet weather events and after a significant bushfire event, if one occurs during the **baseline period**;

(f) **during the baseline period** a progress report must be prepared when the final methodology for the baseline has been determined and approved by the independent expert, and then at 6-monthly intervals until the end of the baseline period.

(g) **upon completion of the baseline period** a report must be prepared ...

(h) the design of ongoing monitoring during and post-construction for aquatic ecology must be determined on the basis of the information acquired for the **baseline** and be subject to the review and endorsement of the independent expert.

OYSTER AQUACULTURE

C18. **Prior to construction of any stage of the Concept Proposal**, the Applicant must prepare an oyster monitoring program for **baseline monitoring**, construction monitoring and post-construction monitoring of environmental indicators and oyster condition around selected oyster leases in the Crookhaven River estuary. The program must:

(b) include **baseline monitoring** for indicators associated with oyster aquaculture and must be undertaken for a period of no less than 18 months prior to commencement of construction. Sampling must occur at a minimum frequency of every two months, with additional sampling for a minimum of 3 wet weather events;

(f) **during the baseline period** a progress report must be prepared when the final methodology or the baseline has been determined and approved by the Environmental Auditor, and then at 6-monthly intervals until the end of the baseline period. ...

SCHEDULE 1 – CONDITIONS FOR THE CONCEPT PROPOSAL

PART A – ADMINISTRATIVE CONDITIONS

The Applicant seeks to amend Condition A9 which relates to lapse of consent. As currently drafted Condition A9 states as follows:

This consent lapses five (5) years after the date from which it operates, unless development of an approved future DA has physically commenced on the land to which the consent applies before that date.

Condition A9 requires a DA to have been prepared and approved and development to have physically commenced. The Applicant now seeks that the consent does not lapse so long as the ‘development of building, engineering or construction work’ has physically commenced. The applicant seeks to remove any reference to an approved DA and the approval process that would apply. This request is curious and the scenarios that would allow for a cessation of any lapse in the consent need to be fully explored.

The applicant seems to be saying that the physical commencement of something less than a DA required action should be sufficient to avoid any lapse of consent. However, there is no explanation as to what that action might be. For example, could there be some kind of action not requiring a DA that could halt any lapsing of the LEC’s consent or an activity that is ‘pre-construction’ (i.e. does not require baseline data) but can still halt any lapse in the consent?

As currently drafted the conditions provide certainty and do not require amendment. They also ensure that all the correct DA procedures will be followed.