

## **ANNEXURE 3**

**Submission under Clause 4.6  
of Shoalhaven LEP 2014**

**prepared by**

**Cowman Stoddart Pty Ltd**

**PROPOSED MODIFICATION  
TO APPROVED DDGS DRYERS  
AND OTHER WORKS  
IN EXCESS OF ELEVEN METRE  
MAXIMUM BUILDING HEIGHT LIMIT  
(Clause 4.3(2A) Shoalhaven LEP 2014)**

**LOTS 62 DP 1078788 and A DP 334511  
BOLONG ROAD  
BOMADERRY  
and  
LOTS 1 DP 131008 and 4 DP 610696  
HANIGANS LANE  
BOMADERRY**

Prepared for

**Shoalhaven Starches Pty Ltd**

June 2016



**Prepared by:**

***COWMAN STODDART PTY LTD***

SUBMISSION UNDER  
CLAUSE 4.6 OF SHOALHAVEN LEP 2014

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## **1.0 INTRODUCTION**

In 2009 the Minister for Planning issued Project Approval for Shoalhaven Starches to enable the Company to increase its ethanol production capacity to meet the expected increase in demand for ethanol arising from the NSW Government's ethanol mandate by upgrading the existing ethanol plant, located at the Shoalhaven Starches Plant at Bomaderry.

Project Approval MP06\_0228 was granted by the Minister for Planning on the 28<sup>th</sup> January 2009 for the Shoalhaven Starches Expansion Project (SSEP). One component of this approval was upgrading the Stillage Recovery Plant which included the provision of 6 additional Dried Distillers Grains Syrup (DDGS) dryers.

This submission has been made in support of a Modification Application that seeks permission to undertake modifications to the DDGS Dryers approved under the Shoalhaven Starches Expansion Project.

This Modification Application proposes to reduce the number of DDGS Dryers from 6 to 4. The proposed modification will also include:

- slight modification to the footprint of the DDGS Dryer Building;
- a mill feed silo and structure to feed the DDGS Dryers;
- relocation of cooling towers within the site;
- the provision of an additional two Biofilters;
- construction of a forklift maintenance building;
- provision of a container preparation area;
- provision of a container storage area; and
- regularisation of two existing coal and woodchip storage areas.

The modified DDGS Dryer Building will have a height above ground level of 22 m, and the exhaust stack serving the Dryer Building will have a height above ground level of 30 m, which is higher than that anticipated under the SSEP (ie. 25 m).

The proposed Mill Feed silo will have a height above ground level of 23 m.

Other proposed components of the Modification application involve:

- relocation of cooling towers, which will have a height above ground level of 9.4 m;
- construction of a forklift maintenance building that will have a height above ground level of 10 m; and
- installation of two additional biofilters which have a height above ground level of 2 m.

This Modification Proposal largely involves works within Lot 62 DP 1078788, which is situated on the south-west side of the factory site. The modification also affects:

- Lot A DP 334511 on the eastern side of the factory site, within which the proposed mill feed silo and associated structure will be located.
- a coal and woodchip storage area located on the north side of Bolong Road within Lot 1 DP 131008 and Lot 4 DP 610696, which form part of the Shoalhaven Starches environmental farm.

The following zones apply to the subject site under the provisions of SLEP 2014:

- Lot 62 DP 1078788 is zoned IN1 (General Industrial) and E2 (Environmental Conservation).
- Lot A DP 334511 is zoned IN1 (General Industrial).
- Lot 1 DP 131008 is zoned as RU1 (Primary Production) and RU2 (Rural Landscape).
- Lot 4 DP 610696 is zoned as RU1 (Primary Production) and RU2 (Rural Landscape).

There are no specific maximum building height provisions specified for the subject site on mapping supporting the LEP. Clause 4.3(2A) of the Shoalhaven LEP stipulates that if no height limit is specified then the maximum height of any building is to be eleven (11) metres.

The proposed DDGS Dryer Building, stack and Mill Feed Silo will therefore exceed the 11 m building height limit set by Clause 4.3(2A) of SLEP 2014. These structures are proposed within that part of the subject site zoned IN1 General Industrial under the provisions of the Shoalhaven LEP (SLEP) 2014 (ie. Lot 62 DP 1078788 and Lot A DP 334511).

Clause 4.6 of Shoalhaven LEP 2014 deals with exceptions to development standards and provides that Council may consent to a development even though it contravenes a development standard. The provisions of Clause 4.6 require that a written request accompany a proposal that justifies the contravention of a development standard.

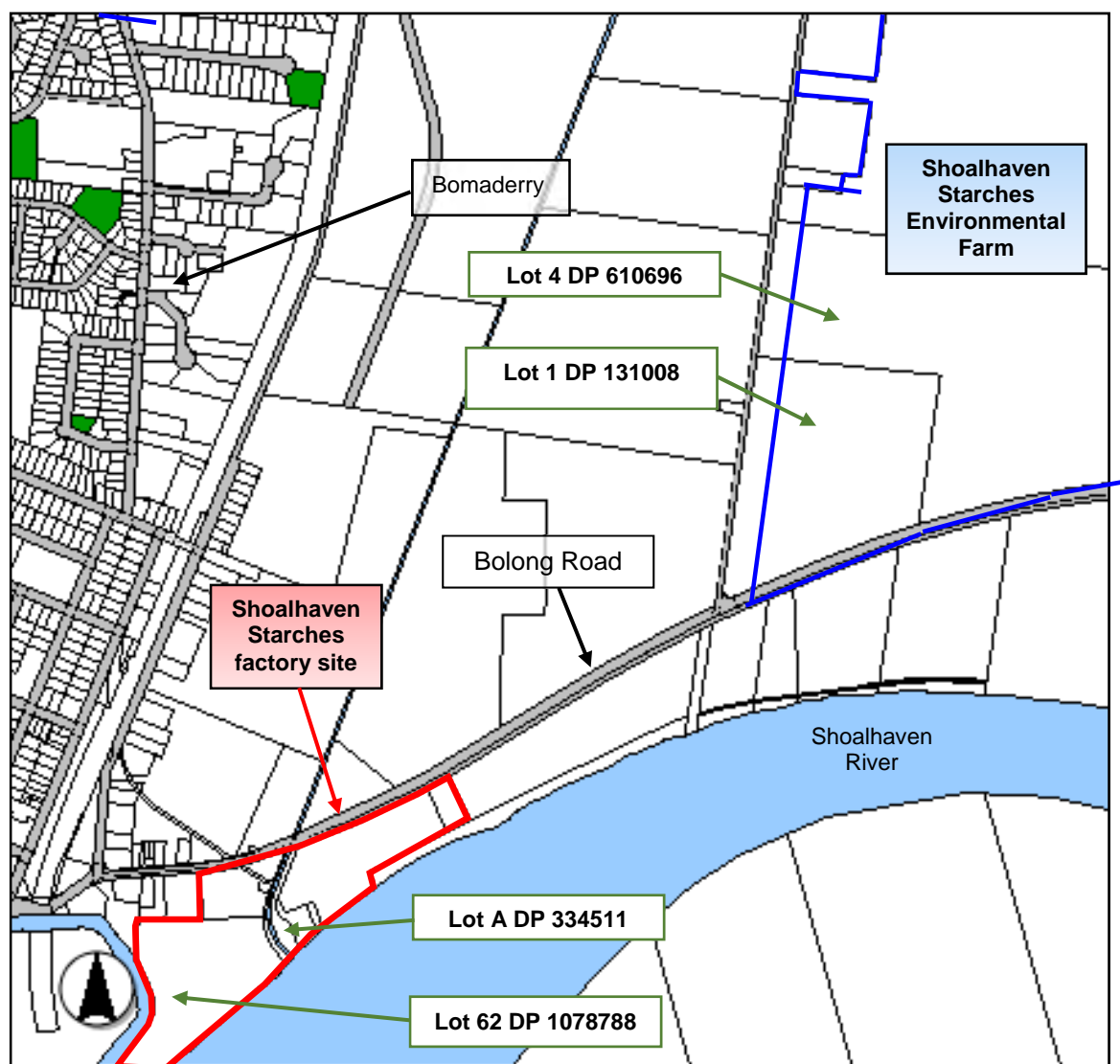
This submission has therefore been prepared pursuant to Clause 4.6 and provides justification that the proposal is appropriate and that strict compliance with the provisions of Clauses 4.3(2A) are unreasonable and unnecessary under the specific circumstances associated with the application.

## 2.0 DESCRIPTION OF SITE AND SURROUNDS

This modification application concerns works which will be situated on the following allotments of land:

- Lot 62 DP 1078788, which is situated within the south west part of the factory site.
- Lot A DP 33451, which is situated immediately east of Abernethy's Creek.
- Lot 1 DP 131008 and Lot 4 DP 610696, which form part of the Shoalhaven Starches Environmental Farm.

**Figure 1** is a site locality plan.



**Figure 1: Site Locality Plan.**

The town of Bomaderry is located 0.5 km (approx.) to the west of the factory site, and the Nowra urban area is situated 2.0 km to the south west of the site.

The “Riverview Road” area of the Nowra Township is situated approximately 1000 metres immediately opposite the factory site across the Shoalhaven River.

The village of Terara is situated approximately 1.5 kilometres to the south east of the site, across the Shoalhaven River. Burruga (Pig) Island is situated between the factory site and the village of Terara and is currently used for dairy cattle grazing.

There are a number of industrial land uses, which have developed on the strip of land between Bolong Road and the Shoalhaven River. Industrial activities include a metal fabrication factory, the Shoalhaven Starches site, Shoalhaven Dairy Co-op (formerly Australian Co-operative Foods Ltd – now owned by the Manildra Group) and the Shoalhaven Paper Mill (Australian Papers). The industrial area is serviced by a privately owned railway spur line that runs from just north of the Nowra-Bomaderry station via the starch plant and Dairy Co-op site to the Paper Mill.

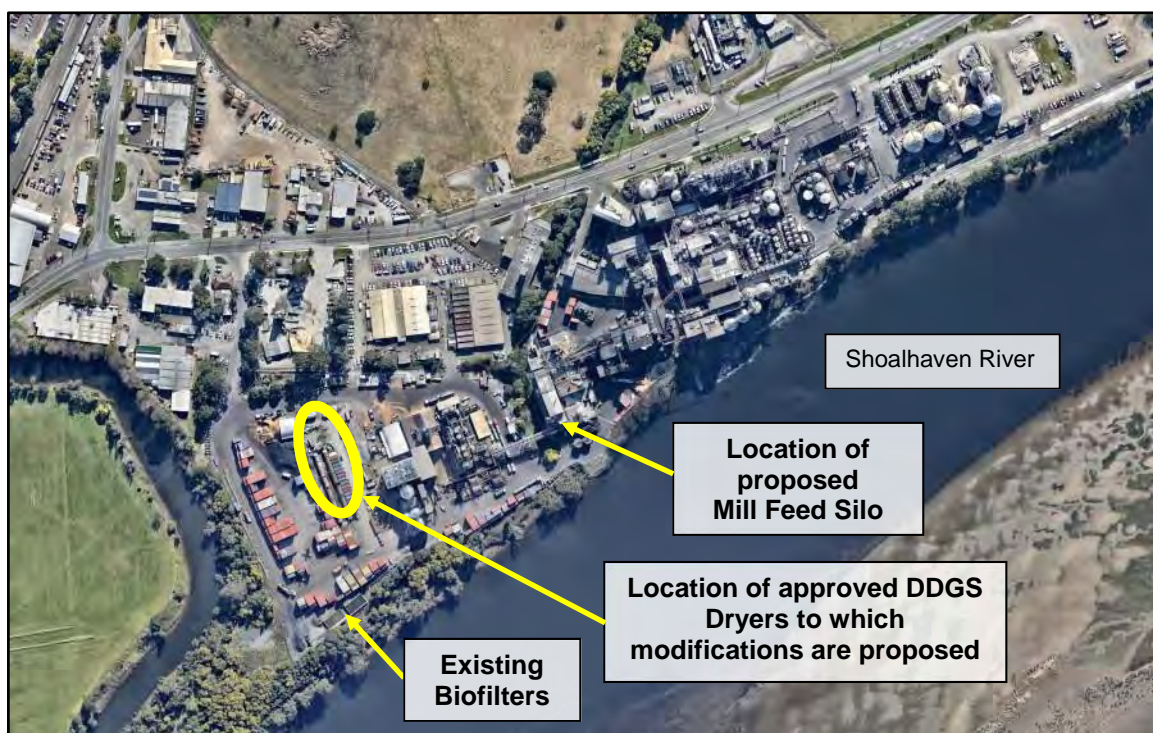
The industrial area is serviced by a privately owned railway spur line that runs from just north of the Nowra-Bomaderry station via the starch plant and Dairy Co-op site to the Paper Mill.

The state railway terminates at Bomaderry Railway Station with a separate, privately owned spur line to the Shoalhaven Starches factory site through the packing plant site. Shoalhaven City Council sewerage treatment works is situated between the railway station and the packing plant site

The Company also carries out irrigation activities on the Company’s Environmental Farm located over 1000 hectares on the northern side of Bolong Road. This area is cleared grazing land and also contains spray irrigation lines and wet weather storage ponds). These wet weather storage ponds on the farm form part of the irrigation management system for the factory.

**Figure 2** is an aerial photograph of the site. The factory site has direct road frontage to Bolong Road to the north. The Shoalhaven River flows along the southern boundary of the factory site.





**Figure 2: Aerial photograph of the subject site.**

Lot 62 DP 1078788 is zoned IN1 (General Industrial) and E2 (Environmental Conservation) under the provisions of SLEP 2014. Lot A DP 334511 is zoned IN1 (General Industrial) under the provisions of SLEP 2014.

That part of the site that is affected by the proposed modifications (with the exception of the proposed coal and woodchip storage area at Hanigans Lane) is zoned IN1 General Industrial under the provisions of the Shoalhaven LEP (SLEP) 2014. Mapping that supports the SLEP 2014 does not identify the subject site as having a specified building height limit. The provisions of Clause 4.3(2A) of the SLEP state that if no height limit is specified for a parcel of land then a maximum building height of eleven (11) metres applies.

### **3.0 THE PROPOSAL**

This submission made pursuant to Clause 4.6 of the SLEP 2014 supports a modification application that seeks approval from the NSW Department of Planning & Environment to undertake modifications to the DDGS Dryers and associated works approved under the Shoalhaven Starches Expansion Project (Project Approval MP06\_0228) at Bolong Road Bomaderry.

It is proposed to reduce the number of DDGS Dryers from 6 (originally approved as part of the SSEP) to 4. In addition to the proposed reduction in number of DDGS dryers, the Modification Proposal also includes the following:

- Forklift Maintenance Building to be located immediately south-west of the proposed relocated DDG Dryers. This building will have a height above ground level of 10 m.
- Slight relocation of the footprint of the DDGS Dryer building in a northerly direction by 28 m to provide more area surrounding the Forklift Maintenance Building and therefore allow for manoeuvring of forklifts within the vicinity of this area. The modified DDGS Dryer Building will have a height above ground level of 22 m.
- The stack serving the Dryer Building will have a height above ground level of 30 m, which is higher than that anticipated under SSEP (ie. 25 m).
- Relocation of approved cooling towers located adjacent to the Shoalhaven River frontage of the site to adjacent to the proposed DDGS Dryer Building. These cooling towers are presently located within close proximity of the Shoalhaven River and encroach into an area that has been zoned E2 Environmental Conservation under the Shoalhaven LEP 2014. It is proposed to relocate these cooling towers adjacent to the DDGS Dryer Building, which they will serve. It will also have the advantage of moving them further away from the river and entirely within the industrial zoned portion of the site. The cooling towers will have a height above ground level of 9.4 m.
- Relocation of approved but yet to be constructed cooling towers from their position adjacent to the approved evaporator. These approved cooling towers are located in a position where a Biofilter Odour Recover Unit Scrubber has been erected. This Scrubber essentially removes particles and directs odorous air emissions to the biofilters located to the south-west corner of the site. It is proposed to relocate these cooling towers from the western side of these existing cooling towers to the eastern side away from this Scrubber. The cooling towers will have a height above ground level of 9.4 m.

- Ability to construct an additional two biofilters. Biofilters treat odorous air emissions from the site. It is Shoalhaven Starches view that the installation of the new DDGS Dryers will potentially necessitate the provision of these additional biofilters. The biofilters will have a height above ground level of 2 m.
- Provision of a Container Preparation area to be located to the east of the proposed Forklift Maintenance Building and south of the proposed relocated DDGS Dryers.
- Provision of a Container Storage area to be located generally to the west of the relocated DDGS Dryers.
- Regularisation of an existing coal and wood chip storage area located to the west of the relocated DDGS Dryers and continued use of this area on a temporary basis (Stage 1) until this location is required for container storage purposes. All coal and woodchips would then be stored within the Hanigans Lane storage area (see below).
- Regularisation of an existing coal and woodchip storage area at Hanigans Lane on the north side of Bolong Road within the Environmental Farm.

The components of the modification application that will have a height above the maximum height level permitted by clause 4.3(2A) are summarised in **Table 1**.

**Table 1**  
**Height of Proposed DDGS Dryers and Associated Works**

<i><b>Component of Modification Proposal</b></i>	<i><b>Maximum Height Above Ground Level</b></i>
DDGS Dryer Building	22 metres
Stack serving DDGS Dryer Building	30 metres
Mill Feed Silo and associated structure	23 metres

### **3.1 JUSTIFICATION FOR PROPOSAL**

In 2009 the Minister for Planning issued Project Approval for Shoalhaven Starches to enable the Company to increase its ethanol production capacity to meet the expected increase in demand for ethanol arising from the NSW Government's ethanol mandate by upgrading the existing ethanol plant, located at the Shoalhaven Starches Plant at Bomaderry.

Project Approval MP06\_0228 was granted by the Minister for Planning on the 28<sup>th</sup> January 2009 for the Shoalhaven Starches Expansion Project (SSEP).

The SSEP sought to increase ethanol production at the Bomaderry plant in a staged manner from 126 million litres per year to 300 million litres per year.

To accomplish the increase in ethanol production, this project required a series of plant upgrades and increase in throughput of raw materials, principally flour and grain. The required plant upgrades included the installation of 6 additional Dried Distillers Grains Syrup (DDGS) dryers within the Stillage Recovery Plant.

Following the Minister's determination Shoalhaven Starches have been implementing and commissioning works in accordance with this approval. The commissioning of components of the approved development provided the Company with an opportunity to review and identify several operational, efficiency and process improvements.

As mentioned above the increase in ethanol production envisaged by the SSEP Project Approval was in response to the NSW Government's 6% ethanol mandate. The reality however is the amount of ethanol that is being blended with petrol within NSW has to date fallen well short of this objective, largely due to on-going exemptions from the mandated ethanol content being granted to the major oil companies. As a result the demand for ethanol is not meeting expectations raised by the NSW Government's ethanol mandate.

Under these circumstances it is proposed to reduce the number of approved DDGS Dryers from 6 to 4. The reduction in Dryer "footprint" on the site will release land for other development purposes. The Modification Proposal also includes the following aspects:

- Forklift Maintenance Building to be located immediately south-west of the proposed relocated DDG Dryers. This building will have a height above ground level of 10 m.
- Slight relocation of the footprint of the DDGS Dryer building in a northerly direction by 28 m to provide more area surrounding the Forklift Maintenance Building and therefore allow for manoeuvring of forklifts within the vicinity of this area. The modified DDGS Dryer Building will have a height above ground level of 22 m and a stack with height above ground level of 30 m, which is higher than that anticipated under SSEP (ie. 25m).
- Installation of a proposed Mill Feed Silo and associated structure, which will be located on the eastern side of the factory site within proximity of DDGS Dryers 1 – 3. Mill feed will be conveyed from this structure by bucket elevators and pipework to the DDGS Dryers. The Mill Feed Silo will have a height above ground level of 23 m.
- Relocation of approved cooling towers located adjacent to the Shoalhaven River frontage of the site to adjacent to the proposed DDGS Dryer Building. These cooling towers are presently located within close proximity of the Shoalhaven River and encroach into an area that has been zoned E2 Environmental Conservation under the Shoalhaven LEP 2014.

It is proposed to relocate these cooling towers adjacent to the DDGS Dryer Building, which they will serve. It will also have the advantage of moving them further away from the river and entirely within the industrial zoned portion of the site.

- Relocation of approved but yet to be constructed cooling towers from their position adjacent to the approved evaporator. These approved cooling towers are located in a position where a Biofilter Odour Recover Unit Scrubber has been erected. This Scrubber essentially removes particles and directs odorous air emissions to the biofilters located to the south-west corner of the site. It is proposed to relocate these cooling towers from the western side of these existing cooling towers to the eastern side away from this Scrubber.
- Ability to construct an additional two biofilters. Biofilters treat odorous air emissions from the site. It is Shoalhaven Starches view that the installation of the new DDGS Dryers will potentially necessitate the provision of these additional biofilters.
- Provision of a Container Preparation area to be located to the east of the proposed Forklift Maintenance Building and south of the proposed relocated DDGS Dryers.
- Provision of a Container Storage area to be located generally to the west of the relocated DDGS Dryers.
- Regularisation of an existing coal and wood chip storage area located to the west of the relocated DDGS Dryers and continued use of this area on a temporary basis (Stage 1) until this location is required for container storage purposes. All coal and woodchips would then be stored within the Hanigans Lane storage area at (see below).
- Regularisation of an existing coal and woodchip storage area at Hanigans Lane on the north side of Bolong Road within the Environmental Farm.

Plan details of the proposed modification are included as Annexure 1 to the EA that this submission supports.

## 4.0      **CLAUSE 4.6 OF SHOALHAVEN LEP 2014**

Clause 4.6 of Shoalhaven LEP 2014 stipulates:

### **4.6 Exceptions to development standards**

- (1) *The objectives of this clause are as follows:*
  - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
  - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
  - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
  - (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) *the concurrence of the Director-General has been obtained.*
- (5) *In deciding whether to grant concurrence, the Director-General must consider:*
  - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) *the public benefit of maintaining the development standard, and*
  - (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6*

*Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

**Note.** *When this Plan was made it did not include all of these zones.*

- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:*
  - (a) a development standard for complying development,*
  - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
  - (c) clause 5.4,*
  - (ca) clause 6.1 or 6.2*

#### **4.1 CLAUSE 4.6 AND ITS USE**

Clause 4.6 of the SLEP 2014 sets out the general principle that a development standard may be varied where strict compliance can be shown to be unreasonable or unnecessary in the circumstances of the case; and that there are sufficient environmental planning grounds to justify contravening the development standard.

Before applying the discretionary power of Clause 4.6 the consent authority must be satisfied that the standard for which the departure is sought is a "development standard" and not a matter which would prohibit the proposal.

A development standard is defined within Section 4 of the EP&A Act.

*"Development standard" means provisions of an environmental planning instrument in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the forgoing, requirements or standards in respect of -*

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or works, or the distance of any land, building or work from any specified point;*

- (b) *the proportion or percentage of the area of a site which a building or work may occupy;*
- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work;*
- (d) *the cubic content or floor space of a building;*
- (e) *the intensity or density of the use of any land, building or work;*
- (f) *the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment;*
- (g) *the provision of facilities for the standing, movement, parking, servicing manoeuvring, loading or unloading of vehicles;*
- (h) *the volume, nature and type of traffic generated by the development;*
- (i) *road patterns;*
- (j) *drainage;*
- (k) *the carrying out of earthworks;*
- (l) *the effects of the development on patterns of wind, sunlight, daylight or shadows;*
- (m) *the provision of services, facilities and amenities demanded by the development;*
- (n) *the emission of pollution and means for its prevention or control or mitigation; and*
- (o) *such other matters as may be prescribed.*

Having regard to the definition of “*development standard*”, particularly paragraph (c), it is considered that Clause 4.3 contains a development standard limiting the height of a building. Furthermore, Clause 4.3 is contained in Part 4 of the Shoalhaven LEP, which contains the primary development standards outlined in the LEP. This reinforces the contention that the provisions of Clause 4.3 are a development standard. Such a development standard is therefore open to a written request made pursuant to Clause 4.6.

A consent authority must also be satisfied of three matters (pursuant to the provisions of Clause 4.6) before it may agree with the written request and grant development consent to a development application for development that could, but for a development standard, be carried out with development consent.

First, the request is to be in writing (Clause 4.6(3)), demonstrate that the compliance with that development standard is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a)) and that there are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)).



Secondly, the consent authority must also be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (Clause 4.6(4)(a)(ii)).

Finally, the consent authority can only grant development consent for a development that contravenes a development standard if the concurrence of the Secretary (formerly Director General) of Planning and Infrastructure has been obtained (Clause 4.6(4)(b)).

The Secretary in deciding whether to grant concurrence must consider pursuant to Clause 4.6(5):

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) *the public benefit of maintaining the development standard, and*
- (c) *any other matters required to be taken into consideration by the Director-General before granting concurrence.*

As this matter does not concern the subdivision of land zoned *RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living* the provisions of Clause 4.6(6) are also not applicable to this proposal and are not further addressed in this written request.

This submission has been prepared having regard to the above relevant matters.

## 5.0 THE DEVELOPEMMENT STANDARD TO BE VARIED

This written request seeks to vary Clause 4.3(2A) of the SLEP 2014 as it applies to this modification application. Clause 4.3 of Shoalhaven LEP 2014 stipulates the following:

### 4.3 Height of buildings

- (1) *The objectives of this clause are as follows:*
- (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of a locality,*
  - (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
  - (c) *to ensure that the height of buildings on or in the vicinity of a heritage item or within a heritage conservation area respect heritage significance.*
- (2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

**(2A) *If the Height of Buildings Map does not show a maximum height for any land, the height of a building on the land is not to exceed 11 metres.***

Mapping supporting the SLEP 2014 does not identify a maximum building height that applies to the subject site. Under these circumstances, and having regard to Clause 4.3(2A) a maximum building height of 11 metres applies to the subject site.

As summarised in Section 3.0 of this submission, the modified DDGS Dryer proposal will include buildings and structures that will have a height above ground level that will exceed the 11 metre maximum building height limit. The development therefore does not comply with the provisions of Clause 4.3(2A) of Shoalhaven LEP 2014.

## 5.1 OBJECTIVES OF STANDARD

As outlined in clause 4.3(1) above the objectives of clause 4.3 are:

- (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of a locality,*
- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
- (c) *to ensure that the height of buildings on or in the vicinity of a heritage item or within a heritage conservation area respect heritage significance.*

## 5.2 OBJECTIVES OF IN1 ZONE

The objectives of the General Industrial IN1 zone that applies to that part of the subject site affected by the proposed works with a building height of more 11 metres are:

- *To provide a wide range of industrial and warehouse land uses.*

- *To encourage employment opportunities.*
- *To minimise any adverse effect of industry on other land uses.*
- *To support and protect industrial land for industrial uses.*
- *To allow a diversity of activities that do not significantly conflict with the operation of existing or proposed development.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.*

## **6.0 DEPARTMENT OF PLANNING AND INFRASTRUCTURE GUIDELINES**

The Department of Planning and Infrastructure has produced a document entitled “*Varying Development Standards – A Guide*” dated August 2011. This document updates the former Circular B1 which applied to *State Environmental Planning Policy No. 1 (SEPP No. 1) - Development Standards* to include the relevant matters applying.

The Guidelines build upon the matters outlined above and in Clause 4.6 itself, and also stipulates that the application should address the “five part test”. In this regard, the Land and Environment Court (*Wehbe v Pittwater Council [2007] NSWLEC827 (21 December 2007)*) has set out a “five part test” for consent authorities to consider when assessing a proposal that seeks to vary a development standard. The “five part test” is as follows:

1. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*
2. *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
4. *the development standard has been virtually abandoned or destroyed by the council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
5. *the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

Relevant matters are addressed in Section 8.0 below.

## **7.0      ASSUMED CONCURRENCE**

The Guidelines prepared by the Department deal with the concurrence requirements of proposals reliant upon an exception to development standards. Where a Standard Instrument LEP applies, as is the case with this proposal and the provisions of Shoalhaven LEP 2014, the Guidelines reference Planning Circular PS 08-003 issued in May 2008 and which advises that the concurrence can be assumed with respect to all environmental planning instruments that adopt Clause 4.6, or a similarly worded clause, providing for exception to development standards.

The concurrence of the Secretary of the Department of Planning and Infrastructure can therefore be assumed with respect to this proposal.

## 8.0 ASSESSMENT

This written request seeks to justify the departure to the provisions of Clause 4.3(2A) of the SLEP 2014 which imposes a maximum building height of eleven (11) metres. The proposal seeks to undertake modifications to the approved DDGS Dryers that formed part of the Shoalhaven Starches Expansion Project approval.

Clause 4.3(2A) imposes, in the absence of a site specific building height limit, a generic height limit of 11 metres.

The components of the modification application that will have a height above the maximum height level permitted by clause 4.3(2A) are summarised in **Table 2**.

**Table 2**  
**Height of Proposed DDGS Dryers and Associated Works**

<i><b>Component of Modification Proposal</b></i>	<i><b>Maximum Height Above Ground Level</b></i>	<i><b>Extent of Departure to Clause 4.3(2A) SLEP 2014</b></i>
DDGS Dryer Building	22 metres	11 m
Stack serving DDGS Dryer Building	30 metres	19 m
Mill Feed Silo and associated structure	23 metres	12 m

This written request demonstrates that compliance with Clause 4.3(2A) of SLEP 2014 is unreasonable and unnecessary given the specific circumstances of this case; and that there are sufficient environmental planning grounds to justify contravention of the maximum height limit.

### 8.1 COMPLIANCE WITH STANDARD UNREASONABLE OR UNNECESSARY

It is our view that requiring compliance with the maximum building height limit of 11 metres as outlined in Clause 4.3(2A) of the SLEP 2014 under the specific circumstances of this case would be unreasonable and unnecessary under the specific circumstances of this case:

The 11 metres height limit imposed by clause 4.3(2A) is a generic height limit that applies throughout all land with the Shoalhaven (unless a site specific height limit applies). The height limit applies irrespective of the zoning or development potential that may apply to land.

The subject site is zoned General Industrial IN1, E2 Environmental Conservation, RU1 Primary Production and RU2 Rural Landscape under the provisions of the Shoalhaven LEP (SLEP) 2014.

That part of the site affected by the proposed modifications that have a building height of more than 11 metres is zoned IN1 General Industrial under the provisions of the Shoalhaven LEP (SLEP) 2014. The purpose of the IN1 zone is to permit a wide range of general industrial land uses and activities.

Importantly the subject site forms part of the Shoalhaven Starches factory complex. The existing factory complex includes a range of large scale industrial buildings that range in height well in excess of 11 metres including:

- Interim Packing Plant has a height of 34 metres.
- Boiler House Stack has a height of 53.7 metres.
- No. 5 Starches Dryer (as approved) has a height of 33 metres.
- Existing Flour Mill building has a height of 34.78 metres.
- The constructed No. 6 Dryer (Wet End) has a height of 34.78 metres.
- The constructed DDG Pelletising Plant has a height of 29.20 metres and a stack with a height of 49.20 metres.

Clearly the existing factory complex includes a number of large scale industrial buildings and structures that are already of a height that well exceed the 11 metres height limit.

It should also be noted that the approved DDGS Dryers that form part of the SSEP included a component of 25 metres which also exceeds the 11 metre height limit set by clause 4.3(2A).

The Shoalhaven Starches factory complex is a larger scale industrial complex with buildings and structures that match the significance of the site. Structures are required to have a scale and height to reflect the industrial activities and processes that take place on the site.

The current modification proposal reflects the scale and height of development that already exists as part of the Shoalhaven Starches factory site.

The 11 metres building height imposed by clause 4.3(2A) is a generic height limit that applies through-out the Shoalhaven and does not reflect the specific nature of development associated with the Shoalhaven Starches factory site.

Given these circumstances, it is our view that requiring compliance with clause 4.3(2A) under the specific circumstances of this case would be unreasonable and unnecessary.

## **8.2 ENVIRONMENTAL PLANNING GROUNDS THAT JUSTIFY CONTRAVENTION OF STANDARD**

The written request is also required to demonstrate that there are sufficient environmental planning grounds to justify contravening the 11 metre building height restriction that applies under Clause 4.3(2A).

As outlined in Section 8.1 above the subject site forms part of the Shoalhaven Starches factory complex. The existing factory complex includes a range of large scale industrial buildings that range in height well in excess of 11 metres.

The approved DDGS Dryers also included a component of 25 metres which also exceeds the 11 metre height limit set by clause 4.3(2A).

The Shoalhaven Starches factory complex is a larger scale industrial complex with buildings and structures that match the significance of the site. Structures are required to have a scale and height to reflect the industrial activities and processes that take place on the site.

The current modification proposal reflects the scale and height of development that already exists as part of the Shoalhaven Starches factory site.

As also discussed in the EA for this Modification Application part of the original justification for the SSEP was the need to meet the expected increase in demand for arising from the NSW Government's ethanol mandate which sought to increase the blending of ethanol in to the total volume of petrol sold in NSW to a 6% ethanol content. The reality however is the amount of ethanol that is being blended with petrol within NSW has to date fallen well short of this objective, largely due to on-going exemptions from the mandated ethanol content being granted to the major oil companies.

As a result the demand for ethanol is not meeting expectations raised by the NSW Government's ethanol mandate.

Under these circumstances Shoalhaven Starches is proposing to reduce the number of approved DDGS Dryers from 6 to 4. The reduction in Dryer "footprint" on the site will release land for other development purposes. The proposed modification works also include:

- slight modification to the footprint of the DDGS Dryer Building;
- a mill feed silo and structure to feed the DDGS Dryers;
- relocation of cooling towers within the site;
- the provision of an additional two Biofilters;



- construction of a forklift maintenance building;
- provision of a container preparation area;
- provision of a container storage area; and
- regularisation of two existing coal and woodchip storage areas.

As will be dealt with further in Section 8.3 below, the proposal is consistent with the objectives and is permissible within the IN1 zone that applies to the affected land.

As will also be dealt with further in Section 8.3 below despite non-compliance with the 11 metre height restriction, the proposal is consistent with the stated objectives of Clause 4.3 as they relate to the building height requirements as outlined above in Section 8.3 of this written request.

The proposed development is representative of the prevailing character of the locality, ie. industrial development within an industrial zone and is of a height consistent with buildings already existent on the development.

Given the above circumstances it is my view that there are suitable environmental planning grounds for justifying contravention of the 11 metres building height limit under the specific circumstances of this case.

### **8.3 IS THE PROPOSED DEVELOPMENT IN THE PUBLIC INTEREST?**

Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC827 (21 December 2007) provides commentary with respect to establishing whether compliance with a development standard is unreasonable or unnecessary under the specific circumstances of a particular matter. Whilst this case related to the use of SEPP 1, given the similarities between the objects of SEPP No. 1 and Clause 4.6 the findings of Preston CJ does provide guidance with respect to the implementation of this clause.

According to Preston CJ one of the most commonly invoked ways to establish that compliance with the development standard is unreasonable or unnecessary is because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. Such also serves to determine whether or not a proposal is consistent with the “public interest”.

The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved.

However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).

As outlined in Section 6.0 above, the objectives underpinning the development standard – in this instance the maximum Building Height of 11 metres is a relevant consideration in determining whether strict compliance with that standard under the specific circumstances of the case would be unreasonable or unnecessary.

The objectives of the height of buildings standard are expressly stated in Clause 4.3 as follows:

- (1) *The objectives of this clause are as follows:*
- (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of a locality,*
  - (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
  - (c) *to ensure that the height of buildings on or in the vicinity of a heritage item or within a heritage conservation area respect heritage significance.*

The above objectives in my view provide a clear understanding of the purposes underpinning the building height standard outlined in Clause 4.3(2A) and which applies to the subject site.

This written submission will demonstrate that this proposal will not prevent the above objectives from being achieved notwithstanding non-compliance with the eleven metre height restriction development standard in the specific circumstances of this case.

Having regard to the objectives of Clause 4.3, it is my view that the proposal is not inconsistent with these for the following reasons:

- The modified DDGS Dryers development will comprise components that will range in height from; 2 metres (biofilters); 10 metres (forklift maintenance building); 9.4 metres (cooling towers); 23 metres (mill feed silo); 22 metres (DDGS Dryer Building); and 30 metres above ground level (stack serving DDGS Dryer Building). As detailed in Section 8.1 above, the existing Shoalhaven Starches factory complex includes a range of large scale industrial buildings and structures which are either significantly higher than those works proposed by this modification proposal; or are of a similar height and scale to those which are proposed. The modified proposal will therefore be compatible with the height, bulk and scale and character of existing development within the locality.

- As detailed in Section 8.5 of the EA that supports this modification application the modified proposal will not adversely impact the visual amenity of the locality.
- Given the siting of the modified DDGS Dryers within the subject land; and the nature of surrounding land uses which comprise either industrial lands uses to the north and east; riparian land and Shoalhaven River to the south; or riparian land, Bomaderry Creek and pasture land within the floodplain to the west; the proposal will not result in disruption of views or adverse overshadowing of adjoining lands.
- The subject site is not located within the vicinity of an item of environmental heritage. The proposal will therefore not have any adverse impacts on any site or locality with identified heritage significance.

Given the above circumstances it is my view that the modified DDGS Dryers proposal will not be inconsistent with the prevailing character of this locality; or that which is envisaged given the planning provisions applying to the land; and will therefore be consistent with the objectives of clause 4.3.

That part of the subject site that is affected by the proposed modifications and which include a building height of more than 11 metres is zoned IN1 General Industrial under the SLEP 2014. . The objectives of the IN1 zone as outlined in Section 5.2 of this submission are:

- *To provide a wide range of industrial and warehouse land uses.*
- *To encourage employment opportunities.*
- *To minimise any adverse effect of industry on other land uses.*
- *To support and protect industrial land for industrial uses.*
- *To allow a diversity of activities that do not significantly conflict with the operation of existing or proposed development.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.*

It is my view that the modification proposal is also consistent with the above objectives of the IN1 zone:

- The DDGS Dryers that are to be modified by this proposal forms part of the SSEP.
- In a broader strategic context the Shoalhaven Starches factory is a key supplier of ingredients to many industries within NSW. The products created at the Shoalhaven Starches Plant at Bomaderry are essential ingredients for a wide range of industries within NSW and Australia.

These industries depend significantly upon products produced at the Shoalhaven Starches Plant, products that are not in many cases produced elsewhere. Were the Shoalhaven Starches plant to cease operations such a cessation would have significant adverse implications to other industries within the State and Australia as a whole. This was one of the reasons why the NSW Government in 1993 identified the Shoalhaven Starches Plant at Bomaderry as a State Significant Site.

- Apart from the important role that the Shoalhaven Starches Plant plays in the NSW economy, the factory plays a particularly important role in the local Shoalhaven (and South Coast) economy. The Shoalhaven Starches factory site at Bomaderry directly employs 280 employees; with the SSEP creating an estimated additional 25 ongoing positions.
- Such employment generation needs to be seen in a broader context with the loss of significant employers within the Shoalhaven including Gates Rubber at South Nowra, the closure of the Dairy Farmers Co-operative operations and the Australian Paper Mill, (both operations situated along Bolong Road). Shoalhaven Starches is one of the few major employers within this region seeking to generate additional employment for the local economy.
- The SSEP, of which the modified DGS Dryers development forms a significant component, will ensure the on-going operations of the Shoalhaven Starches plant at Bomaderry in a commercially and environmentally sustainable manner. In doing so the SSEP will be integrated with an overall Odour Management Plan for the complex, which has and will continue to result in significant reduction in odours that emanate from the site. The SSEP also includes the implementation of a waste water treatment plant that will treat waste waters to a higher quality standard where over half of the waste water treated will be able to be re-used in the factory process on the site. The remainder will be able to be irrigated in a sustainable manner on the Company's Environmental Farm.
- The proposed modified DDGS Dryers development as demonstrated by the EA that supports the modification application (and in particular by the expert assessments that support the EA) will not result in adverse impacts on the surrounding locality in terms of:
  - Air quality (including odours);
  - Noise;
  - Flooding;
  - Traffic;

- Visual Impacts;
- Hazards; and
- Riverbank Stability.

Given the above it is our view that the modification proposal will be consistent with the zone objectives that apply to the land.

Given the modification proposal is consistent with the objectives of Clause 4.3; and is not inconsistent with the IN1 zone objectives that apply to the land; it is our view that the modification proposal will be in the public interest.

#### **8.4 CLAUSE 4.6(5) MATTERS FOR CONSIDERATION BY DIRECTOR-GENERAL**

As outlined the concurrence of the Director-General is to be assumed in this case.

- As identified in the original EA for the SSEP the overall proposal is consistent with state and regional planning provisions that apply to the site.
- As outlined in Section 8.3 of this submission it is our view that the proposal is in the public interest.

## 9.0 CONCLUSION

Under these circumstances it is my view that this objection made pursuant to Clause 4.6 is well founded and strict compliance with Clause 4.3(2A) of Shoalhaven LEP 2014 would be unreasonable under the specific circumstances of this case as:

- The objectives that underpin the development standard outlined in Clause 4.3 of Shoalhaven LEP are achieved notwithstanding non-compliance with the development standard.
- The proposal is consistent with the objectives of the IN1 zone that applies to the affected land.
- The proposed development is representative of the prevailing character of the locality, ie. industrial development within an industrial zone.
- The modified DDGS Dryer development will not be dissimilar to existing structures already located within the immediate vicinity of the site in the existing Shoalhaven Starches complex and will conform to the visual character of the locality
- The underlying purpose of the proposed modifications would be defeated if compliance was required as restricted height would limit the ability to accommodate the type of plant and infrastructure associated with this proposal. Such would have an adverse impact on the ongoing operations on the site.

Although well considered, the 11 metre height restriction for the broader Shoalhaven encapsulated within Clause 4.3 should not be rigidly enforced as a development standard in all cases.

This submission demonstrates that the variation to the development standard sought by this proposal is consistent with the objectives of the state, regional and local planning provisions for this site. It is my opinion that strict compliance with this development standard under the specific circumstances of this case would be unreasonable and unnecessary.

For these reasons, this submission pursuant to Clause 4.6 requests that the Department exercise the discretionary power and support this proposal and the development application.



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