

ASSESSMENT REPORT

PORT WARATAH COAL SERVICES TERMINAL 4 MP 10_0215 MOD 1

1. INTRODUCTION

This report is an assessment of a request to modify the Project Approval for a coal export terminal at Kooragang Island in the Newcastle local government area.

The request has been lodged by Port Waratah Coal Services Limited (the Proponent) under section 75W of the *Environmental Planning and Assessment Act 1979* (EP&A Act). It seeks approval to amend the timing requirements and triggers for enabling works, which are required to be completed prior to the commencement of project construction.

2. SUBJECT SITE

The subject site is located at Kooragang Island (see **Figure 1**).

3. APPROVAL HISTORY

On 30 September 2015, the Planning Assessment Commission granted Project Approval for construction and operation of a coal export terminal (Terminal 4) with capacity of up to 70 million tonnes per annum.

4. PROPOSED MODIFICATION

The Proponent has lodged a section 75W modification request (MP 10_0215 MOD 1) seeking approval to amend the timing requirements and triggers for enabling works, which are required to be completed prior to the commencement of project construction.

The Project Approval requires the Proponent to conduct a series of works prior to commencement of the project. Most critically, the Proponent is required to seek approval for, then implement once approved, a Site Management Plan for the project site. The Plan must incorporate actions to be implemented to minimise further degradation of environmental values of the site, to be set out in a Priority Action Statement. These Priority Actions include on-site biodiversity conservation and remediation works. They do not, however, include the full range of other environmental management measures and biodiversity offsets that are required to be completed under the approval during construction and operation of the project.

Completion of the Priority Actions in the Priority Action Statement is deemed to constitute 'substantial commencement of construction'. Once the Proponent has substantially commenced construction, the project approval cannot lapse.

Under the Project Approval, a number of additional works must also be completed before 'commencement of construction'. Of note, this includes an upgrade to the existing Cormorant Road and Pacific National Road T-intersection and the Cormorant and Newcastle Coal Infrastructure Group (NCIG) Wharf Access Road T-intersection to a four leg traffic signal controlled intersection. This is a substantial work, which the Proponent asserts is only required to facilitate peak construction traffic.

The Proponent seeks to remove the link between the completion of the Site Management Plan and the completion of those other pre-construction works that are required before commencement of construction of the remainder of the terminal. The modification is requested on the basis that those other pre-construction works are linked to development of the terminal itself, and not to the Priority Actions, and therefore should only be required prior to construction of the terminal (i.e. not before completion of the Site Management Plan).

The Proponent agrees that the pre-construction works (such as the intersection upgrade) set out in the Project Approval are required prior to commencement of construction of the terminal. However, the Proponent asserts that:

- the actions in the Priority Action Statement are required as a priority
- it is committed to undertaking those Priority Actions, in the form approved separately by the Secretary
- it should, however, also retain the option to decide not to proceed with the Project, and therefore be able to not commence construction of the terminal if it so chooses (consistent with other projects)
- other than the Priority Actions, the works required before commencement of construction, such as the intersection upgrade discussed above, are required to address impacts of the construction and operation of the project
- it should therefore not be required to complete those other pre-construction works until the Proponent makes a decision to proceed with the project, and 'takes up' the Project Approval.

In accordance with the requirements of condition A6 of the Project Approval, the Proponent submitted a Site Management Plan which was approved by the Department in November 2017. The Proponent does not seek to amend the requirements for preparation and implementation of a Site Management Plan under the Project Approval. The Proponent does however seek to amend condition A6 to replace a cross reference to condition A1 (which sets out an obligation to minimise harm to the environment) with a reference to condition A5 (which sets out the lapse date of the project). This amendment would correct a minor error, and confirm that completion of Priority Actions constitutes commencement of construction and means the project does not lapse.

The Proponent has consequently asked that the Project Approval be modified to provide it with the express opportunity to take up the approval. The Proponent proposed a new condition to achieve this outcome; however, ultimately, its request is that the condition be set out similar to condition 8 of the Warkworth Continuation Project development consent (SSD 6464). The requested condition states that:

A16. The Applicant shall:

- (a) notify the Secretary in writing of the date of commencement of development for the Terminal under this consent; and*
- (b) may only commence development for the Terminal under this consent once the Secretary has agreed in writing that all prerequisites to the commencement of*

- development of the Terminal under this consent have been met.*
- (c) *the condition A15, and those conditions in Part B, C or D do not operate until the Secretary has issued her agreement in writing under condition A16(b).*

Note: The prerequisites under the consent include the approval of management plans etc that are required to be approved prior to the commencement of construction. Notice is not required to be given under this condition to commence any works identified in the Site Management Plan or works on the Biodiversity sites.

5. STATUTORY CONSIDERATION

5.1 Section 75W

The project was originally approved under Part 3A of the EP&A Act. Although Part 3A was repealed on 1 October 2011, the project remains a 'transitional Part 3A project' under Schedule 6A of the EP&A Act, and hence any modification to this approval must be made under the former section 75W of the EP&A Act.

The Department is satisfied that the proposed changes are within the scope of section 75W of the EP&A Act, and the proposal does not constitute a new application.

5.2 Approval Authority

The Minister for Planning is the approval authority for the request. However, the Planning Assessment Commission may determine the request under delegation.

While the Department has delegation to determine this modification (as no objections or political donations disclosures were received), the Department considers that it is most appropriate that the application is referred to the Commission for determination.

The Department considers that the Commission should determine the request, because the requirements for a Site Management Plan, and the timing of works following its completion, were a determining matter for the Commission in its assessment of the original project application.

6. CONSULTATION

The Department made the modification request publicly available on its website, and consulted with **Newcastle City Council** (Council) about the proposed modification. Council noted that:

It appears that the purpose of the application is to merely address an anomaly in the framing of the consent that results in a requirement to carry out significant works at a time that is likely to be earlier than is necessary, ie at a point in time when there is no nexus with the approved development proceeding.

The proposal does not appear to have any direct bearing on the timing of the requirement for a voluntary planning agreement to be entered into with Council. On this basis, the proposed modification does not raise any particular concern for Council.



Figure 1: Site layout
(Source: T4 Project Response to Submissions and Preferred Project Report (EMM, 2013))

7. ASSESSMENT

The Department considers the key issue is whether it is acceptable for the Proponent to retain the ability to decide not to proceed with the Project, after it implements the Priority Actions (to minimise further degradation of environmental values of the site as set out in the Site Management Plan), but before it is obliged to undertake other pre-construction works.

The Department has reviewed the Commission's determination report for the project approval to determine whether the Proponent's proposed timing is acceptable. The timing of preliminary works was a critical component of the Commission's consideration of the project. In making its determination, the Commission sought to balance what it deemed the reasonable imperatives of both the public and the Proponent. This balance is to be achieved by the completion of the Priority Actions — certain physical remediation works and actions to protect biodiversity assets — within a five-year lapse period of consent. In determining to impose the requirement for the Site Management Plan, the Commission stated that:

condition A6 will fast track remediation and biodiversity works and as such, [the Commission] is satisfied there will be enhanced certainty of public benefit as a result of the approval. The Commission anticipates that the commencement of the Priority Actions will activate the approval, thus providing ongoing certainty for the Proponent.

The Department recommends that no change be made to this general arrangement in the conditions. There is a clear need for the Proponent to deliver the Priority Actions, and the Proponent's commitment to deliver those actions within the lapse period endures.

The Department, however, accepts the Proponent's concerns that other pre-construction works also required by the approval should not be tied to completion of the Priority Actions. Other relevant pre-construction works include:

- upgrade to the existing Cormorant Road and Pacific National Road T-intersection and the Cormorant and NCIG Wharf Access Road T-intersection
- completion of a voluntary planning agreement with Council.

The required pre-construction works are independent of the Priority Actions envisaged in condition A6—for instance, the completion of the Priority Actions themselves doesn't create a traffic demand for the intersection upgrade. Instead, the need for these pre-construction works is directly required to address the impacts of construction and operation of the coal terminal. It is therefore acceptable that the Project Approval decouples completion of the Priority Actions from completion of the other pre-construction works.

The Department has recommended new conditions that specify that the completion of the Priority Actions do not trigger the need for other pre-construction works. These works will, however, still be required prior to commencement of construction of the terminal.

The Department considers that it is acceptable for the Project Approval to be modified to allow the Proponent the option to deliver the project or not, after it completes the Priority Actions. As envisaged in the Commission's determination report, there remains uncertainty in the coal market and the Proponent still seeks the flexibility to build the

terminal once (and if) demand for coal increases.

The Department accepts that a proponent should retain the option not to build its project. The Department also considers that it is reasonable that this decision be made before it is required to undertake the pre-construction works that are required to minimise the impacts of construction and operation. The Department acknowledges that the cost of these works may be significant, and considers that those costs should only be incurred when it is clear that the impact they are seeking to mitigate will take place.

The Department has recommended conditions that provide for the following:

- the approval for the Project will lapse unless construction has substantially commenced (unchanged from the Commission's project approval)
- the completion of the works associated with the priority actions identified in the Priority Action Statement will constitute substantial commencement of construction for the purpose of determining the lapsing of the approval only (recommended condition A6A)
- otherwise, commencement of construction of the terminal will occur once:
 - the Applicant notifies the Secretary in writing of the date of commencement of construction
 - the Secretary has agreed in writing that all pre-requisites to the commencement of construction (such as approval of the Construction Environmental Management Plan) have been met (recommended condition A16).

8. CONCLUSION

The Department has assessed the modification request and supporting information in accordance with the relevant requirements of the EP&A Act. The Department's assessment concludes that the proposed modification is appropriate on the basis that:

- the requirement for the Proponent to undertake Priority Actions approved by the Secretary, and the Proponent's commitment to do so, remains
- it is acceptable for the Proponent to retain the decision to not pursue construction of its project after those Priority Actions are completed, consistent with established planning practice
- if the Proponent decides to pursue the project, the requirements for pre-construction works, such as a major intersection upgrade adjacent to the site, would remain unaffected, and need to be fulfilled before construction of the terminal commences.

Following its assessment of the project, the Department considers the project is approvable, subject to the recommended conditions (outlined in **Appendix A**). This assessment report is hereby presented to the Commission for determination.

Recommended by:

 28/11/17

Dominic Crinnion
Team Leader
Ports and Water Assessments

Recommended by:

 28/11/17

David Gainsford
Executive Director
Priority Projects Assessments

APPENDIX A: NOTICE OF MODIFICATION

A copy of the notice of modification can be found on the Department's website at:

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=8763

APPENDIX B: SUPPORTING INFORMATION

The following supporting documents and supporting information to this assessment report can be found on the Department's website at:

1. Modification request

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=8763

2. Submissions

http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=8763