

MINISTERIAL SUBMISSION

SUBJECT: Director-General's Report for the Proposed Minor Modification of Approval for the Western Sydney Orbital under Section 115 BAA of the Environmental Planning and Assessment Act 1979

File No. S00/00689

BACKGROUND

The Roads and Traffic Authority (RTA) has requested minor modifications to the approval granted by the Minister on 28 February 2002 for the proposed Western Sydney Orbital. Modifications are sought to amend apparent minor misdescriptions in a number of conditions relating to pre-construction requirements. There is also a minor misdescription relating to a stormwater management condition. The RTA's request is attached, tagged "A".

Pre-construction Requirements

The existing Instrument of Approval defines substantial construction. This was intended to enable minor site preparation works to proceed, ahead of substantial construction, where no or minimal environmental impact is likely.

Numerous conditions require sub plans or other mitigation measures to be prepared or implemented prior to construction, but should have read prior to "substantial" construction. Unchanged, this could cause major timing conflicts.

Condition 151 – Stormwater Management

Condition 151 states that stormwater measures required for the operational phase of the project be installed and utilised within the road reserve prior to construction commencing. The RTA states that it is not possible to comply with this as to do so would in itself be considered "substantial construction" as other works would need to take place first. However, the intent of the condition could still be met wherever it is practical and feasible to do so.

DEPARTMENT'S CONSIDERATION

The RTA considers that these issues outlined above are minor misdescriptions and seeks that the approval be modified pursuant to Section 115BAA of the *Environmental Planning and Assessment Act 1979*. The Department has reviewed the modifications requested and concludes that the proposed changes would reflect the purpose and intent of the various conditions. It is therefore recommended that the Minister modify the Approval under section 115 BAA of the Act.

Further details of the Department's consideration of the request for modification are attached (tagged B").

RECOMMENDATION

It is RECOMMENDED that the Minister:

- (i) approve the requested modification under Section 115 BAA of the *Environmental Planning and Assessment Act 1979*;
- (ii) sign the Instrument of Modification, tagged 'C'; and,
- (iii) sign the notification letter to the Chief Executive of the Roads and Traffic Authority, tagged 'D'.

S. Haddad
Executive Director
Sustainable Development

ENDORSED

MINISTER

ATTACHMENT B

IMPACTS

Construction Commencement Related Conditions

The requested changes to the Approval would result in sub-plans currently requiring preparation prior to construction would be required prior to substantial construction instead. The glossary to the Instrument of Approval defines "substantial construction" as follows:

"does not include survey, acquisitions, fencing, test drilling/test excavations, building/road dilapidation surveys, minor surveys, minor clearing except where endangered ecological communities or threatened flora or fauna species would be impacted, establishment of site compounds in generally cleared, highly disturbed or non-environmentally sensitive areas, minor access roads, minor adjustments to services/utilities, noise mitigation measures and other minimal environmental/community impact activities."

The intent of including this definition was to allow those activities with low environmental risk to proceed prior to determination and implementation of mitigation measures and safeguards required to manage the impacts of "substantial construction". In drafting the conditions, the term "construction", which is not defined, has been mistakenly used. By using this term in the conditions outlined in **Table 1** and **Table 2**, it suggests that these should be fulfilled prior to ANY works commencing on site. However, these conditions generally relate to the preparation of environmental management plans and sub-plans or installation of measures to manage impacts, these clearly would not be required until prior to commencement of "substantial construction" when impacts are anticipated to occur.

Therefore, the Department considers this to be a minor error and amendment of the conditions as outlined in **Table 1** and **Table 2** to refer to "substantial construction" rather than construction would not alter the intent of the condition and would allow additional time to identify, install and implement appropriate mitigation measures and safeguards.

Condition 151

This condition currently requires that all permanent stormwater controls be installed and operational prior to construction commencement. The RTA has requested that this condition be modified to include "where reasonable and feasible" on the basis that it is not be possible to comply with a strict interpretation of this condition. The intent of the condition was to reduce the need for installation and removal of temporary (construction) stormwater control measures where permanent (operational) measures could be installed earlier in the construction programme to fulfil both functions. This is considered a "misdescription" as the condition does not accurately convey this intent.

The Department accepts the argument that the detailed design of all permanent control measures may not be completed in all instances prior to construction or even "substantial construction" OR the works may in themselves constitute "substantial construction", particularly where these are in the form of detention basins. The Department has reviewed the EIS, Representations Report and Director-General's assessment report to confirm that the proposed amendment would not conflict with the commitments or recommendations made in these reports. Therefore, the Department recommends modification of Condition 151 in accordance with Section 115 BAA of the *Environmental Planning and Assessment Act* to amend the misdescription.

CONCLUSION

It is considered that the changes requested would serve to reflect the purpose of the various conditions by ensuring that all mitigation measures and safeguards have been considered and implemented prior to substantial construction, when impacts are anticipated to occur. The Department concludes that the

modifications requested are minor in nature and closely reflect the purpose and intent of the Conditions of Approval, whilst allowing the implementation of these to be deferred until immediately before substantial construction is to commence. This also provides for more certainty regarding the operation of the measures, as more detailed information regarding the design and construction programme will be available upon which to determine appropriate measures.

Table 1 Western Sydney Orbital – Proposed Modifications to Approval Conditions (EMP/sub-plan related)

Approval Conditions	Apparent Misdescription	Modification Requested	Reasons
49	Flora and Fauna Management Sub Plan to be prepared prior to construction rather than prior to substantial construction	second sentence, replace prior to construction with prior to substantial construction	<p>The environmental management documentation for construction embodied in the approval conditions include the following three tiers of documents:</p> <p>Construction Framework EMP (CFEMP);</p> <p>Management Sub Plans; and</p> <p>Construction Method Statements (CMS).</p> <p>It is understood that the intention was for the CFEMP to be prepared first, as a high level policy/guideline document. The management sub plans were to be prepared in conjunction with the CFEMP to document impacts, safeguards and management procedures for each key environmental element. Once the CFEMP and sub plans were approved, CMS were to be prepared for each construction method or work site.</p> <p>Condition 21 requires the CFEMP to be prepared and approved prior to the commencement of substantial construction. However these conditions require documents below the CFEMP to be submitted prior to construction.</p>
50	Threatened Species Management Procedure(s) to be prepared prior to commencement of construction activities rather than prior to substantial construction	Second sentence, replace Prior to commencement of construction with Prior to substantial construction	
100	Framework Traffic Management Plan to be prepared and approved prior to construction commencement rather than prior to substantial construction	Last sentence, replace Prior to construction commencement with Prior to substantial construction	
125	Soil and Water Quality Management Plan to be prepared prior to construction rather than prior to substantial construction	Third sentence, replace Prior to construction with prior to substantial construction	
148	Stormwater Management Plan(s) to be prepared prior to the commencement of construction rather than prior to substantial construction	First sentence, replace Prior to the commencement of construction With Prior to substantial construction	
178	Spoil and Fill Material Management Sub Plan to be prepared before the commencement of construction rather than prior to substantial construction	Fourth sentence, replace Before the commencement of construction with Prior to substantial construction	
191	Acid Sulphate Soil Contingency Sub Plan to be developed prior to the commencement of construction rather than prior to substantial construction	First sentence, replace Prior to the commencement of construction with prior to substantial construction	

Table 2 Western Sydney Orbital – Proposed Modifications to Approval Conditions (General)

Approval Conditions	Apparent Misdescription	Modification Requested	Reasons
32	Alternative design treatments to address flooding issues for the section between Camden Valley Way and Cowpasture Road to be investigated prior to construction rather than prior to substantial construction	First sentence, replace Prior to construction with Prior to substantial construction	<p>Many of the approval conditions provide for compliance with particular requirements prior to substantial construction. However these approval conditions provide for compliance with particular requirements prior to construction rather than prior to substantial construction.</p> <p>Construction is not a term defined in the approval, and an adverse interpretation of it may mean that activities require to plan and implement environmental safeguards cannot be carried out in a timely fashion.</p> <p>It is understood that it was not intended that early construction activities that have low environmental risk should be held up pending finalisation of these safeguard measures.</p>
34	The feasibility, impact and cost effectiveness of using vertical walls or other treatments to minimise the footprint in the vicinity of sensitive sites to be investigated prior to construction rather than prior to substantial construction	First sentence, replace Prior to construction with Prior to substantial construction	
84	Noise mitigation measures at schools to be installed prior to construction rather than prior to substantial construction	Second sentence, replace Prior to construction with Prior to substantial construction	
105	Road dilapidation reports for non-arterial roads likely to be used by construction traffic to be prepared prior to commencement of construction rather than prior to substantial construction	First sentence, replace Prior to commencement of construction with Prior to substantial construction	
106	Management techniques for construction traffic on local roads to be prepared prior to commencement of construction rather than prior to substantial construction	First sentence, replace Prior to construction with Prior to substantial construction	
136	Consultation in relation to the design and timing of all watercourse crossings prior to construction rather than prior to substantial construction	First sentence, replace Prior to construction with prior to substantial construction	
165	Statements of significance, statements of heritage impacts, management and archaeological monitoring strategies and permits and approvals to be undertaken prior to construction rather than prior to substantial construction	First sentence, replace Prior to construction commencing with Prior to substantial construction	

Table 2 Western Sydney Orbital – Proposed Modifications to Approval Conditions (General) (cont.)

Approval Conditions	Apparent Misdescription	Modification Requested	Reasons
168	Plans of Management for historically significant items and areas to be prepared	First sentence, replace Prior to construction with Prior to substantial construction	See above
169	Newspaper advertisement in relation to possible burial site E-15 to be placed three months prior to construction rather than three months prior to substantial construction	First sentence, replace Prior to construction commencement with Prior to substantial construction	
173	Consultation with affected landowners regarding practical and cost effective measures to mitigate acquisition impacts prior to construction commencement rather than prior to substantial construction	First sentence, replace Prior to commencement of construction with Prior to substantial construction	
184	Assessment of potentially contaminated land to be undertaken prior to construction rather than prior to substantial construction	First sentence, replace Prior to construction with Prior to substantial construction	
213	Geotechnical study to determine potential impacts of the project to be undertaken prior to commencement of construction rather than prior to substantial construction	First sentence, replace Prior to commencement of construction with prior to substantial construction	
151	Permanent stormwater control measures to be installed and utilised prior to construction commencing, rather than where practical and feasible and prior to substantial construction	First sentence, insert at start of sentence Where practical and feasible, and replace prior to construction commencing. with Prior to substantial construction.	It is not possible to comply with a strict interpretation of this condition, as the construction of those control measures in itself constitutes “substantial construction”. The detailed design of the permanent control measures will not be completed in all cases before substantial construction, and in some locations it will not be possible to commence the control measures until other construction works have been undertaken. It is understood that the intent of this condition was to wherever practical and feasible install and utilise the permanent stormwater control measures prior to substantial construction.

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

**MODIFICATION OF APPROVAL UNDER SECTION 115 BAA OF THE ENVIRONMENTAL PLANNING
AND ASSESSMENT ACT 1979**

S00/00689 Pt 7

I, the Minister for Infrastructure and Planning, after examining and considering the Roads and Traffic Authority's request for modification of the Approval dated 28 February 2002; pursuant to Section 115 BAA of the *Environmental Planning and Assessment Act 1979*, modify the approval referred to in Schedule 1 in the manner set out in Schedule 2.

Dated this _____ of _____ 2003

Craig Knowles MP
Minister for Infrastructure and Planning
Minister for Natural Resources

SCHEDULE 1

Approval granted by the Minister for Planning on 28 February 2002 to the Roads and Traffic Authority for the Western Sydney Orbital.

SCHEDULE 2

The approval is modified as follows:

- (a) in **Condition 32**, replace “Prior to construction” with “Prior to substantial construction”
- (b) in **Condition 34**, replace “Prior to construction” with “Prior to substantial construction”
- (c) in **Condition 49**, replace “prior to construction” with “prior to substantial construction”
- (d) in **Condition 50**, replace “prior to commencement of construction” with “prior to substantial construction”
- (e) in **Condition 84**, replace “prior to construction” with “prior to substantial construction”
- (f) in **Condition 100**, replace “prior to construction commencement” with “prior to substantial construction”

- (g) in **Condition 105**, replace "prior to commencement of construction" with "prior to substantial construction"
- (h) in **Condition 106**, replace "prior to commencement of construction" with "prior to substantial construction"
- (i) in **Condition 125**, replace "prior to construction" with "prior to substantial construction"
- (j) in **Condition 136**, replace "prior to construction" with "prior to substantial construction"
- (k) in **Condition 148**, replace "prior to commencement of construction" with "prior to substantial construction"
- (l) in **Condition 151**, insert at start of sentence "Where practical and feasible" and replace "prior to construction commencing" with "prior to substantial construction"
- (m) in **Condition 165**, replace "prior to construction commencing" with "prior to substantial construction"
- (n) in **Condition 168**, replace "prior to construction" with "prior to substantial construction"
- (o) in **Condition 169**, replace "prior to construction commencement" with "prior to substantial construction"
- (p) in **Condition 173**, replace "Prior to commencement of construction" with "Prior to substantial construction"
- (q) in **Condition 178**, replace "before the commencement of construction" with "prior to substantial construction"
- (r) in **Condition 184**, replace "prior to construction" with "prior to substantial construction"
- (s) in **Condition 191**, replace "prior to the commencement of construction" with "prior to substantial construction"
- (t) in **Condition 213**, replace "prior to the commencement of construction" with "prior to substantial construction"

ATTACHMENT 1

ROADS AND TRAFFIC AUTHORITY'S REQUEST FOR MODIFICATION OF APPROVAL GRANTED ON 28 FEBRUARY FOR THE WESTERN SYDNEY ORBITAL, UNDER SECTION 115 BAA OF THE *ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979*.