



PORT WARATAH COAL SERVICES

4 September 2017

Carolyn McNally
Secretary
Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

Dear Ms McNally,

PROPOSED MODIFICATION TO TERMINAL 4 PROJECT APPROVAL

1. Introduction

Part 3A planning approval was granted for the Terminal 4 (T4) Project (reference MP 10_0215) by the Planning Assessment Commission (PAC) under delegation from the Minister for Planning on 30 September 2015 (T4 Approval).

Port Waratah Coal Services Limited (Port Waratah) has concerns with some of the conditions of the T4 Approval, including conditions that must be complied with prior to taking up the approval by way of commencing it, and conditions requiring significant works be undertaken at significant costs prior to Port Waratah taking up the approval. These go against a key legal principal of planning law that prior to the lapsing of a planning approval a person entitled to act on it is not obliged to comply with it, and can surrender or let the planning approval lapse.

As such, Port Waratah is seeking to modify the T4 Approval to remove the requirement for certain works to be undertaken prior to taking up the approval, and provide the opportunity of taking up the approval (or vice versa, abandoning it). Condition A6 in Schedule B of Part A of the T4 Approval is also proposed to be amended to correct what we believe is an administrative, or typographical, error.

2. Issues relating to sequencing of works

Condition A5 in Schedule B of Part A of the T4 Approval states that it will lapse five years from the date of the approval unless construction has substantially commenced on or before that date. In isolation this condition means that substantially commencing construction works for the T4 Project (ie constructing the terminal) any time up until five years from the date of the T4 Approval activates the planning approval.

However, Condition A6 in Schedule B of Part A of the T4 Approval requires Port Waratah to prepare and submit for the Secretary's approval, a Site Management Plan (SMP) for the project site prior to construction of the terminal and within two years of the date of the approval. The SMP is to include actions set out in a Priority Action Statement (PAS) "to minimise further degradation of environmental values of the site" and surrounding land. These actions must be completed within five years of the date of grant of the T4 Approval. These actions could include site capping works and the

construction of ponds for the Green and Golden Bell Frog link to known habitat for the frog in and surrounding the site.

Condition A6 in Schedule B of Part A of the T4 Approval states that "completion of the works associated with the priority actions identified in the Priority Action Statement shall be deemed to constitute commencement of construction ..."

Port Waratah is advised that prior to being able to undertake the actions in the Priority Action Statement, which will necessitate undertaking and completing some significant civil works, the conditions of the T4 Approval require other conditions, which themselves require significant civil works, to be carried out. An example of this is Condition A8 in Schedule B of Part A, which requires the upgrade of the existing Cormorant Road and Pacific National Road T-intersection and the Cormorant and NCIG Wharf Access Road T-intersection to a four leg traffic signal controlled intersection, prior to the construction commencing on the site. The works in the SMP and PAS could not be carried out without first complying with this condition. However, these traffic signals are only required during the peak of construction activities for the terminal, which will require in excess of 1,000 construction workers, not works associated with the SMP (ie capping works and construction of ponds).

Condition A6 in Schedule B of Part A in the T4 Approval was included by the PAC after the conditions of the approval were drafted by the Department. It is Port Waratah's view that the inclusion of this condition has had unintended consequences on the requirement to undertake certain works prior to construction of the T4 Project.

It is proposed to amend the definition of "construction" on page 4 of the T4 Approval to exclude actions identified within the SMP and PAS being defined as construction activities.

The proposed amendment to the definition can be seen in the attachment to this letter.

3. Ability to take up or abandon approval

Port Waratah is advised that a key legal principal of planning law that prior to the lapsing of a planning approval a person entitled to act on it is not obliged to comply with it, and can surrender or let the planning approval lapse. The reason for this is that there is no ability under the *NSW Environmental Planning and Assessment Act 1979* (EP&A Act) for a proponent to negotiate the conditions of an approval. Certainly this wasn't the case when the conditions of the T4 Project were drafted by the PAC prior to it issuing the approval. Accordingly, a proponent must be able to assess a planning approval, and determine whether it is feasible and economic to implement once the conditions are known, and abandon it if necessary. This is not possible if an approval is granted with a condition forcing compliance even if the approval is not commenced.

There are various conditions in the T4 Approval that are in breach of the above, and impose timelines or require immediate compliance prior to the lapsing period specified in Condition A5 in Schedule B of Part A. As an example, Condition A6 in Schedule B of Part A (requiring the preparation of the SMP and PAS) requires "actions to be implemented to minimise further degradation of environmental values of the site" within two years of the date of the approval regardless of whether the T4 Project is commenced.

It is proposed to include a condition within the T4 Approval which provides Port Waratah with the opportunity of taking up the approval (or vice versa. abandoning it). The condition would be similar



to the condition which was proposed by the Department and imposed by the PAC in the project approval for the Warkworth Continuation Project.

The proposed amendment to the definition can be seen in the attachment to this letter.

4. Amendment Pathway

The modification to the T4 Approval can be considered under the repealed Part 3A of the EP&A Act. As part of the repeal by the NSW *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* (Part 3A Repeal Act), transitional provisions were introduced (Schedule 6A of the EP&A Act) enabling 'transitional Part 3A projects' to continue to be subject to Part 3A of the EP&A Act (as in force immediately before the repeal and as modified by the Part 3A Repeal Act). Section 2(1) of Schedule 6A of the EP&A Act states that transitional Part 3A projects include an approved project whether approved before or after the repeal of Part 3A.

Specifically, the modification can be considered under the repealed section 75W of the EP&A Act which allows a proponent to request that the Minister for Planning modify an approval for a project (or in this case, a transitional Part 3A project).

The NSW Minister for Planning is the consent authority for modifications under section 75W of the EP&A Act. However, pursuant to section 23 of the Act, the Minister may delegate the consent authority function to a range of public officers or authorities.

5 Closing

Should you have any queries regarding this matter, please do not hesitate to contact the undersigned on (02) 49072788.

Yours sincerely,



Terry Tynan
General Manager Development



ATTACHMENT

Proposed deletions to text are coloured red and insertions of new text are coloured blue:

It is proposed to amend the definition of 'construction' on page 4 of the T4 Approval to include actions identified within the SMP. As such, the definition is proposed to be amended as follows.

Construction	<p>Includes all work in respect of the Project other than:</p> <ul style="list-style-type: none">a) survey, acquisitions, building/ road dilapidation surveys;b) investigative drilling, excavation, or salvage;c) minor clearing or translocation of native vegetation;d) establishing ancillary facilities/ construction work sites (in locations meeting the criteria identified in the Conditions of Approval);e) installation of environmental impact mitigation measures, fencing, enabling works;f) other activities determined by the Environmental Representative to have minimal environmental impact (e.g. minor access roads, minor adjustments to services/ utilities, etc);g) actions contained within the Site Management Plan referred to in condition A6. <p>Note - work where heritage, threatened species, populations or endangered ecological communities would be affected by that work is classified as construction, unless otherwise approved by the Secretary in consultation with the Office of Environment and Heritage.</p>
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It is proposed to modify the wording of condition A6 of the T4 Approval to address what Port Waratah believes an administrative, or typographical, error, as follows:

- A6. The Proponent shall, prior to the commencement of construction and within two (2) years of the date of this approval, prepare and submit to the Secretary for approval, a Site Management plan for the project site. The **Site Management Plan** shall:
- (a) be prepared in consultation with OEH, the EPA, relevant councils, the Commonwealth Department of Environment, NSW Fisheries (DPI), the Hunter Development Corporation and the Local Land Services (Hunter);
 - (b) include actions to be implemented to minimise further degradation of environmental values of the site, with particular consideration given (but not limited) to:
 - (i) measures to contain and treat (where appropriate) contamination ahead of any decision to proceed to construction; and
 - (ii) biodiversity values of both the site and the Hunter Estuary Ramsar Site, in particular its ecological character description; and
 - (iii) amending the stockyard layout, for example to provide sufficient space to adequately capture and contain stormwater runoff from the site and to retain Deep Pond as a freshwater system; and
 - (c) include a Priority Action Statement which commits to the actions that are to be completed within five (5) years of the date of this approval.

The **Site Management Plan** must be implemented upon receipt of the Secretary's approval and be reviewed at least annually. The Plan is to remain in place until such time as the actions are completed on the site. Once approved by the Secretary, the



Proponent shall ensure the Plan is made publicly available on a suitable website, and that the website is kept up-to-date with details of its implementation.

The completion of the works associated with the priority actions identified in the **Priority Action Statement** shall be deemed to constitute substantial commencement of construction for the purposes of condition A+ A5 above. If the priority actions are not completed prior to the lapse date identified in condition A5, then this approval will be deemed to have lapsed.

* **Notes:**

1. *Nothing in this condition requires the Proponent to remediate or cap any portion of the site which it does not own or hold a legally binding agreement to manage; or to which a current and enforceable Approval of the Surrender of Licence is held by a third party*
2. *Nothing in this condition prevents the implementation of approval remediation works on any part of the site.*

It is proposed to insert a new condition (A16) into the T4 Approval, as follows:

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.

To assist with the interpretation of this proposed new condition, it is proposed to introduce a definition for 'terminal' as follows:

Terminal

Means the coal terminal which includes the train arrival tracks, dump stations, train departure tracks, inbound conveyors, coal stockyard and associated machinery (stackers and reclaimers), outbound conveyors, wharves and berths but does include any works identified in the Site Management Plan or works on the Biodiversity sites.



