

COUNCIL ASSESSMENT REPORT

Panel Reference	PPS-2018STH027
DA Number	10.2015.2000498.3
LGA	Snowy Monaro
Proposed Development	Extractive Industry – Modification and Deletion of Conditions
Street Address	Lot: 160 DP: 724552, Lot: 159 DP: 724552
Applicant/Owner	Snowy Monaro Regional Council/ N W Walters & M Walters
Date of DA Lodgement	17/09/2018
Number of Submissions	Four (4)
Recommendation	It is recommended that the application be approved in part by deleting condition no. 5 and amending condition no. 20 all other conditions subject to the modification application should remain unchanged.
Regional Development Criteria (Schedule 7 of SEPP (State and Regional Development) 2011	Under the provisions of Part 4 clause 20 (1) of State Environmental Planning Policy (State and Regional Development) 2011 "Extractive Industries " are considered regionally significant development in accordance with Schedule 7, 7(a) if they meet the requirements for designated development.
List of all relevant s4.15(1)(a) matters	SEPP (State and Regional Development) 2011 Cooma Monaro Local Environmental Plan 2013 Cooma Monaro Development Control Plan 2013
List all documents submitted with this report for the Panel's consideration	<ul style="list-style-type: none"> • Draft modified conditions of consent • Statement of Environmental Effects (Modification) • Visual Impact Assessment • Redacted Submissions/Objections • Correspondence from state agencies
Report prepared by	Sophie Ballinger
Report date	20/09/2021

Summary of s4.15 matters Have all recommendations in relation to relevant s4.15 matters been summarised in the Executive Summary of the assessment report?	Yes
Legislative clauses requiring consent authority satisfaction Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarized, in the Executive Summary of the assessment report? <i>e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP</i>	Yes
Clause 4.6 Exceptions to development standards If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report?	N/A
Special Infrastructure Contributions Does the DA require Special Infrastructure Contributions conditions (57.24)? <i>Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions</i>	N/A
Conditions	Yes

Have draft conditions been provided to the applicant for comment? <i>Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report</i>	
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4.55(2) ASSESSMENT REPORT

1.0 EXECUTIVE SUMMARY

Application No:	10.2015.2000498.3
Planning Portal Reference:	PPS-2018STH027
Date of lodgment:	17/09/2018
Development proposal:	Alterations and Additions to Extractive Industry (Modify Conditions)
On land comprising:	Lot: 160 DP: 724552, Lot: 159 DP: 724552
Applicant's details:	Snowy Monaro Regional Council
Owner's details:	N W Walters & M Walters
Zoning:	R5 - Large Lot Residential
Type of development:	Local
Notification/Advertising:	30 days

This application seeks to amend an approval issued by the Southern Regional Planning Panel in 2016 for "Extractive Industry" (Upper Bunyan Gravel Pit). The application under S4.55 of the Environmental Planning and Assessment Act 1979 ("the Act") proposes the deletion of four (4) conditions and the amendment of one (1). The modification has been assessed against the provisions of S4.55(2) of the Act.

As the original consent was determined by the Southern regional Planning Panel, and conditions of consent proposed to be modified were imposed by the Panel, it was deemed appropriate for this application to be presented to the panel for determination.

Due to a recent court judgment impacting on what can be considered as a modification under S4.55 of the Act each of the conditions proposed to be amended have been assessed undertaken against the framework of this decision.

The application was notified and advertised in accordance with the provisions of the Cooma Monaro Development Control Plan 2014 and four (4) submissions were received. These are considered in the body of the report.

It is recommended that the application be approved in part by deleting condition no. 5 and amending condition no. 20. All other conditions subject to the modification application should remain unchanged.

The development has been considered against the requirements of section 4.55(2) and, has achieved an acceptable level of compliance. The specific clauses applicable for assessment under the provisions of section 4.15 are summarised below:

State Environmental Planning Policy (State and Regional Development) 2011 schedule 7 clause 4	The development satisfies the provisions of the subject clause.
Cooma Monaro Local Environmental Plan 2013	
Clause 6.3 Terrestrial biodiversity	The development satisfies the provisions of the subject clause.
Clause 6.9 Scenic protection area	The development satisfies the provisions of the subject clause.

2.0 BACKGROUND AND MODIFICATION PROPOSED

This application seeks to amend DA 10.2015.489.1 issued in 2016 for *“Extractive Industry (Upper Bunyan Gravel Pit)”*. The current modification application 10.2015.200489.3 is the second modification submitted in relation to the development application. The first modification proposed the same changes as that which are proposed in this the second modification however it was lodged under S4.55(1A) of the Act and was deemed not to meet the provisions of that section and was withdrawn by the applicant. The second modification was notified and advertised when submitted and as such the submissions to this current modification do reference the previous modified application as does correspondence from State Agencies. The application as submitted proposes to delete four (4) conditions and amend one (1) condition. The following is a summary of the conditions as approved by the original development consent and the reasons provided by the applicant for the changes proposed.



Figure 1 – Plan showing approved stages and offset areas as approved by DA 10.2015.498.1

2.1 Summary of Conditions and Reasons provided by Applicant for Modification

2.1.1 The applicant has applied for approval be granted for the deletion of condition 5:

- 5 The offset area included in Appendix D is to be increased to include the balance of the site identified as exotic grassland in the northern and western portion of the site. Mature canopy trees are to be planted in all the offset areas as increased by this condition and as identified in Appendix D of the approved EIS.

Reason: Requirement of the Office of Environment and Heritage in order to complement the proposal to protect all-natural regeneration that occurs across the site.



Figure 2 – Plan showing offset areas as per Appendix D referred to in Condition 5.

The area to be included in the offset area is depicted in brown in figure 2 above. The offset areas are shown in white. It is within this larger offset area that the planting of mature trees is proposed by condition 5.

Reasons provided by the applicant for the removal of the condition:

1. The area of land to be revegetated with mature trees is not an area that has had trees in the past. It is an area identified as grassland in nature and may not support the planting required.
2. The site is exposed and subject to weather that would make it very difficult to support the planting required.

3. If the requirement for the establishment of mature trees is for screening purposes then this would have little impact due to the topography and soil type. The growth of the trees would be limited by these factors thereby reducing their visual screening purpose. The applicant has provided a visual impact assessment to further demonstrate this.
4. The planting of mature trees is problematic as they are difficult to establish and keep alive, it would be more effective for smaller tube stock to be planted so as to create a more stable root system for continued growth. The number of trees would be difficult to obtain as mature trees due to the prevalence of tube stock in the market place.
5. Historic rate of extraction is low and as such it would take some time for the subject area to be impacted upon. The staging of the development will have the effect of extraction from the higher quality areas last reducing the need for offsets to be in place from commencement of extraction.
6. The offset management sites were linked to stages of development allowing the less value (from a biodiversity point of view) to be extracted last meaning their offsets would also be delayed. The requirement to include the balance of the land into an offset area that needs to be revegetated from stage 1 is unreasonable. The full timeline for the development is 25 years with the stages broken down into 5 year periods with offset areas corresponding to the extraction timeframes.

2.1.2 The applicant has applied for approval be granted for an amendment to condition 6:

- 6 Grazing must be excluded from the offset area at all times whilst the canopy species are regenerating.

Reason: Requirement of the Office of Environment and Heritage.

The applicant has requested the condition be amended as follows:

- 6 *Grazing must be excluded from offset sites 1a and 1 b at all times whilst plantings are establishing.*

Reason: Requirement of the Office of Environment and Heritage.

Reasons provided by the applicant for the change to the condition:

1. The condition would limit the grazing of stock of a lengthy period (10 years) due to the rate of growth.
2. Grazing management is an integral part of the Conservation Property Vegetation Plan (CPVP) to reduce noxious weeds on site (specifically African Lovegrass) and promote the establishment of native herbs, forbes and grasses.

2.1.3 The applicant has applied for approval be granted for the deletion of condition 14:

- 14 Extraction of materials from the site is limited to a total of twenty-five (25) days in anyone calendar year.

Reason: To minimise land use conflicts and to ensure the extractive industry does not exceed the total allowable volume of extractive materials per year.

Reasons provided by the applicant for the removal of the condition:

1. The condition does not allow for flexible use of the site.
2. Often access and extraction on site is for small amounts of material and this may happen more than the 25 days per year.
3. The entrance to the site is proposed to be upgraded to a standard required by TfNSW

2.1.4 The applicant has applied for approval be granted for the deletion of condition 20:

- 20 The '50 metre tree buffer' area, shown in Figure 2-3 of the approved Environmental Impact Statement, is to be extended along the full length of the northern and western boundary of the site. A one (1) metre high earthen mound is to be constructed adjacent to the boundary of the site within the '50 metre tree buffer' area. Plans of the modified '50 metre tree buffer' area and mound are to be provided within the required Biodiversity Offset and Rehabilitation Plans. The establishment of the '50 metre tree buffer' area is to be completed prior to any extractive works occurring on the site.

Reason: To ensure the extractive industry is visually screened from the Monaro Highway.

Reasons provided by the applicant for the removal of the condition:

1. The calculation method used at the time of the original development application was compliant with the then legislation.
2. The vegetation community in the area was native temperate grassland rather than woodland as such the planting of trees in this area is not in keeping with the historical vegetation pattern.
3. The applicant would seek to undertake further planting north of the existing gravel pit, as there are trees in this location that indicate it would have had a vegetation community made up of woodland species.
4. An earth bund could be established around the exiting gravel pit to offer visual screening of the site with fast growing understory native plants being planted in this area.
5. The applicant has provided a visual impact assessment has been provided addressing the visual impact of the quarry from the Highway and adjoining residences and has recommend deletion of this condition.

2.1.5 The applicant has applied for approval be granted for the deletion of condition 25(d):

- 25 (d) The draft Property Vegetation Plan is to be made available for public comment prior to adoption by Local Land Services. Implementation of the PVP and restoration of the EEC Ribbon Gum, Snow Gum grassy open forest is to commence prior to commencement of works.

Reason: To ensure native vegetation on the site is protected and enhanced.

Reasons provided by the applicant for the removal of the condition:

1. The development of a PVP does not involve public consultation it is between the landowner and Local Land Services.
2. Leads to confusion with the roles of those involved in the process.

3. This is a private agreement which sits outside of the DA process and therefore is not required to have public consultation.

2.2 The implications of the judgement in the Court of Appeal - Ku-ring-gai Council v Buyozo [2021] NSWCA 177 on the this modification application.

In a recent Court of Appeal judgment, the court held that that the power to modify a development consent only arises where the proposed modification changes the development itself. In Court of Appeal - Ku-ring-gai Council v Buyozo [2021] NSWCA 177 the appeal centered on the ability for an applicant to modify a condition that related to the payment of development contributions that had already been received by Council. Whilst the court held that this was not a function available under the provisions of S4.55 of the Act, it went further looking into what the powers were conveyed by S4.55.

The Court held that there were four powers to modify a development consent, being section 4.55(1), section 4.55(1A), section 4.55(2), and section 4.56(1) of the Act.

Where a modification to a development consent is applied for under section 4.55(1A), section 4.55(2), or section 4.56(1) of the Act, the Court's judgment requires that at least one of the results of the modification application must be a change to the proposed development. In that regard, the Court stated:

"[55] The constraints on three of the powers, s 4.55(1A), s 4.55(2) and s 4.56(1), indicate that the modification of the development consent sought needs to effect some change to the development the subject of the development consent, while the constraints on one of the powers, s 4.55(1), indicate to the contrary that no change to the development the subject of the development consent needs to be effected."

As such it is not possible to use the power of S4.55 (1A), S4.55(2) and S4.56(1), to simply apply to make changes to any conditions of development consent. The change must relate to a "change in development". The only caveat to this is for minor changes allowable under S4.55(1) which allows for modifications involving minor error, misdescription or miscalculation.

This judgment is pertinent to this application, as the applicant has requested that several conditions be deleted or amended. As such each of the conditions will need to be considered as to whether they meet the test of "effecting a change to the development" due to the application being lodged under the provisions of S4.55(2) of the Act.

Under S1.5 of the Act Development is defined as any of the following—

- (a) the use of land,
- (b) the subdivision of land,
- (c) the erection of a building,
- (d) the carrying out of a work,
- (e) the demolition of a building or work,

(f) any other act, matter or thing that may be controlled by an environmental planning instrument.

With respect to this modification application it is considered that the “development” of an extractive industry is not merely the extraction of material but also the operational aspects of managing the impacts of the activity on the site. As such the “development” which can be changed would include the operation of offsets and other aspects that allow for the extractive industry to operate.

As such it is considered that all but condition 6 and 25(d) meet the test for a “change to the development”. The amendment proposed for condition 6 is would materially “change the development” it is merely requesting that there are areas that should be allowed to be grazed in all areas while growth is occurring except for particular offset areas.

Condition 25(d) whilst it does not meet the test that it will “effect a change to the development”. It could however be considered under S4.55(1) of the Act as the correction of an error, being that the requirement for public consultation is not part of the process of developing a Property Vegetation Plan. As such the condition adds an additional requirement to an existing legislative process outside of the bounds of that legislation. This could not be approved under this application however as it is being assessed under S4.55(2) of the Act. Should the applicant wish to remove this condition it could be considered under S4.55(1) though the lodgment of a new application.

The consideration of each condition against the subject Judgement is not a merit assessment of whether the consent should be amended but an assessment of whether such a change could even be considered under the power of S4.55 of the Act.

3.0 CONSENT AUTHORITY

Under the provisions of Part 4 clause 20 (1) of State Environmental Planning Policy (State and Regional Development) 2011 “Extractive Industries” are considered regionally significant development in accordance with Schedule 7, 7(a) if they meet the requirements for designated development. In this case the modification is not considered “designated development” and therefore would usually be determined by Council. However, in this case as a number of the conditions requested to be amended were included by the Panel on the final consent it was deemed appropriate to bring the determination of their modification back to the Panel.

Under the provisions of S4.5(b) of the Act the Southern Regional Planning Panel is designated the consent authority for the determination of this Development Application.

The proposed development was reviewed against the relevant provisions of the EP&A Act 1979 to identify whether the application was integrated development. It is was not deemed to be Integrated Development under Section 4.46 of the Environmental Planning and Assessment Act 1979.

4.0 REFERRALS

4.1 External Referrals

The development application was referred to the following agencies for comment:

Section	Comments
EPA	No comment received
Transport for NSW (formally RMS)	No objection to the modification.
Office of Water	No comment received

DPIE – Biodiversity and Conservation (formally OEH)

There are several pieces of correspondence from OEH which relate to the modification of the original development application. Two of which were received prior to lodgement of the application and one after. The two letters received prior to the lodgement OEH provided advice as to alternatives to the conditions and did not object outright to their modification. The advice refers directly to the conditions proposed to be amended including amendments to conditions that related to extending the offset area and the planting of mature trees. However the final correspondence stated that OEH does not support the proposed changes to conditions of consent as this would require a change to the Conservation Property Vegetation Plan. This seems to be a change in direction for the department. This is of particular reference to condition no.5 which refers to OEH in the reason given for the condition. OEH in this case is not a concurrence or integrated referral agency and the consent authority can consider a change to a condition that is not supported by the department.

Correspondence 1/11/16 OEH as a response to a previously withdrawn application to modify condition 5 stated the following:

“OEH does not require the north western exotic part of the block to be re-planted with mature canopy trees to fulfil the offset requirements for this project. However if it can be restored to natural temperate grassland and potential habitat for threatened reptiles then this would be a good outcome for the area. If natural regeneration of mid-story or canopy species occurs in this area then it should be left in-situ, albeit unlikely given the nature of this area.”

In further correspondence dated 29/05/18 in response to a site meeting at Bunyan Quarry with Council and OEH staff the following advice was provided:

“OEH acknowledges that the grassland areas within the offset and on adjoining areas are now significantly degraded due to the invasion of exotic African Love Grass. However, in order to maintain the natural landscape integrity, OEH does not support planting of trees within areas that were likely to have been natural grassland. OEH also understands from previous tree planting experiences on the Monaro that planting trees within areas of natural grassland may be unproductive as trees and shrubs have a low likelihood of establishing. OEH considers a better ecological outcome along the northern side of the offset could be achieved by planting additional trees and shrubs within the current/natural woodland area. Such a planting would also help in the restoration of the important Snow Gum Woodland endangered ecological community in this area.”

OEH considers such a planting would achieve a better ecological outcome for the endangered Snow Gum woodland and also achieve at least an equally effective screening compared to the currently proposed plantings along the northern boundary.

Map 1: OEH's recommended planting areas for stage 1 and 2



Figure 3 – OEH Recommended planting as per correspondence dated 29/5/18, relating to the requirements of condition 20.

In the final correspondence with OEH dated 11/10/18 in relation to this specific modification application the response was as follows:

“OEH does not support the proposed changes to the conditions of consent.”

5.0 STATUTORY CONSIDERATIONS AND ASSESSMENT

5.1 Assessment against section 4.55(2) of the EP&A Act 1979

Requirement	Response
The development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was	Having regard to the nature, scale, character, magnitude, and type of amendments proposed in this S4.55 application, it is considered the development to which the consent as modified relates is substantially

modified (if at all)	the same development.
Consultation has been undertaken with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body.	None of the conditions proposed to be amended or deleted were conditions of consent imposed by an approval body other than the consent authority. However, a number of the conditions the subject of the modification were imposed by the Planning Panel as such the applications being referred back to the panel for determination.
The application has been notified	The application has been notified and advertised in accordance with the requirements of the DCP and Regulations.
Consideration of Submissions	Submissions are considered below.
Matters for consideration under section 4.15(1) as are of relevance to the development the subject of the application.	The relevant matters have been considered below.

5.2 Assessment of the modified development application having regard to those matters relevant to be considered under section 4.15(1) of the EP&A Act 1979

Matters for Consideration	Response
Provisions of any environmental planning instrument	<p>The provisions of State Environmental Planning Policy (State and Regional Development) 2011 have been satisfied.</p> <p>The subject development has been considered with respect to permissibility in the original development assessment. The changes proposed to the conditions of consent do not impact on the permissibility of the development as per the requirements of the Cooma Monaro LEP 2013. The subject modification does not seek the change the nature of scope of the development originally approved.</p> <p>The following clauses of the CMLEP are relevant to the consideration of the modification application:</p> <ul style="list-style-type: none"> • Clause 6.3 Terrestrial biodiversity • Clause 6.9 Scenic protection area
Draft environmental planning instruments.	There are no proposed environmental Planning instruments applying to the land.
Any development control plan	The subject development was considered fully against the provisions the Cooma Monaro Development Control Plan 2014 at the time of the original assessment. As there are no changes are proposed to the nature or scope of the development, the assessment of the application against the provisions of the DCP at the time of the original application is considered satisfactory. As such the development modification as proposed is

	considered to be consistent with the provisions of the DCP.
Any matters prescribed by the regulations	Not applicable for this modification.
The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality	The likely impacts of the proposed modification have been further addressed below, they relate principally to visual impacts and environmental impacts.
the suitability of the site for the development	This was considered as part of the original development application. The changes proposed by the modification will not impact on the suitability of the site for the existing development.
Any Planning Agreement or Draft Planning Agreement.	Not applicable .
Any submissions made in accordance with this Act or the regulations	Five (5) Submissions were received relating to the modification and are addressed below.
The public interest	The amendments proposed are not considered to be contrary to the public interest. Whilst they relate to the operation of the Quarry and the environmental management practices proposed they are not inconsistent with the approval originally issued and are not considered to have an unreasonable impact on the public.

5.2.1 Comma Monaro Local Environmental Plan 2013

5.2.1.1 Clause 6.3 Terrestrial biodiversity

The modification does not seek to clear any additional vegetation over that which was approved by the original development application. The modification is to reduce the amount of planting required for both offset areas and visual screening. As such it is considered that the modification as proposed satisfies the requirements of the clause.

5.2.1.2 Clause 6.9 Scenic protection area

The applicant has provided a Visual Impact Assessment which takes into consideration, the original application, the conditions imposed, the modification proposed and the submissions received. This assessment has deemed that the requirements of the original EIS are appropriate and provide adequate screening of the property from the Monaro Highway, which is the subject of the scenic protection clause in this case. As such it is considered that the development as recommended to be modified satisfies the provisions of this clause.

5.2.2 Impacts of the Development - Environmental, Social & Economic

5.2.2.1 Visual Impact

The applicant has provided a Visual Impact Assessment (VIA) addressing the proposed amendments. The VIA prepared by NGH Environmental considered both the original visual assessment provided to the panel in 2016, the changes to the proposed conditions and the submission received as part of this modification application.

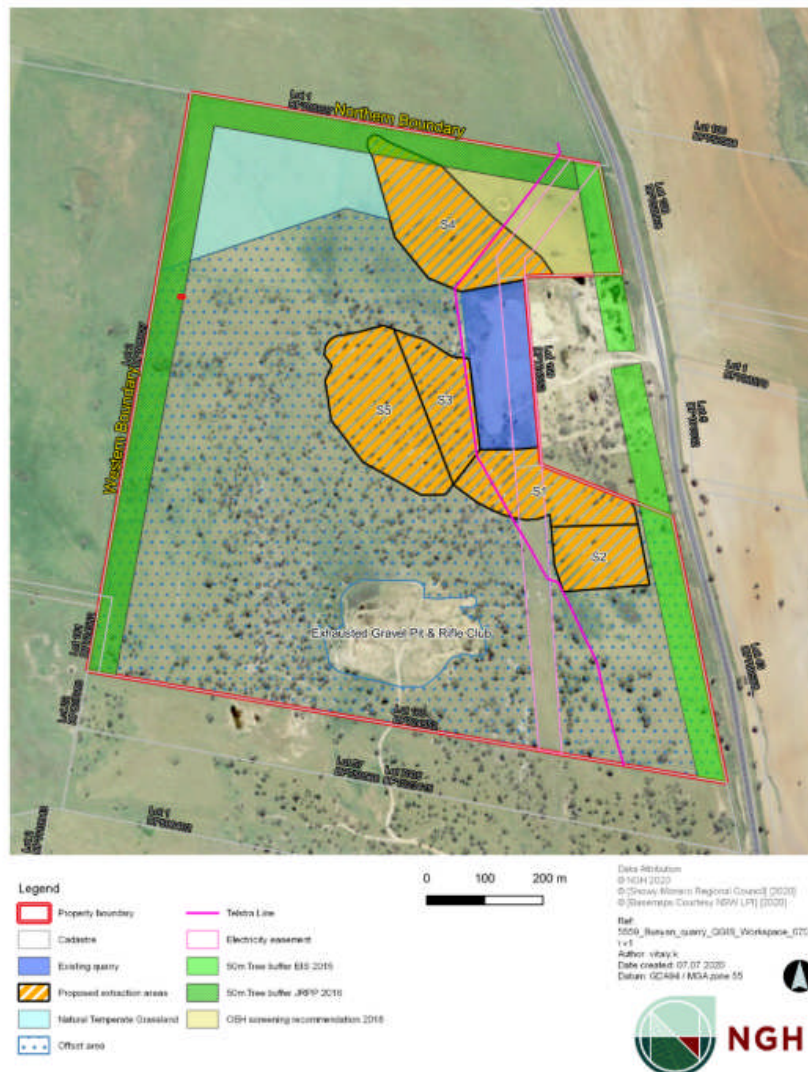


Figure 4 – Showing Extraction area staging and proposed screening options (source – NGH Visual Impact Assessment)

The VIA reviewed the modification proposed to condition 20 and concluded the following:

- *There were no areas that were considered to have high visual impacts, and therefore no mitigation measures required as it is considered that only high visual impacts must be mitigated/require design changes to reduce impacts.*
- *There are three viewpoints with a moderate visual impact including viewpoints 2, 4 and 5. However, it was considered unlikely that viewpoints 4 and 5 would have views due to existing screening and topography. They are only moderate visual impact due to the high sensitivity of the rural residences. While viewpoint 2 include receivers R29 and R35 have*

potential to have views of the gravel pit expansion areas, specifically the north eastern corner and stage 5 area.

- Although the proposed gravel pit expansion is considered to have good visual integration, safeguards have been included to provide assurance about further minimisation of visual impacts. This includes additional screening to what was outlined in the EIS (NGH, 2015).*
- Viewpoints 1,3,6, 7, 8 and 9 were assessed to have a low visual impact due to the topography, and vegetation resulting in high integration or no views. Specifically, for viewpoint 1, it was identified that the proposed 50m wide tree corridor required as part of the EIS (NGH, 2015) along the eastern boundary would further integrate the gravel pit with the surrounding landscape.*

As such the VIA concludes that the mitigation measures outlined in the original EIS and assessed as part of the development application in the first case are still applicable. However it is recommended that some additional screening is installed as per advice from OEH. This area is shown in figure 3 above. The additional mitigation measures proposed through the VIA are as follows and have been included in the amendments recommended for condition 20:

- A vegetation buffer would be planted in stages to correspond with the staged expansion areas. The trees are to be planted in conjunction with extraction Stages 1 and 2.*
- Native tree species appropriate to the local area would be used.*
- Removal of trees to be minimised.*
- All machinery and equipment associated with gravel pit operations would be parked within the existing pits and extraction areas.*
- Rapid implementation of rehabilitation actions (refer to Section 6.1), for areas where extraction has ceased. New areas should not be expanded until funds and planning for exhausted areas can be demonstrated.*
- In addition to the 50m tree buffer along the highway, Council will undertake further canopy and understorey planting north of the existing gravel pit. There are existing mature trees in this locality indicating this would have been Tablelands Snow Gum Grassy Woodland. Staff from the OEH has been onsite and are in full support of this option. Refer Attachment A, letter of support from OEH.*
- Council would establish an earth bund around the existing gravel pit site to offer visual screening of the extractive industry. Fast growing understory native plants (Acacia species) could be planted at the base of the bund.*

5.2.2.2 Environmental Impact

The conditions proposed to be amended do not seek to remove additional vegetation however they do seek to remove the need for some additional planting that was required for visual screening of the development. As such it is considered that the modification has limited environmental impact as the conditions proposed to be amended relate to an area that is predominantly exotic species and not valuable native grassland or woodland.

With respect to condition 6 which relates to the grazing of stock in the offset areas until such time as canopy species have regenerated would have an environmental impact. Whilst merit consideration of this condition is not required to be undertaken, allowing grazing in all offset areas is not supported and would have a negative environmental impact to the establishment of canopy species. It is noted in addition to this that OEH does not support the amendments

to this condition due to the impact that may occur to the regrowth and establishment of canopy species.

5.2.2.3 Noise Amenity Impact

The applicant has requested that condition 14 be deleted to effectively allow for the operation of the quarry 365 days per year. The deletion of this condition is not supported by the information provided by the applicant and is considered to have an unreasonable amenity impact on the surrounding properties. This application is not making a determination as to whether it is appropriate to have a quarry in this location, that has been previously approved however the request to have it operate with no limits on time or volume is not considered reasonable. The balance of the conditions sought to be modified do not have an impact on noise generation.

5.2.3 Public Submissions

The proposed development was placed on public exhibition and adjoining landowners were notified in accordance with the provisions of the Cooma Monaro DCP 2014 for a period of 30 days.

Four (4) submissions were received objecting to the submitted modification. The redacted submissions have been provided to the panel as an associated document

The following is a consideration of the issues raised by each submission:

Submission 1

This submission was generally concerned with the expansion of the quarry activities. The modified development application does not seek to expand the operations other than the request to delete the condition limiting the number of days for extraction. However, this aspect of the modification was not referenced in the submission. The modification does not seek to expand the quarry into any of the approved offset areas nor remove any additional vegetation to that which was proposed in the original application.

Submission 2

This submission raised concerns with the development as approved and its impact on the native vegetation found on site. It refers to an “expansion of the quarry” which is not the subject of this modification. The only reference to the modification as submitted was an agreement that the planting of mature trees would be “counterproductive”.

Submission 3

Submission 3 is comprised of three submissions and legal advice sought by the submitter. Of the three submissions presented one relates to the modification as proposed and the other two are resubmissions of previous objections. The legal advice pertains to a previous withdrawn application that was submitted under S4.55(1A) of the Act.

The submission has raised the following issues:

- That the condition of consent should not be diluted and that offset planting is required;

- That there has been insufficient cost benefit analysis in the EIS to assess whether other sites may be more economically and ecologically preferable, and
- Legal reasons as to why this proposed DA Modification should be referred to the SJRPP as the decision making authority rather than to the SMRC.
- That the modification should be assessed against the provisions of the Biodiversity Conservation Act.
- That further changes need to be made to the conditions of consent outside of those which are proposed to be amended by the applicant
- Legal advice to the use of S4.55(1A) as a mechanism for approval of the application.

The application does not trigger the assessment against the Biodiversity Conservation Act as there is no expansion of the quarry facility nor any additional clearing of native vegetation proposed. The application is being determined by the Southern Regional Planning Panel and not Council. The application is for a modification under S4.55(2) of the Act not S4.55(1A). The legal advice provided in the submission relates to a previously withdrawn modification that was submitted under S4.55(1A). This application however could not be considered under that section of the Act and did not proceed.

With respect to the request to make further changes to conditions of consent that are not subject to this modification, it is not legally possible to make changes to conditions that have not been applied for change through the modification submitted. S4.55 does not allow this nor does the modification application allow for the original development to be reassessed. Only those conditions listed in the modification application can be considered along with the impacts of those changes.

The concerns raised regarding the original approval and whether or not it is appropriate to have the quarry expansion continue are not relevant to the consideration of this application as consent has been granted and development can occur in relation to that approval.

The change to the size of the offset and the need for additional screen planting has been assessed and the reasons for consideration of the change can be found in this report.

Submission 4

This submission was received on behalf of the Upper Snowy Landcare Group who have objected to any changes being made to the original development consent and to the approval of the original development application. The submission provided reasons for objection to each of the conditions and the main issues raised have been summarised below.

The submission has raised the following issues:

- That the deletion of the consent conditions will remove the need for the applicant to mitigate the removal of native vegetation.
- Protection of native vegetation
- That the modification will trigger the Biodiversity Conservation Act
- That the existing approval (subject to the modification) should be revoked
- That council cannot be the determining authority for the application.

The approval has offset areas which are required to be maintained and or rehabilitated in accordance with the stages of the development consent. These designated offset areas which were deemed to have higher quality vegetation will not change should this modification be approved. These will remain protected, there is no proposal through the conditions requested to be amended that seeks to remove any of the existing vegetation and there are mechanisms

in the original consent that will be put in place to protect the native vegetation on site. The application seeks only to delete a condition which required an additional low quality area to be included in an offset and additional mature screen planting to occur in that area.

The application does not trigger the Biodiversity conservation Act as there is no expansion of the quarry facility nor any additional clearing of native vegetation proposed.

A modification application is not an opportunity to revisit the assessment of the original application nor it is possible to “revoke” an existing approval in this way. The application is to be determined by the Southern Regional Planning Panel and not Council.

General Comments

The approved expansion and activities at the Upper Bunyan Gravel Pit have not changed since the preparation of the original EIS, the conditions which are subject to this modification do not seek to further expand the use of the site. Whilst it is acknowledged that the submitters have concerns with the overall development and the impact that it has on the environment and residential amenity this application is for a modification to a consent, which is not an opportunity to revisit the merits of the original approval.

6 CONCLUSION

It is considered that the parts of the proposed modification can comply with the relevant provisions of the Act however not all of the proposed changes requested by the application can be supported.

6.1 It is recommended that conditions 6, 14 and 25(d) remain unchanged from the original consent, for the following reasons:

Condition 6

This condition is not able to be modified through the subject S4.55(2) application as it does not meet the precondition of effecting a “change to the development” as per the Judgement of *Ku-ring-gai Council v Buyozo [2021] NSWCA 177* .

Condition 14

The deletion of this condition not supported as the removal of a restriction on extraction timeframes will have an unreasonable amenity (noise) impact. However, it must be noted that condition 14 is not limiting the number of times in a year that the quarry can be accessed for the collection of material only the “extraction “of material. As such with a 25-day limit, extraction could occur twice per month with material stockpiled for collection. This is a reason provided by the applicant as to why this condition needed to be removed and as such is not applicable.

Condition 25(d)

This condition does not meet the test that it will “change to the development”. It could however be considered under S4.55(1) of the Act as the correction of an error, the requirement for public consultation is not part of the process of developing a Property Vegetation Plan. As such the condition adds an additional requirement to an existing legislative process outside of the bounds of that legislation. Whist this cannot be approved

under this application as it is being assessed under S4.55(2) of the Act, should the applicant wish to remove this condition it could be considered under 4.55(1A) though the lodgment of a new application.

6.2 It is recommended that condition 5 be deleted for the following reasons:

Condition 5

The condition as imposed is unreasonable due to the location of the land and the vegetation type predominating. This land was expressly excluded from the offset areas due to its value and composition. Concerns have been raised by OEH in their most recent response to the application that the conditions should not be amended or deleted as proposed by the applicant. However in previous correspondence it was noted by OEH that the land the subject of condition 5 was not an area that should be included into the offset area due to its quality and that the planting of mature canopy trees in this area is not consistent to the landscape characteristics of the site. OEH in their correspondence of the 1/11/16 state that they do not require planting of canopy trees into this area which is predominated by exotic species. They do recommend that the area could be reinstated to Natural Temperate Grassland to enable potential habitat for threatened reptiles. This could be undertaken by the applicant outside of the requirements of this development consent as the area is not required to be part of an offset due to the predominance of exotic and weed species. The reason provided by OEH in their correspondence dated 11/10/18 that the conditions cannot be amended due to the requirements for an amendment to a Conservation Property Vegetation Plan cannot be the sole reason for refusal of such an amendment. As such on the balance of the information provided it is recommended that this condition be deleted.

6.3 It is recommended that condition 20 be amended for the following reasons:

Condition 20

It is recommended that condition 20 be amended to remove the additional buffer planting above that which was shown on the approved plans and to include recommendations provided in the Visual Impact Assessment. This will require adding additional parts to condition 20 to facilitate compliance with the recommendations in the VIA. The VIA addressed the requirements set out in condition 20 and the proposal to remove this condition. It found that an extension of the tree buffer along the entire length of the northern and western boundary as is required in condition was not warranted. Whilst the recommendation is that the additional planting along the entire length of the northern and western boundary is not supported by the VIA it does include a recommendation that some additional planting be included in the in the north eastern portion of the site, in close proximity to the boundary. This alternative planting was suggested in correspondence to the applicant from OEH. This will allow for this additional screening will also meet the reason for JRPP Condition of Approval 20 'To ensure the extractive industry is visually screened from the Monaro Highway'. The additional screening along the northern boundary will visually screen the extractive industry from the highway and receivers along the highway specifically R2 and R35. In addition it is important to protect the existing vegetation on the western slopes as it provides screening to the dwellings to the west of the site.

Proposed Amended condition 20:

Condition Amended by 10.2015.2000498.3

- 20 The '50 metre tree buffer' area, shown in Figure 2-3 of the approved Environmental Impact Statement is to be expanded by further canopy and understory planting to the north of the existing gravel pit. The additional planting to be established in accordance with the requirements of the Visual Impact Assessment (NGH, August 2020).
Reason: To ensure the extractive industry is visually screened from the Monaro Highway.
- 20a All machinery and equipment associated with gravel pit operations is to be parked within the existing pits and extraction areas.
Reason: To ensure the extractive industry is visually screened from the Monaro Highway.
- 20b An earth bund shall be established around the existing gravel pit site to offer visual screening of the extractive industry. Fast growing understory native plants (Acacia species) are to be planted on the bunded area.
Reason: To ensure the extractive industry is visually screened from the Monaro Highway.

7.0 RECOMMENDATION

Pursuant to section 4.55(2) of the Environmental Planning and Assessment Act 1979 (amended) it is recommended that modification 10.2015.200498.3, being an amendment to conditions of consent for "Extractive Industry (Bunyan Gravel Pit)" on lots 159 & 160 DP724552 be approved in part in accordance with the attached draft conditions of consent attached

Appendix A

Draft Amended Conditions of Consent

General

1. The development being carried out substantially in accordance with the approved documents/plans listed in the Schedule below and development application except where amended by the conditions of this Consent as set out in the following conditions or by any subsequently approved Section 96 modification.

Document/Plan Schedule			
Ref	Description	Prepared/Drawn By	Received
-	Environmental Impact Statement – Upper Bunyan Gravel Pit	Jane Blomfield & Jane Mills	16/12/2015
D 1099-7	Draft Plan of Proposed Pit Extension (finished floor levels only)	W.J.H	16/12/2015

Reason: Requirement that the development is completed in accordance with Council's consent. P_1_01

2. RMS will be exercising its powers under Section 64 of the Roads Act, 1993 to become the roads authority for works on the Monaro Highway. Given this, a Section 138 consent under the Roads Act, 1993 must be obtained from the RMS prior to extraction works commencing.

Note: conditions of development consent do not guarantee RMS final consent to the specific road work, traffic control facilities and other structures and works on the classified road network. In this regard, prior to undertaking any such work, Council is required to submit detailed design plans and all relevant additional information prior to commencing work on the State road network. Council will need to pay all RMS fees and charges associated with works. In the first instance, to progress the post consent process, Council should email the conditions of development consent to: WAD.southern@rms.nsw.gov.au.

Reason: Requirement of the Roads and Maritime Services P_0_01

3. All roadworks and traffic control facilities must be undertaken by a pre-qualified contractor. A copy of pre-qualified contractors can be found on the RMS website at:

<http://www.rta.nsw.gov.au/doingbusinesswithus/tenderscontracts/prequalifiedcontractors.html>.

Reason: Requirement of the Roads and Maritime Services P_0_01

4. All roadworks, traffic control facilities and other works associated with this development, including any modifications required to meet RMS standards, will be at

no cost to RMS. All works must be completed prior to any expansion of the gravel pit.

Reason: Requirement of the Roads and Maritime Services P_0_01

Deleted by 10.2015.200498.3

- ~~5. The offset area included in Appendix D is to be increased to include the balance of the site identified as exotic grassland in the northern and western portion of the site. Mature canopy trees are to be planted in all of the offset areas as increased by this condition and as identified in Appendix D of the approved EIS.~~

~~*Reason: Requirement of the Office of Environment and Heritage in order to complement the proposal to protect all natural regeneration that occurs across the site.*~~ P_0_04

6. Grazing must be excluded from the offset area at all times whilst the canopy species are regenerating.

Reason: Requirement of the Office of Environment and Heritage. P_0_04

7. All offsets must be secured and managed in accordance with the required Biodiversity Offset Plan and Conservation Property Vegetation Plan for the duration of the consent at the proponent's expense.

Reason: Requirement of the Office of Environment and Heritage. P_0_04

8. The Little Eagle nest is to be checked carefully before being removed when the operation reaches that stage of extraction. The nest must not be removed if the Little Eagles are utilising the nest at the time, especially not during breeding season.

Reason: Requirement of the Office of Environment and Heritage. P_0_04

9. Stormwater management and sediment and erosion control should be managed in a manner consistent with the principles stated in 'Managing Urban Stormwater, Soils and Construction. Volume 2E Mines and quarries' (DECC, 2008). Activities at the site must be carried out to ensure that any discharge from the premises complies with Section 120 of the *Protection of the Environment Operations Act 1997*

Reason: Requirement of the Environment Protection Authority and the *Protection of the Environment Operations Act 1997*. P_0_05

10. The required Soil and Water Management Plan (Condition 23) is to include that water from the sediment dams (when available) is to be used as a means of dust suppression on the site.

Reason: Requirement of the Environment Protection Authority. P_0_05

11. All works on the site will need to be planned and carried out in accordance with the NSW WorkCover 'Work Near Overhead Power Lines' Code of Practice 2006 (link attached below) and TransGrid's Easement Guidelines for Third Party Development (V10) (Guidelines). Please contact TransGrid in event of any uncertainty.

<http://www.workcover.nsw.gov.au/health-and-safety/industry-safety/electrical-and->

Note: In the event that the developer does hit either an earthing strap or overhead transmission line/stanchion, please pause all works and contact TransGrid immediately. Any excavation or construction work on the subject site that results in damage to either TransGrid's overhead transmission line or surrounding stanchion/tower's, TransGrid will be seeking full reimbursement of costs from the developer. This would include penalty feeds arising from any outages to the overhead transmission line network.

Reason: Requirement of TransGrid and the *State Environmental Planning Policy (Infrastructure) 2007*.

12. The extractive industry must not extract more than 30,000 tonnes of extractive materials from the site per year at any time during operations.

Reason: Production above this threshold would result in the proposal being a Scheduled activity under the provisions of the *Protection of the Environment Operations Act 1997* and would require a license under the provisions of the *Protection of the Environment Operations Act 1997*.

13. The maximum depths for extraction shown on the approved plans are not to be exceeded without the submission and approval of an application to modify the development for extraction at any new proposed depth.

Reason: To ensure the finished site is in accordance with the approved plans and to protect groundwater beneath the site.

14. Extraction of materials from the site is limited to a total of twenty-five (25) days in any one calendar year.

Reason: To minimise land use conflicts and to ensure the extractive industry does not exceed the total allowable volume of extractive materials per year.

15. This consent will expire twenty-five (25) years from the date of this determination. All works must cease at this time and must not recommence unless further development consent is obtained.

Reason: In accordance with the time period applied for and the application was assessed as per this time period.

16. The development must be undertaken in the order of stages specified in the approved Environmental Impact Statement.

Reason: The order of the stages was an important consideration during the assessment process and if changed will alter the potential environmental impacts of the proposal.

Required Works

17. Intersection Warning signs are to be installed in place of the proposed Truck Turning warning signs in accordance with Australian Standard AS1742.

Reason: Requirement of the Roads and Maritime Services

18. All pavement design on the State road network must be in accordance with Austroads standards.

Reason: Requirement of the Roads and Maritime Services P_0_03

19. Prior to commencement of extraction operations for Stage 1, Council must upgrade the existing access onto the Monaro Highway to be a sealed auxiliary left turn AUL(S) together with a sealed basic right turn (BAR) configuration in accordance with *Austroads Guide to Road Design – Part 4a: Unsignalised and Signalised Intersections*. The access must be sealed a minimum distance of 10m back from the edge of seal.

Reason: Requirement of the Roads and Maritime Services P_0_03

Condition Amended by 10.2015.2000498.3

- 20 The '50 metre tree buffer' area, shown in Figure 2-3 of the approved Environmental Impact Statement is to be expanded by further canopy and understory planting to the north of the existing gravel pit. The additional planting to be established in accordance with the requirements of the Visual Impact Assessment (NGH, August 2020).

Reason: To ensure the extractive industry is visually screened from the Monaro Highway.

- 20a All machinery and equipment associated with gravel pit operations is to be parked within the existing pits and extraction areas.

Reason: To ensure the extractive industry is visually screened from the Monaro Highway.

- 20b An earth bund shall be established around the existing gravel pit site to offer visual screening of the extractive industry. Fast growing understory native plants (*Acacia* species) are to be planted on the bunded area.

Reason: To ensure the extractive industry is visually screened from the Monaro Highway.

Conditions to be met prior to commencement of work

20. Prior to works commencing, the applicant must enter into a Works Authorisation Deed (WAD) with the RMS for all works on the Monaro Highway.

Reason: Requirement of the Roads and Maritime Services P_0_02

21. Council must apply for, and obtain a Road Occupancy Licence (ROL) from the RMS Traffic Operations Unit (TOU) prior to commencing roadworks on a State Road or any other works that impact a travel lane of a State Road or impact the operation of traffic signals on any road. Council will require a Traffic Management Plan (TMP) to be prepared by a person who is certified to prepare Traffic Control Plans. Should the TMP

require a reduction of the speed limit, a Speed Zone Authorisation will also be required from the TOU. Council must submit the ROL application 10 business days prior to commencing work. It should be noted that receiving an approval for the ROL within this 10 business day period is dependent upon RMS receiving an accurate and compliant TMP.

Notes: An approved ROL does not constitute an approval to commence works until an authorisation letter for the works has been issued by RMS Project Manager.

Reason: Requirement of the Roads and Maritime Services P_0_02

22. Prior to commencement of works, a detailed Rehabilitation Plan is to be prepared by a suitably qualified person, in consultation with the Local Land Services and the Office of Environment and Heritage. The Rehabilitation Plan is to be consistent with the Rehabilitation Strategy contained within Appendix A of the approved Environmental Impact Statement. The Rehabilitation Plan is to be submitted to Council's Town Planning Section prior to any works occurring on the site.

Reason: To ensure rehabilitation of the site occurs in accordance with the approved Environmental Impact Statement. P_0_08

23. Rehabilitation of the site is to be carried out progressively throughout the life of the quarry in accordance with the Rehabilitation Plan.

Reason: To ensure rehabilitation of the site occurs in accordance with the approved Environmental Impact Statement. P_0_08

- 24.
- a) Prior to commencement of works, a detailed Biodiversity Offset Plan is to be prepared by a suitably qualified person, in consultation with the Local Land Services and the Office of Environment and Heritage and include requirements of conditions 5 & 20.
 - b) The Biodiversity Offset is to be consistent with the Offset Strategy contained within Appendix D of the approved Environmental Impact Statement. The Biodiversity Offset Plan is to be submitted to Council's Town Planning Section prior to any works occurring on the site. Where possible seeds should be collected on site and utilised throughout the Offset areas. The Offset areas contained within the Biodiversity Offset Plan are to be managed under a Conservation Property Vegetation Plan, prepared by the Local Land Service, in accordance with Part 4 of the *Native Vegetation Act 2003*.
 - c) The Biodiversity Offset plan is to include a staging plan that stages work in such a way to ensure early commencement of planning to undertaken prior to commencement of Stage 1. At least 60% of the Biodiversity Offset Plan is to be implemented by the finalisation of Stage 2. The remaining 40% is to be evenly implemented across the remaining stages.
 - d) The draft Property Vegetation Plan is to be made available for public comment prior to adoption by Local Land Services. Implementation of the PVP and restoration of the EEC Ribbon Gum, Snow Gum grassy open forest is to commence prior to commencement of works.

Reason: To ensure native vegetation on the site is protected and enhanced. P_0_08

25. A detailed Soil and Water Management Plan is to be prepared by a suitably qualified person, in accordance with the Best Practice guidelines contained within Soils and

Construction Vol.1 (Landcom 2004). The Soil and Water Management Plan is to be consistent with Section 5.2.3 of the approved Environmental Impact Statement. The Soil and Water Management Plan is to be submitted to Council's Town Planning Section prior to any works occurring on the site.

Note: Operations of the extractive industry are to comply with the Soil and Water Management Plan at all times.

Reason: To ensure soil and water is managed appropriately on the site. P_0_08

26. A detailed Weed Management Plan is to be prepared by a suitably qualified person, in consultation with Council's Noxious Weeds Section. The Weed Management Plan is to be consistent with Section 5.3.5 of the approved Environmental Impact Statement. The Weed Management Plan is to be submitted to Council's Town Planning Section prior to any works occurring on the site.

Note: Operations of the extractive industry are to comply with the Weed Management Plan at all times.

Reason: To ensure the development complies with the requirements of the *Noxious Weeds Act 1993*. P_0_08

27. A detailed Aboriginal Heritage Management Plan is to be prepared in consultation with a qualified archaeologist, in conjunction with Registered Aboriginal Parties and the Office of Environment and Heritage (OEH). The Aboriginal Heritage Management Plan is to be consistent with Section 5.4.4 of the approved Environmental Impact Statement. The Aboriginal Heritage Management Plan is to be submitted to Council's Town Planning Section prior to any works occurring on the site.

Note: If any Aboriginal objects are uncovered during the proposed extraction activity; all works must stop and the relevant OEH office contacted for advice. An Aboriginal Heritage Impact Permit (AHIP) will be required if Aboriginal objects cannot subsequently be avoided as part of the extraction works

Reason: To ensure impacts to Aboriginal heritage is minimised during extraction. P_0_08

28. The mitigation measures contained with Section 6.1 of Appendix C of the approved Environmental Impact Statement are to be implemented through the life of the subject extractive industry.

Reason: To minimise environmental impacts on the site. P_0_08

29. An updated version of the Cooma-Monaro Shire Council's Chemical Spill procedure is to be prepared to include the measures contained within Section 5.2.3 of the approved Environmental Impact Statement. The updated version of the Cooma-Monaro Shire Council's Chemical Spill procedure is to be submitted to Council's Town Planning Section prior to any works occurring on the site.

Note: Operations of the extractive industry are to comply with the updated version of the Cooma-Monaro Shire Council's Chemical Spill procedure at all times.

Reason: To minimise potential contamination of the site. P_0_08

30. Prior to carrying out any development, the applicant shall prepare, and following approval implement, an Environmental Management Strategy for the development to the satisfaction of the Director of Environmental Services. The strategy must:

- a) Be a single document kept on site and submitted to Council annual based on the date of approval of the first document.
- b) Provide the strategic context of environment that apply to the development
- c) Identify the statutory requirements that apply to the development
- d) Describe how the environmental performance of the development would be monitored and managed during the development including:
 - Traffic Management Plan
 - Rehabilitation Plan
 - Soil and Water Management Plan
 - Biodiversity Offset Plan
 - Weed Management Plan
 - Aboriginal Heritage Management Plan
- e) Describe the procedures that would be implemented to:
 - Keep the local community and relevant agencies informed about the operation and environmental performance of the development
 - Receive, handle, respond to, and record complaints
 - Resolve any disputes that may arise during the course of the development
 - Respond to any non-compliance
 - Manage cumulative impacts; and
 - Respond to emergencies
- f) Describe the role, responsibility, authority and accountability of the key personnel involved in environmental management of the development.
- g) Include a monitoring program updated annually as required
- h) Include an Incident Report Management Plan
- i) Include an Annual Environmental Management Report (AEMR) to be included in the second submission and annual thereafter.
- j) Be made available to the public for inspection at the offices of Cooma-Monaro Shire Council and be placed on Council' website.

Note: Each part (including the required management plans, reports and programs) of the EMS shall include a list identifying all relevant conditions of consent (including GTAs) specific to that section of how those requirements have been satisfied/addressed within the document.

Reason: To prevent the proposed development having a detrimental effect on the developments existing on the adjoining lands. Section 79C(1)(e) of the *Environmental Planning and Assessment Act* as amended. P_0_08