

DATE OF DETERMINATION	Tuesday, 14 September 2021
PANEL MEMBERS	Justin Doyle (Chair), Angus Gordon, Greg Britton, Judy Clark and Jeff Organ
APOLOGIES	None
DECLARATIONS OF INTEREST	None

Papers circulated electronically on 24 August 2021.

MATTER DETERMINED

PPSSWC-2 – Hawkesbury City Council – DA0508/18 at 374 Freemans Reach Road, Freemans Reach – Extractive Industries: Sand Extraction and Processing Facility, Road Works, Site Works, Ancillary Office, Fencing, Landscaping and Site Rehabilitation (as described in Schedule 1)

PANEL CONSIDERATION AND DECISION

The panel considered: the matters listed at item 6, the material listed at item 7 and the material presented at meetings and briefings and the matters observed at site inspections listed at item 8 in Schedule 1.

Development application

The Panel by majority determined to approve the development application pursuant to section 4.16 of the Environmental Planning and Assessment Act 1979.

The decision was 3:2 in favour. against the decision were Judy Clark and Jeff Organ.

REASONS FOR THE DECISION

The majority of the Panel (drawing upon the expertise of the two Panel members expert in coastal engineering and flood management) resolved to approve the development application for the following reasons.

The proposal is for the extraction from the site and processing of up to 700,000 tonnes of sand over a 10-year operation, and progressive reinstatement and revegetation of the affected areas is prohibited development in the RU2 Rural Landscape Zone under Hawkesbury LEP 2012. However, cl 7(1) of SEPP (Mining, Petroleum Production and Extractive Industries) 2007 permit mining and extractive industries to be conducted on land on which development for the purposes of agriculture may be carried out with or without consent. The objectives of that SEPP include the proper management and development of mineral, petroleum and extractive material resources for the purpose of promoting the social and economic welfare of the State.

As builder's sand is a scarce commodity in high demand in the local construction industry, the proposed sand extraction facility will make a positive contribution to the regional economy. Approval of the proposal subject to the rigorous conditions to be imposed is consistent with the objective of encouraging sustainable primary industry production without causing a significant adverse effect on the adjacent Hawkesbury River.

Because extraction is proposed to progress in stages, only a portion of the extraction area will be exposed at any one time. At the completion of the project in accordance with the proposed conditions the land will be reinstated to existing levels and revegetated. Given those factors and the anticipated 10 year life of the facility, the Panel was ultimately satisfied that the visual impacts of the proposal were assessed to be acceptable, such that the existing rural character will not be unacceptably affected.

The Council assessment staff recommended refusal of the application. During the course of the assessment of the DA the Council commissioned the preparation of a document entitled “Hawkesbury Rural Lands Strategy”. This development application is referred to specifically in that Strategy as follows:

Council currently has an application for a sand extraction on one property in the Freemans Reach area. This has the potential to have a significant impact on the agriculture sector – both turf farming and market gardens. The application is to take sand from a small area of an existing turf farm and if it is established, it may then seek extensions of the area to encompass more of the agricultural land. This as well as impact on the Hawkesbury River and its environmental values would have to be addressed by the Council. For this reason, it is considered that no sand extraction should be considered in this area. This will be discussed in more detail in chapter 6.

The Panel carefully considered the issues presented in that passage as a reason for refusing the DA, but were ultimately satisfied those issues were adequately resolved in the proposed development with the conditions to be imposed. In summary:

(a). Potential impact on the agricultural sector – turf farming and market gardens

The proposed sand extraction facility will cover just a relatively small portion of this active turf farm which is proposed to continue operations. The life of the project to be completed in stages is just 10 years with the surface of each stage to be rehabilitated for continued use as part of the turf farm. Accordingly, the impact on the agricultural sector will be comparatively negligible and of limited duration. The proposal will not impact on any market garden.

Consequently, the proposal is unlikely to have any substantial or permanent impact on local land use trends, existing rural land uses or agriculture.

The location of the sand extraction is found on the inside of a bend in the River where a valuable high quality of sand has accreted. Those conditions are not reproduced generally along the River, such that approval of this facility is not expected to be serve as a precedent for a general expansion of sand extraction along the Hawkesbury River. In any event, any future similar use elsewhere in the locality would have to be the subject of a further DA.

(b) Potential impact on the environmental values of the Hawkesbury River.

The locality is marked by substantial disturbance to the natural environment with the introduction of turf farming and other uses. There are parts of the waterfront of the site which retain mapped vegetation within the riparian corridor, but in general the site is heavily disturbed and weed infested. The significant vegetation is not proposed to be unacceptably impacted by the proposal.

While there will be some removal of River-flat Eucalypt forest and 0.01 ha of Freshwater Wetlands on Coastal Floodplains the Council assessment staff accepted the advice of the project ecological reports that will not result in permanent isolation, fragmentation or extinction. As each stage is completed and reinstated, it will be required to be revegetated using native species in accordance with the vegetation management plan.

The Application was accompanied by a detailed flora and fauna assessment and aquatic ecology assessment supported by threatened species targeted surveys, and was assessed by the Council staff to be acceptable in that regard.

As such, a majority of the Panel was satisfied that the ecological effects will be acceptable having regard to the considerations identified by cl 6(3) of the Hawkesbury LEP and of limited duration. As required by clause 6(4) the Panel is satisfied that:

- (a) the development has been sufficiently designed and sited, and will be required to be managed to adequately minimise any significant adverse environmental impact, with the resulting impacts mitigated by the vegetation management plan and reinstatement strategy.

- (b) if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or
- (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

In that regard, the development application was referred to the EPA, NSW Fisheries, Water NSW, NRAR and the NSW Office of Environment and Heritage. None of those authorities raised objection to the proposal, with each providing general terms of approval which are incorporated into the consent through the conditions to be imposed.

(c) Flood planning

The impacts of the proposed development on the Hawkesbury River from flooding and erosion perspectives have been shown to be acceptable allowing for the effects of climate change, and conditions have been included to ensure the Applicant is responsible to remediate any damage occasioned to adjacent properties or the river, as a consequence of the project, for the life of the project including rehabilitation (see Condition 9).

The majority of the Panel supportive of the DA examined the Flood Risk Management Plan prepared by Martens consulting engineers (Martens Report) supplied as part of the documents supporting the DA and were satisfied that flood related impacts had been adequately examined and designed for. The Panel reached that conclusion by accepting the advice summarised at page 4 of the Martens Report, and taking into account the matters identified at clause 5.21(3) of Hawkesbury LEP and the NSW Government's Flood Prone Land Policy and the principles of the Floodplain Development Manual 2005.

If the development is carried out in accordance with the proposed conditions, it is expected that the proposed development:

- (a) will be compatible with the flood function and behaviour on the land,
- (b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and
- (c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and
- (d) incorporates appropriate measures to manage risk to life in the event of a flood, and
- (e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.

The specialist panel members were satisfied that the subsequent modelling undertaken by Martens demonstrated the proposed activities would not result in an increase in velocities and hence the erosive forces on the riverbank opposite the site, noting that the opposite bank is on the outside of a bend in the river and is, and will continue to be the subject of erosive forces due to the natural actions of the river. Upon reviewing additional modelling requested during the assessment process, a condition has been proposed to require reinstatement of the extraction area to existing levels to address the potential for erosion of the downstream properties.

The Panel Approval of the DA with the proposed conditions will be consistent with the relevant provisions of "Considering flooding in land use planning Guideline July 2021", the NSW Government's Flood Prone Land Policy and the principles of the Floodplain Development Manual 2005.

The DA is supported by a preliminary site investigation, detailed site investigation and remedial action plan (RAP), prepared by Martens & Associates Pty Ltd. The RAP proposes to excavate the contaminated material for offsite disposal. Complete removal and offsite disposal would provide a high level of certainty that the area will be made suitable for extractive purposes. The Panel is satisfied that the issue of contamination and potential contamination of the land is therefore adequately resolved to meet the requirements of SEPP 55.

The proposal is seen as compatible with and supportive of the objectives of the Western City District Plan, noting in particular Planning Priority W17 Better Managing Rural Areas which includes the following:

“... The rural lands also contain extractive resources which are based on the construction material resources. There are major resources of construction sand in the Londonderry area as well as along the Hawkesbury River. It is this area that is within the LGA. The District Strategy states that by sourcing construction materials locally, it reduces the transportation, thus reducing costs and environmental footprint and the social impact of construction. ...”

TfNSW was notified of the DA but raised no objections to the DA in relation to any potential traffic related impacts.

Having regard to the matters discussed above, the Panel was satisfied that the considerations raised for attention by Sydney Regional Environmental Plan No. 20 – Hawkesbury-Nepean River have been suitably addressed.

The Aboriginal Cultural Heritage Assessment supplied with the DA identified a number of artefacts at the site possibly deposited during past flood events. Any such items found are required by the Conditions to be managed in accordance with an AHIP under Section 90 of the National Parks and Wildlife Act 1974.

The staff assessment report has been considered carefully including its assessment of the project against relevant provisions of Hawkesbury Development Control Plan 2002, the Greater Sydney Region Plan, the Western City District Plan and the other planning instruments discussed therein. On most issues the development has been found to be acceptable. The Panel departs from the conclusion and recommendation of the report for the reasons set out above.

Notably, DPI Agriculture does not support the proposal for reasons set out in its letter dated 9 January 2019, for reasons including that the development is not in keeping with the objectives of the RU2 (Rural Landscape) Zone and is to occur on Biophysical Strategic Agricultural Lands, which it is argued should be protected from inappropriate development that will reduce their productive capacity. The Panel does not however agree that (for reasons already explained) there will be any substantial impact on the agricultural use of the site.

Judy Clark voted in favour of refusal on the basis that in her view the proposal is unsatisfactory pursuant to Clause 12 of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 for the following reasons:

- a) The proposal involves significant changes to and interference with the current landform, existing vegetation and adjacent riverbank through sand extraction, excavation, stockpiling and importation of fill. This is incompatible with the existing and approved rural, rural-residential and agricultural land uses in the vicinity of the proposed development, and would also have a negative impact on the scenic, environmental and ecological qualities of the Hawkesbury River for an extended period of time (10 years).
- b) Measures proposed by the applicant to avoid or minimise the incompatibility between the proposal (being an extractive industry) and the established and existing uses characteristic of the RU2 Rural Landscape Zone under Hawkesbury Local Environmental Plan 2012:
 - i. fail to provide an acceptable level of certainty that the ongoing operation of the proposed sand extraction and processing facility will not have significant adverse environmental impacts, and
 - ii. are over reliant on self-management and plans of management that contain a complex matrix of ongoing requirements that would be difficult for Council to monitor and enforce, noting that further complexity in relation to ongoing management/mitigation requirements would arise from concurrent compliance with the General Terms of Approval (GTAs) issued by the relevant agencies.

2. Approval of the proposal would set an undesirable precedent for similar applications along the Hawkesbury River in circumstances where there is a reasonable likelihood that sand deposits exist on other lots with a Hawkesbury River frontage in the vicinity of the subject site, in the context that the cumulative impacts of sand extraction on the Hawkesbury River are uncertain.

Jeff Organ similarly voted for refusal listing his reasons as:

1. The application does not address the issue of precedent should the adjoining lands be found to be suitable for resource extraction and concurrent works were then to take place as a consequence. Concurrent activity and cumulative impacts of resource extraction, particularly where multiple extraction pits may be open at any given time pending rehabilitation is likely, have not been considered.
2. The proposal does not identify the source or availability of fill material to remediate the extraction areas. The impact and volume of traffic movements is likely to be of a different profile to the controlled vehicle movements generated by the extraction activity. The proposal does not provide any certainty over the timely availability to source and receive suitable material in line with the extraction sequence, noting that stockpiling of material is not proposed.
3. The proposal will result in substantial impacts and changes to the existing riverine landform, with attendant impacts on vegetation and potential for erosion on adjoining and opposite properties.
4. The proposal is likely to adversely affect the nearby areas scenic, environmental, and ecological qualities. The duration of the proposed activity, whilst time limited, is such that significant flood events may occur outside of the simple probability assessment of flood likelihood over that period.

CONDITIONS

The development application was approved subject to the conditions in the council assessment report with the following amendments:

Condition 23 Flood Prone Land - Engineers Certification

Replace 'geotechnical engineer' with 'maritime engineer', and add to the end of the condition the additional words:

The certification is to include confirmation that the dredge to be employed and tethering will be stable and physically capable of withstanding anticipated forces associated with flood events up to and including the 100 year ARI allowing for potential overturning.

Condition 41 Erosion and Sediment Controls in Place

Add words to the end of the existing condition:

"The appointed suitably qualified engineer is to confirm that the grass covering of the low flood bunds is sufficiently well established prior to the commencement of extraction activities to be capable of withstanding overtopping velocities of at least 1.8 metres per second (noting the importance of ensuring the stability of the bunds)".

Condition 9 Obligation to Remediate any Harm to the Environment and Condition 90 Restriction on Use of the Land

A new condition is to be included in the determination to the effect:






"On completion of each stage, the surface of the sand extraction facility is to be restored to the profile and levels that existed prior to any extraction with that obligation to be recorded in the public positive covenant to be registered on the title."

CONSIDERATION OF COMMUNITY VIEWS

In coming to its decision, the panel considered written submissions made during public exhibition and heard from all those wishing to address the panel. The panel notes that issues of concern included:

- Permissibility within the RU2 zoning.
- Inappropriate use of rural lands and loss of agricultural land.
- Concerns the proposal will set a precedent for further sand mining in the Richmond Lowlands.
- Suitability of rehabilitation including fill material for existing and future agricultural land uses.
- Potential impacts on flora and fauna at the site and along the Hawkesbury River including riparian vegetation and habitat as well as key fish habitat.
- Concerns related to the management of acid sulphate soils.
- Concerns related to the generation of dust and fine sand particulates.
- Potential impacts on Aboriginal and non-Aboriginal heritage.
- Potential contamination of receiving groundwater, wetlands, watercourses and drinking water.
- Potential for environmental damage during a flood event.
- Potential increase in traffic to the local area and deterioration of local roads.
- Potential visual impacts to neighbouring properties and Hawkesbury River users.
- Potential operational noise impacts to surrounding receivers including neighbouring properties.

The panel took into account those concerns raised by the community but considered that they had been adequately addressed in the DA and supporting reports, the general terms of approval of the referral authorities, and the consent conditions.

PANEL MEMBERS	
 Justin Doyle (Chair)	 Angus Gordon
 Greg Britton	 Judy Clark
 Jeff Organ	

SCHEDULE 1		
1	PANEL REF – LGA – DA NO.	PPSSWC-2 – Hawkesbury – DA0508/18
2	PROPOSED DEVELOPMENT	Extractive Industries: Sand Extraction and Processing Facility, Road Works, Site Works, Ancillary Office, Fencing, Landscaping and Site Rehabilitation
3	STREET ADDRESS	374, 395 & 415 Freemans Reach Road Freemans Reach NSW 2756 (Lot 2 in DP 85885 (No. 415), Lot 4 in DP 718505 (No. 395) and Lot 2 in DP 77951 (No. 374))
4	APPLICANT/OWNER	Applicant: Greener Valley Sands Pty Ltd Owner: Mr Anthony Muscat (395 Freemans Reach Road)
5	TYPE OF REGIONAL DEVELOPMENT	Crown development over \$5 million
6	RELEVANT MANDATORY CONSIDERATIONS	<ul style="list-style-type: none"> • Environmental planning instruments: <ul style="list-style-type: none"> ○ State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Extractive Industries SEPP); ○ State Environmental Planning Policy (State and Regional Development) 2011 (SRD SEPP); ○ State Environmental Planning Policy (Coastal Management) 2018 (Coastal Management SEPP); ○ State Environmental Planning Policy No. 55 – Remediation of Land (SEPP No. 55); ○ State Environmental Planning Policy No. 33 – Hazardous and Offensive Development (SEPP No. 30); ○ State Environmental Planning Policy No. 44 – Koala Habitat Protection (SEPP No. 44); ○ State Environmental Planning Policy No. 64 – Advertising and Signage (SEPP No. 64); ○ Sydney Regional Environmental Plan No. 20 – Hawkesbury-Nepean River (SREP No. 20); ○ Sydney Regional Environmental Plan No. 9 – Extractive Industry (SREP No. 9); ○ Hawkesbury Local Environmental Plan 2012 (HLEP). • Draft environmental planning instruments: <ul style="list-style-type: none"> ○ Draft State Environmental Planning Policy (Remediation of Land); ○ Draft State Environmental Planning Policy (Environment). • Development control plans: <ul style="list-style-type: none"> ○ Hawkesbury Development Control Plan 2002 • Planning agreements: Nil • Provisions of the <i>Environmental Planning and Assessment Regulation 2000</i>: Environmental Planning and Assessment Regulation 2000 (EP&A Regulation). • Coastal zone management plan: State Environmental Planning Policy (Coastal Management) 2018 (Coastal Management SEPP); • The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality • The suitability of the site for the development

		<ul style="list-style-type: none"> Any submissions made in accordance with the <i>Environmental Planning and Assessment Act 1979</i> or regulations The public interest, including the principles of ecologically sustainable development
7	MATERIAL CONSIDERED BY THE PANEL	<ul style="list-style-type: none"> Council assessment report: 24 August 2021 Council assessment report: 28 April 2021 Late submission uploaded into the portal: 24 May 2021 Written submissions during public exhibition: 124 Verbal submissions at the public meeting: <ul style="list-style-type: none"> Christine Watson on behalf of Community Group Hawkesbury Environment Network, Councillor John Ross and Bill Sneddon Council assessment officer – William Pillion Consultant: Claire Jones Advisian On behalf of the applicant – Daniel Martens Martens & Associates, Mo Shahrojhian Martens & Associates Total number of unique submissions received by way of objection: 124 Additional modelling supplied by Martens engineers
8	MEETINGS, BRIEFINGS AND SITE INSPECTIONS BY THE PANEL	<ul style="list-style-type: none"> Briefing: Monday, 7 September 2020 <ul style="list-style-type: none"> <u>Panel members</u>: Justin Doyle (Chair), Nicole Gurran, Louise Camenzuli, Judy Clark and Jeff Organ <u>Council assessment staff</u>: William Pillion and Cristie Evenhuis <u>Consultants</u>: Claire Jones and & Alex Pappas Advisian Briefing: Monday, 29 March 2021 <ul style="list-style-type: none"> <u>Panel members</u>: Justin Doyle (Chair), Greg Britton and Angus Gordon Site inspection: Thursday, 6 May 2021 <ul style="list-style-type: none"> <u>Panel members</u>: Judy Clark and Jeff Organ <u>Council assessment staff</u>: William Pillion and Anthony Mucat Site inspection: Thursday, 13 May 2021 <ul style="list-style-type: none"> <u>Panel members</u>: Justin Doyle (Chair) and Angus Gordon <u>Council assessment staff</u>: William Pillion and Nick Muscat Site inspection: Sunday, 23 May 2021 <ul style="list-style-type: none"> <u>Panel members</u>: Greg Britton Final briefing to discuss council's recommendation: Monday, 24 May 2021 <ul style="list-style-type: none"> <u>Panel members</u>: Justin Doyle (Chair), Greg Britton and Angus Gordon, Judy Clark and Jeff Organ <u>Council assessment staff</u>: William Pillion and Cristie Evenhuis <u>Consultants</u>: Claire Jones Advisian Final briefing to discuss council's recommendation: Monday, 6 September 2021 <ul style="list-style-type: none"> <u>Panel members</u>: Justin Doyle (Chair), Greg Britton and Angus Gordon, Judy Clark and Jeff Organ <u>Council assessment staff</u>: William Pillion and Cristie Evenhuis
9	COUNCIL RECOMMENDATION	Refusal
10	DRAFT CONDITIONS	Attached to assessment report