

**From:** [Terry Sinclair](#)  
**To:** [IPCN Enquiries Mailbox](#)  
**Subject:** Dunmore Lakes Sand Extraction Project Modification 2-Objection  
**Date:** Wednesday, 4 November 2020 12:58:23 PM  
**Attachments:** [Dunmore Lakes v1.0.pdf](#)

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Dear Commissioners,

Please find attached my Objection to the Dunmore Lakes Proposal.

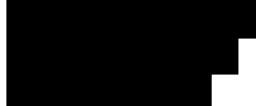
It is noted that the name of the Proposal, being the “Dunmore Lakes” Sand Extraction Project, reflects the lasting and cumulative consequences of legacy decisions in the sensitive Minnamurra River Catchment. “Dunmore Lakes” is a recent geographical name applied to an area known simply as “Dunmore” and/or “Minnamurra” since colonisation, and is in itself an artificial, low-value, foreign body of brackish water left as a memorial to previous sand mining operations in the Catchment.

This latest Proposal seeks to compound this historical error by expanding the “lakes” with the addition of two new sand extraction pits and once again plans to leave artificial, low value eco-systems in place once sand mining is complete. It is also noted that this proposal is referred to as ‘Modification 2’, whereas the NSW Major Projects portal clearly shows that there have already been 10 previous Modifications to the current Consent.

As the Commission is aware, the Minister is authorised under section 2A - Public Interest Consideration for Part 3A projects, to take the public interest into account when deciding whether or not to provide consent. The Minister is not bound to take into account whether the Secretary's report on the project did or did not give consideration to, or make any recommendation about, the public interest or any particular aspect of the public interest. In this particular case, where the approval process being pursued by the Applicant was repealed almost 10 years ago, the public interest should be given particular weight by the Minister.

Regards

Terry Sinclair



Independent Planning Commission  
Level 3, 201 Elizabeth Street,  
Sydney NSW 200  
ipcn@ipcn.nsw.gov.au

Dear Commissioners,

This Submission sets out my strong objection to the Dunmore Lakes Sand Extraction Project: Modification 2. I have been a ratepayer/resident of Minnamurra since 1985. I lodge my Submission as an individual, representing no other interests, and without affiliation to political parties or officeholders. In addition to the Proposal being a matter of State Significance under the EP&A Act, it is one of great local significance and potential impact. Substantial public interest has been demonstrated by:

- . 4883 citizens who signed a petition referred to NSW parliament by Justin Field MLC
- . 1000+ voices who gathered on the Minnamurra headland to protest the Proposal (approx. 20% of local population)
- . the strong voice of traditional owners/custodians
- . 139 individual submissions to DPIE
- . 10 community interest group submissions to DPIE
- . representations by local, state and federal members
- . the consistent and strong objection of both Shellharbour and Kiama Councils

As the Commission is aware, the Minister is authorised under section 2A - Public Interest Consideration for Part 3A projects, to take the public interest into account when deciding whether or not to provide consent. The Minister is not bound to take into account whether the Secretary's report on the project did or did not give consideration to, or make any recommendation about, the public interest or any particular aspect of the public interest. In this particular case, where the approval process being pursued by the Applicant was repealed almost 10 years ago, the public interest should be given particular weight by the Minister.

The grounds for my objection are summarised as follows:

**The Proposal is non-compliant with the Regulations that apply to the repealed Part 3A section 75 W approval process given that:**

- . the Applicant failed to provide complete Environmental Assessment documentation by 1 September 2018
- . the DPIE failed to determine the Proposal by 1 September 2108
- . the Applicant failed to provide complete Environmental Assessment documentation by the DPIE "discretionary" date of 1 March 2019; and
- . the DPIE failed to notify parties of this default.

**The Proposal is not "substantially the same" as the current approval given that:**

- . the Environmental Assessment fails to demonstrate that the new development is essentially or materially the same, having assessed the qualitative and quantitative differences in their proper context; and
- . the DPIE Response erred in its application of "does not constitute a radical transformation" as an appropriate test of "substantially the same".

**The Environmental Assessment does not contemplate implications for the critically endangered South Eastern Littoral Rain Forest given that:**

- . the Environmental Assessment fails to identify the facts in relation to the South Eastern Littoral Rain Forest;
- . the Applicant failed to notify the Minister as required under the EPBC Act; and
- . the DPIE failed to notify the Applicant of this default.

It is noted that the name of the Proposal, being the "Dunmore Lakes" Sand Extraction Project, reflects the lasting and cumulative consequences of legacy decisions in the sensitive Minnamurra River Catchment. "Dunmore Lakes" is a recent geographical name applied to an area known simply as "Dunmore" and/or "Minnamurra" since colonisation, and is in itself an artificial, low-value, foreign body of brackish water left as a memorial to previous sand mining operations in the Catchment.

This latest Proposal seeks to compound this historical error by expanding the "lakes" with the addition of two new sand extraction pits and once again plans to leave artificial, low value eco-systems in place once sand mining is complete. It is also noted that this proposal is referred to as 'Modification 2', whereas the NSW Major Projects portal clearly shows that there have already been 10 previous Modifications to the current Consent!

**The Commission should deny the Proposal for Dunmore Lakes Sand Extraction Project: Modification 2, and advise the Minister to subject the proposal to approval under the current EPA Act section 4.55, as amended.**

**This will require the Applicant to undertake an Environmental Impact Statement and subsequent public exhibition, and notification to the federal Minister for the EPBC Act, in order to provide economic and scientific certainty, as well as satisfy the public interest in this matter.**

## **1.0 The Proposal is non-compliant with the Regulations that apply to the repealed Part 3A section 75W approval process.<sup>1</sup>**

The Dunmore Lakes Project (DA 195-8-2004) was originally approved under Part 4 of the EP&A Act, in 2004. The EPA Act as amended provides for modifications to existing consents under Section 4.55 (2) of the Act, which states:

*“Other modifications: A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—  
(a) it is satisfied that 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 modified”<sup>2</sup>*

**1.1 The Applicant faced a “degree of risk” if it followed a section 4.55 (2) approval pathway:** Prior to lodging the Proposal request, the Applicant sought advice from the Department of Planning Industry and Environment (DPIE) as to the appropriate approval pathway for the proposal. The DPIE provided the Applicant with the following advice in relation to a Section 4.55 (2) approval pathway:

*“I have reviewed the information provided and sought advice from the Departments Legal Branch. This advice indicates that there is a **degree of risk** that Modification 2 would not be considered “substantially the same” as the development for which consent was originally granted. On this basis you are advised to seek and carefully consider legal advice before proceeding with the proposal under section 4.55 of the EP&A Act 1979”<sup>3</sup>*

**1.2 The DPIE further advised the Applicant of an alternate approval pathway, with certain limitations, and with a cut off date for a COMPLETE EA of 28 February 2019:** The DPIE advised the Applicant that given it was already December 2018, ie well past the Regulated determination date of 1 September 2018, that any application after September 2018 had to pass a specific threshold as determined by the Secretary:

*“Alternatively (to a section 4.55 (2) approval pathway) the modification request may continue under the sect 75W approval pathway, provided that a complete Environmental Assessment (EA) is provided by no later than 28 February 2019.”<sup>4</sup>*

The DPIE further advised the Applicant of the binary consequences if the cut-off date threshold was not met:

*“The Secretary may decide not to deal with a modification request made under section 75W at any time after 1 September 2018, if the Secretary is of the opinion that insufficient information’s been provided to deal with the request....If a complete EA is not submitted to the Department by 28 February 2019, the Department intends to give immediate notice that Modification 2 will not be dealt with under section 75W”<sup>5</sup>*

**1.3 The DPIE exercised an excessive form of discretion when it advised the Applicant of a revised date for acceptance of a complete EA by 28 February 2019, as it is materially different from the date stated in the Regulations, for determination by 1 September 2018:** There is no documentation available to the public that demonstrates or justifies why such an exception to the Regulations was made given that an approved project or concept plan cannot be modified under the previous section 75W of the EPA Act after 1 March 2018, unless the request to modify:

*“...that it cannot continue if the request has not been determined by 1 September 2018”<sup>6</sup>.*

In revising both the timeline and the threshold, the DPIE appears to have acted in direct conflict with the Regulations as stated above. Such an explicit breach of the Regulations would have been justified and documented in some form to ensure due process had been observed by way of justifiable discretion being exercised by the Secretary within their delegated authority. The Commission should avail itself of that internal documentation prior to any determination on this matter.

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<sup>1</sup> EPA STOP Regulations, 2017. Sch.2,

<sup>2</sup> EPA Act 2020 Section 4.55 (2)

<sup>3</sup>Extract from DPIE Director Howard Reed letter to the Applicant dated 21.12. 2018

<sup>4</sup>Extract from DPIE Director Howard Reed letter to the Applicant dated 21.12. 2018

<sup>5</sup>Extract from DPIE Director Howard Reed letter to the Applicant dated 21.12. 2018

<sup>6</sup> EPA STOP Regulations, 2017. Sch.2, 3BA (4) (a)

The only reference for any discretion available to the Secretary is found in the Winding-up of transitional Part 3A modification provisions Clause 3BA as follows:

- 1) For the purposes of this clause, the "cut-off date" is 1 March 2018.
- 2) An approved project or a concept plan cannot be modified under section 75W on or after the cut-off date, except as provided by this clause.
- 3) Subclause (2) does not apply if the request to modify the approved project or concept plan under section 75W was lodged before the cut-off date. Accordingly, the provisions of this Schedule relating to a modification made pursuant to such a request continue to apply.
- 4) A request to modify an approved project or concept plan under section 75W that may be dealt with because of subclause (3) cannot be dealt with under section 75W if-
  - (a) the request has not been determined by 1 September 2018, and
  - (b) the Secretary is of the opinion that insufficient information has been provided to deal with the request and notifies the person who made the request that it will not be dealt with under section 75W

The available information demonstrates that the Proposal was not determined by 1 September 2018, and also demonstrates that at that date (1 September 2018), insufficient information had been provided to deal with the request, as the letter on 21.12.18 from DPIE Director Howard Reed so clearly articulates.

**1.4 The final/complete EA was received by DPIE on 10 April 2019, circa.6 weeks after the revised discretionary cut-off date:** The only document available to the public that draws attention to this matter is the Response from Shellharbour Council (which strongly objects to the Proposal), when it states:

*"Revision 1 of the EA is dated 26 February 2019 for an "adequacy review", whereas the FINAL EA is dated under "document control" as 10 April 2019, with lodgement of the entire package assumed to have occurred shortly after this date"*<sup>7</sup>

Therefore, given that the Applicant had been advised by DPIE that consent via. section 75 W will not be considered if the EA is not complete by 28 February 2019, the Applicant was in default of the regulated cut-off date (and in this case, the revised discretionary cut off date indicated by the DPIE).

Furthermore, evidence that the EA was not "complete" can be found in internal DPIE correspondence issued by DPIE-Water when responding to the EA on 8th August 2019:

*"due to insufficient information on groundwater impacts the DPIE - Water Assessments, ...recommends the following."*<sup>8</sup>

The DPIE letter also contains an attachment which specifies 7 additional areas of scientific assessments and data which are deemed necessary to be provided prior to any determination of the Proposal. This DPIE letter is dated 8th August 2019, a full 17 months after the regulated "cut-off "date, 11 months after the regulated as determined by date" and 5 months after the DPIEs "complete EA" revised discretionary cut off date

The Proposal therefore clearly does not qualify for consideration under this approval pathway as the EA was not complete, even by the revised discretionary cut-off date of 28 February 2019, as evidenced by DPIE own internal records.

**1.5. The current DA Consent was granted 16 years ago based on an EIS conducted 20+ years ago and prior to the enactment of many Regulations/Acts relevant to any Consent in 2020:** The Dunmore Lakes Project (DA 195-8-2004) was originally approved under Part 4 of the EP&A Act, in 2004. The approval pathway taken by the Applicant is that of a "transitional Part 3A project" in accordance with Schedule 2 to the EP&A (Savings, Transitional and Other Provisions) Regulation 2017. It should be noted that Part 3A of the EP&A Act, has been repealed and the cut-off date under transitional provisions was 1 March 2018 for Section 75W modification applications. Part 3A of the EP&A Act enables an exemption from compliance with a number of Regulations.

The current Consent (2004), was granted prior to any consideration under these current Acts/Regulations/Policies as they were not in force at that time:

- . Environmental Planning+Assessment Act 2020 - 203 amendments since the original Dunmore Lakes Consent
- . State Environmental Planning Policy (State and Regional Development) 2011

<sup>7</sup> Extract from Shellharbour Council GM Carey McIntyre Response to Submissions dated 12 July 2019

<sup>8</sup> Extract from DPIE letter from Liz Rogers DPIE Water Assessments 8th August 2019

- . State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007
- . State Environmental Planning Policy (Coastal Management) 2018
- . State Environmental Planning Policy (Hazardous and Offensive Development) 2019
- . State Environmental Planning Policy 55 – Remediation of Land 2020
- . NSW Aquifer Interference Policy, 2012
- . Shellharbour Local Environmental Plan 2013.
- . Kiama Local Environmental Plan 2013
- . Illawarra/Shoalhaven Regional Plan 2015

**1.6. The Proposal prioritises the economics of Boral's co-located Hard Rock Quarry to the detriment of the Minnamurra River Catchment.** Boral has failed to plan and provide adequate infrastructure to enable both their quarries at Dunmore to operate side by side without interruptions over the next 5 to 10 years. The EA clearly states this as the reason for needing to find new extraction pits in new locations:

*"Given recent high demand, the sand resource in Stage 3 of the approved project is expected to be exhausted in approximately three to five months. The last extraction stage, Stage 4, contains the existing site's road access and private rail line and infrastructure for the approved project and Boral's neighbouring Dunmore hard rock quarry. As such, sand extraction cannot commence in this area until this infrastructure (for the Hard Rock Quarry) is relocated in future..... Boral, proposes to meet part of this increased demand in natural sand by establishing the additional Stage 5 extraction area on land adjoining its current operations."<sup>9</sup>*

The EA does not sufficiently contemplate any operational alternatives that would allow the Applicant to continue mining from the current approval areas sufficient reserves. The EA does infer that such scenarios may require, planning, investment and operational continuity decisions, just as any other business would be expected to carry out in order to fulfil their current approvals **prior** to seeking additional and new locations to be mined. This should be especially the case when the extraction industry is to be located in sensitive catchment and eco-systems areas.

As a consequence, the community and the environment are being pressured by this Proposal to accommodate/ compensate Boral for their lack of operations planning and investment in suitable infrastructure to support their co-located operations, under current approvals.

**1.7 The Proposal is non-compliant with the Regulations that apply to the repealed Part 3A section 75 W approval process given that:**

- . the Applicant failed to provide complete Environmental Assessment documentation by 1 September 2018
- . the DPIE failed to determine the Proposal by 1 September 2108
- . the Applicant failed to provide complete Environmental Assessment documentation by the DPIE "discretionary" date of 1 March 2019; and
- . the DPIE failed to notify parties of this default.

**2.0 The Proposal is not "substantially the same" as the current approval.**

For a development consent to be provided under the Section 75W, the proponent must not only meet the lodgement requirements for complete documentation by statutory cut-off dates, but must also demonstrate that the change, if carried out, would result in a development that would be "substantially the same" as the original consent.

The test of what is "substantially the same" is typically taken as meaning **essentially or materially the same, having assessed the qualitative and quantitative differences in their proper context**. Materiality is indicated at +/-30%, based on a review of EPA guidelines/L&E Court decisions and guidelines published by various legal firms.

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<sup>9</sup> Modification 2: Environmental Assessment - Element Environment April 2020

The Proposal EA, limits its' assessment of qualitative and quantitative differences to a narrow set of operational/technical aspects of the sand extraction/logistics process, without adequate weight being given to the overall parameters of the Proposal, such as:

- . sites/locations,
- . catchment areas
- . zonings/LEP considerations
- . excavation pit designs

**2.1 The overall site footprint increases by 43%:** The EA identifies that the current approval area of 88 ha, will be increased to a total of 126 ha for the Proposal area, but does not contemplate the qualitative and quantitative differences in the overall scale of the subject lands/ footprint. Such an increase in overall footprint/interface with the surrounding environments, is clearly material being, a 43% increase.

**2.2 The new extraction pits are up to deeper by up to 120%:** The current operations have sand extraction pits at approx. 12m depth. The new pits are to be excavated to a maximum depth of 27m. This is a material difference (+120%) to one of the most important operational parameters that could impact groundwater in the Minnamurra River Catchment, the behaviour of the pits under flooding events, siltation effects in the waterways, impact on sensitive ecosystems and the consideration of safe margins/angles of repose from waterways, roadways and structures in any revised EPA license conditions.

**2.3 The new extraction pits are in different Catchment areas:** The subject Lots and proposed new extraction pits for stage 5A and 5B are materially different in nature and context from the current approval as they are situated in different catchment areas. The new locations are in the Minnamurra River Catchment, which has Endangered Ecological Communities within it, whereas the current operations are located in the Rocklow Creek Catchment. The EA identifies the sensitivities of the new locations when it states:

*"The proposed modification areas are located on privately owned land that would be leased to Boral for the duration of the continued operations. These lands are situated on the edge of an alluvial coastal floodplain and adjacent to the tidal reaches of the Minnamurra River, which drains to the Pacific Ocean around 1.5 km from the site."<sup>10</sup>*

**2.4 The new extraction pits are to be located in different LEP Zones:** The subject Lots and are materially different in nature and context to the current approval sites as they are subject to different zonings, being RU2 – Rural Landscape and E3 – Environmental Management, in the Minnamurra River Catchment area.

This land is subject to Shellharbour Councils LEP 2013 and the objectives of the RU2 and E3 zones are incompatible with Sand Mining (an Extractive Industry). Sand Mining and its associated dredging is not a compatible land-use with the objectives of the zone which focus on encouraging sustainable primary industry, the maintenance of the rural landscape and the protection of sensitive environmental areas.

**2.5 The subject Lots are not “adjacent” the current approval area:** The proposed operation is not situated contiguously with the current operation and would be conducted approximately 1.1km south-east of the the current operations and separated by various roads, easements and third party land holdings. The misrepresents this when it states:

*"to establish additional extraction areas (Stage 5) on adjoining private property which is to be leased by DSS. Extraction is proposed in two separate extraction areas, namely Stage 5A (immediately south of Riverside Drive), and Stage 5B (to the north of Minnamurra River)." <sup>11</sup>*

However, Figure E1 and E2 of the EA, clearly indicate that the new extraction areas are separated from the current approval by the easements for the Princes Highway and Swamp Road as well as various Lots associated with a significant residential subdivision known as the Dunmore Lakes Estate and a further wedge of Lots supporting forest and grasslands.

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<sup>10</sup> DPIE Modification Assessment Report section 1.3.4 Sept 2020

<sup>11</sup> Modification 2: Environmental Assessment - Element Environment April 2020

This is also highlighted by Shellharbour Council when its states:

*"Given the application is to include a site that is not part of existing operations, I would think a new DA would be required to be submitted. I also note that 471 Riverside Drive is not mapped as a mineral transition area."*<sup>12</sup>

**2.6 The new extraction pits are likely to be flooded every two years:** Flooding is a common occurrence on the Minnamurra River floodplain, with local property owners reporting flooding for the years 1932, 1942, 1952, 1959, 1975, 1978, 1984, 1988 and 1991<sup>13</sup>. The average maximum flood level on Terragong Swamp is about 4.0 m AHD, with a maximum of 4.9 m.

The EA identifies that most of the Stage 5A extraction area is below 1.5m AHD, and states:

*"as such backwater flooding from Rocklow Creek would inundate almost all of Stage 5A extraction area in a 1% AEP event, with about 60% of the disturbance footprint inundated in a 10% AEP event. The low lying nature of the Stage 5A extraction area comprising a significant portion below 1.5m AHD means that backwater flooding over this surface area is likely to be below the 50% AEP backwater flood level for Rocklow Creek meaning that inundation is estimated to occur every two years or so".*<sup>14</sup>

**2.7 Groundwater impacts are not sufficiently contemplated:** The EA does not adequately assess the Proposals qualitative and quantitative differences in groundwater arising form the two new extraction pits.

*'Due to insufficient information on groundwater impacts the DPIE Water Assessments, has significant concerns with the proposed excavation 5A and 5B as they are both located within 200 meters of a High priority Groundwater Dependent Ecosystem, Minnamurra River Estuary SEPP14 wetlands'*<sup>15</sup>

The DPIE letter contains an attachment which states the additional assessments that the Applicant needs to demonstrate prior to any determination to include:

- . that there is or will be minimal drawdown impact to the groundwater dependent eco-system;
- . that there is or will be minimal drawdown impact in accordance with the NSW Aquifer Interference Policy, 2012
- . and 5 other significant data and assessment issues

**2.8 The Proposal is a Prohibited Development, irrespective of the ultimate approval process:** The aim of the State Environmental Planning Policy (Coastal Management) 2018 is to promote an integrated and co-ordinated approach to land use planning in the coastal zone in a manner consistent with the objects of the Coastal Management Act.

The modification site is in a 'coastal environment area'. The proposed Stage 5A extraction area is on land identified as a 'proximity area for coastal wetlands' and the Stage 5B extraction area is adjacent to land identified as a 'proximity area for coastal wetlands'. In accordance with clause 11 of the Coastal SEPP, prior to granting consent to a proposed development, a consent authority must be satisfied that the proposed development will not have a significant impact upon:

*"(a) the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or  
(b) the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland or littoral rainforest."*<sup>16</sup>

The Shellharbour Local Environmental Plan 2013 (LEP) objectives for lands zoned RU2-Rural landscape are to encourage sustainable primary industry and the maintenance of the rural landscape character of the land. The objectives of the zone are incompatible with Sand Mining (an Extractive Industry). Sand mining and its associated dredging is not a compatible land-use.

The southern portion of Stage 5B extraction area is zoned E3 – Environmental Management. Extractive industries are not permitted in this zoning.

<sup>12</sup> Shellharbour Council submission 2020

<sup>13</sup> (Patterson Britton and Partners, 1995)

<sup>14</sup> Modification 2: Environmental Assessment - Element Environment April 2020

<sup>15</sup> Extract from DPIE letter from Liz Rogers DPIE Water Assessments 8th August 2019

<sup>16</sup> State Environmental Planning Policy (Coastal Management) 2018

Land to the east and south of the modification site is zoned E2 – Environmental Conservation and E3 – Environmental Management, and this land is associated with environmental conservation areas of Minnamurra River and associated Coastal SEPP wetland. Extractive industries are not permitted in this zoning and should be properly addressed in any DA for development on adjacent sites, in this case the EA does not adequately contemplate these adjacent sensitive environmental areas.

**2.9 DPIE is applying the wrong test:** The DPIE Response appears that a different standard/rule may be being applied by the DPIE when assessing this Proposal, as it states in its Assessment Report

*“The Department considers that the Proposal can be considered as a modification to the existing development consent, as it does not constitute a ‘radical transformation’ of the project”<sup>17</sup>*

Not constituting a ‘radical transformation’ of the project is not the same standard/rule as the Applicant demonstrating that the Proposal is “substantially the same” as the original consent.

**2.10 The Proposal is not “substantially the same” as the current approval given that:**

- . the Environmental Assessment fails to demonstrate that the new development is essentially or materially the same, having assessed the qualitative and quantitative differences in their proper context; and
- . the DPIE Response erred in its application of “does not constitute a radical transformation” as an appropriate test of “substantially the same”.

### **3. The EA does not contemplate the implications for the critically endangered SE Littoral Rain Forest**

The Minnamurra Point Littoral Rainforest was listed as Critically Endangered 10-Oct-2008. It is specified as part of the “Littoral Rainforest and Coastal Vine Thickets of Eastern Australia”<sup>18</sup>

The Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) ensures that any ‘nationally significant’ animals, plants, habitats and heritage places are identified, and any potential negative impacts on them are carefully considered, before changes in land use or new developments are approved. This means that landowners, developers, companies, individuals and governments must seek Commonwealth approval in addition to state and territory or local government approvals if their plans might significantly impact on matters of national significance. The relevant objectives of the EPBC Act are to:

- . provide for the protection of the environment, especially matters of national environmental significance conserve Australian biodiversity
- . provide a streamlined national environmental assessment and approvals process
- . enhance the protection and management of important natural and cultural places
- . promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources
- . recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity

Consequently, any action that is likely to have a significant impact on listed threatened species and ecological communities under the EPBC Act must be referred to the Minister and undergo an environmental assessment and approval process.

#### **3.1 The proposal EA fails to identify the critically endangered The Minnamurra Point Littoral Rainforest:**

The List of Threatened Ecological Communities and the Species Profile and Threats Database, pursuant to the EPBC Act identifies the “Littoral Rainforest and Coastal Vine Thickets of Eastern Australia” to include the Minnamurra Point and is listed as “Critically Endangered”. This area is located approx. 1.5km downstream from the Proposal extraction pits.

<sup>17</sup> DPIE Modification Assessment Report section 1.3.4 Sept 2020

<sup>18</sup><https://www.environment.gov.au/system/files/resources/19747170-3fd3-4930-9ca5-6ca89508b571/files/littoral-rainforest.pdf>

The Proposal EA is therefore deficient due to its lack of proper consideration of these matters, in particular Section 4.11, the Applicant states that:

*"The Protected Matters Search Tool .....was searched in December 2018 to find protected matters recorded within 10 km of the modification site (Appendix B). Results of this search are presented in Table 4.1. This data, together with other local knowledge and records was used to assess whether the project will have, or is likely to have, a significant impact upon a MNES or on Commonwealth land".<sup>19</sup>*

The proposal EA however does not identify, nor consider any potential negative impacts on The Minnamurra Point South Eastern Littoral Rainforest including the quantity and quality of surface and groundwater flows to and from the adjacent south eastern littoral rainforest as identified in the List of Threatened Ecological Communities and the Species Profile and Threats Database. The Minnamurra Point Littoral Rainforest which is located on the sand spit which shelters the estuary eco-system and the village from the Pacific Ocean and its rising seas levels.

This is clearly not an example of taking due care or applying necessary rigour or satisfying the requirement for discover and scientific certainty. The Minnamurra Point Littoral Rainforest was listed as Critically Endangered 10-Oct-2008 and this can be evidenced by a 30 second Google search!

The Applicant has failed to refer the matter of a "Critically Endangered" habitat under the EPBA Act and therefore any Consent maybe challenged on the basis that the NSW government may now be acting ultra vires in relation to the Proposal

### **3.2 The Proposal identifies direct impacts on biodiversity without adequate remediation strategies:** The Proposal EA identifies the following direct impacts on biodiversity:

.clearing of native vegetation and associated habitat, conservatively estimated to be 7.5 ha, including 4.53 ha of Bangalay-Old-man Banksia open forest on coastal sands, Sydney Basin Bioregion and South East Corner Bioregion TEC;

.clearing of approximately 4.04 ha of exotic grassland vegetation; and clearing of associated species credit fauna habitat, including hollow bearing trees and logs.

.12 Bangalay trees containing hollows will require removal

.the Grey-headed Flying-fox could be impacted by the proposed modification via removal of potential habitat, and as such an assessment of significance was undertaken for the species

The EA concluded the proposed modification will not result in a significant impact to the species and that no referral to the Commonwealth government is required under the EPBC Act.

### **3.3 The Environmental Assessment does not contemplate implications for the critically endangered SE Littoral Rain Forest given that:**

- . the Environmental Assessment fails to identify the facts in relation to the SE Littoral Rain Forest;**
- . the Applicant failed to notify the Minister as required under the EPBC Act; and**
- . the DPIE failed to notify the Applicant of this default.**

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<sup>19</sup> Modification 2: Environmental Assessment - Element Environment April 2020

## 4.0 Conclusions

The Dunmore Lakes Sand Extraction Project: Modification 2, does not warrant consent under 3A section 75 W on a range of grounds, each one alone, potentially sufficient for the Proposal to be denied consent. Taken as a whole, the Applicant should be advised to exercise caution when seeking advice on approval pathways to the EPA Act, which would deny due process, apply superficial scientific review and run counter to broad community concerns.

In addition to the considerations of the merits, the overarching precautionary principle should provide further guidance to the decision making approach by the Commission.

The function of the precautionary principle is to require the decision-maker to assume that there is, or will be, a serious or irreversible threat of environmental damage and to take this into account, notwithstanding that there is a degree of scientific uncertainty about whether the threat really exists. It is not necessary that serious or irreversible environmental damage has actually occurred. It is the threat of such damage that is required, whereas the concept of a “threat” has been taken by various Courts to mean “likelihood” or “probability”.

And yet here we are in 2020 and the Applicant relies on a decade old repealed approval pathway which requires only scientific-lite certainty, ie an Environmental Assessment as opposed to an Environmental Impact Statement.

The EA attempts a nod toward the application of the precautionary principle and thus merely includes a simplistic paragraph which reads:

*“This understanding gained from observing and monitoring similar operations has led to the identification of the key issues relating to the proposed modification which pose the greatest risk to the environment. Detailed independent technical assessments were then undertaken to fully understand the key issues associated with the development and to identify necessary environmental controls and management measures to avoid, minimise or at least mitigate these issues. The approvals process meets the requirements of the precautionary principle and this EA provides a process for identifying and assessing the potential impacts and environmental consequences of the proposed modification.<sup>20</sup>*

Due consideration under the precautionary principle requires that the environmental damage threatened must attain the threshold of being serious or irreversible. Assessing the seriousness or irreversibility of environmental damage involves careful and substantive consideration of many factors which have not been adequately addressed by the Applicant including:

- . the spatial scale of the threat - for example, local, regional, statewide, national, international;
- the magnitude of possible impacts on both natural and human systems;
- . the perceived value of the threatened environment;
- . the temporal scale of possible impacts in terms of both the timing and the longevity - or persistence - of the impacts;
- . the complexity and connectivity of the possible impacts;
- . the manageability of possible impacts, having regard to the availability of means and the acceptability of means

This Submission identifies a series of specific factors, relating to those as listed above, which are not adequately addressed with any scientific certainty and in some cases completely ignored in the Proposal EA. However, in 2020, the burden of proof more lies more towards the Applicant than those who may object and this is reflected in recent rulings by the NSW LEC, including :

*“The rationale for requiring this shift of the burden of proof is to ensure preventative anticipation; to act before scientific certainty of cause and effect is established. It may be too late, or too difficult and costly, to change a course of action once it is proven to be harmful. The preference is to prevent environmental damage, rather than remediate it. The benefit of the doubt is given to environmental protection when there is scientific uncertainty. To avoid environmental harm, it is better to err on the side of caution<sup>21</sup>.*

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<sup>20</sup> Modification 2: Environmental Assessment - Element Environment April 2020

<sup>21</sup> Telstra Corp Ltd v Hornsby Shire Council [2006] NSWLEC 133

The Commission plays an integral role in upholding the integrity of the NSW planning system, given its key functions<sup>22</sup> are to:

- determine State significant development applications where there is significant opposition from the community
- conduct public hearings for development applications and other planning and development matters, or
- provide independent expert advice on any planning matter (but not development applications), when requested by the Minister for Planning and Public Spaces or Secretary of the Department of Planning, Industry and Environment

It may indeed be an irony for an Applicant in 2020, seeking to use an approval pathway that was repealed a decade ago, to contemplate a contemporary application of the precautionary principle by a Commission that was enacted on the very same date that the Regulations define as the “cut off date” to qualify for the repealed approval pathway ie 1 March 2018.

In conclusion the grounds for my objection are as follows:

**The Proposal is non-compliant with the Regulations (EPA STOP 2017 Sch.2), that apply to the repealed Part 3A section 75 W approval process given that:**

- . the Applicant failed to provide complete Environmental Assessment documentation by 1 September 2018
- . the DPIE failed to determine the Proposal by 1 September 2108
- . the Applicant failed to provide complete Environmental Assessment documentation by the DPIE “discretionary” date of 1 March 2019;
- . the DPIE failed to notify parties of this default.

**The Proposal is not “substantially the same” as the current approval given that:**

- . the Environmental Assessment fails to demonstrate that the new development is essentially or materially the same, having assessed the qualitative and quantitative differences in their proper context; and
- . the DPIE Response erred in its application of the test “does not constitute a radical transformation” as an appropriate test of “substantially the same”.

**The Environmental Assessment does not contemplate the implications for the critically endangered SE Littoral Rain Forest given that:**

- . the Environmental Assessment fails to identify the facts in relation to the SE Littoral Rain Forest;
- . the Applicant failed to notify the Minister as required under the EPBC Act; and
- . the DPIE failed to notify the Applicant of this default.

**The Commission should deny the Proposal for Dunmore Lakes Sand Extraction Project: Modification 2, and advise the Minister that it should be subject to a new Development Application, under section 4.55 of the EPA Act as amended.**

**This will require notification to the federal Minister for the EPBC Act, an Environmental Impact Statement and public exhibition, in order to achieve economic and scientific certainty as well as satisfy the public interest in this matter.**

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<sup>22</sup> Part 2, Division 2.3 of the Environmental Planning and Assessment Act 1979 on 1 March 2018

## Appendix 1



Mr Adnan Voloder  
Boral Land & Property Group  
PO Box 6041  
North Ryde NSW 2113

Dear Mr Voloder

**Dunmore Lakes Sand Extraction Project (DA 195-8-2004)  
Modification 2**

I refer to the above modification request and to your email dated 1 November 2018 seeking the Department's advice as to the appropriate approval pathway for the proposal.

I have reviewed the information provided and sought advice from the Department's Legal Branch. This advice indicates that there is a degree of risk that Modification 2 would not be considered 'substantially the same' as the development for which consent was originally granted. On this basis, you are advised to seek and carefully consider legal advice before proceeding with the proposal under section 4.55 of the *Environmental Planning and Assessment Act 1979*.

Alternatively, the above modification request may continue under the section 75W approval pathway, provided that a complete Environmental Assessment (EA) is provided to the Department by no later than **28 February 2019**.

On the above date, 12 months will have elapsed since the transitional arrangements for section 75W modification applications were discontinued. The Department considers that this is sufficient time to finalise the EA.

Under clause 3BA(4) of Schedule 2 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017*, the Secretary may decide not to deal with a modification request made under section 75W at any time after 1 September 2018, if the Secretary is of the opinion that insufficient information has been provided to deal with the request. If a complete EA is not submitted to the Department by 28 February 2019, the Department intends to give immediate notice that Modification 2 will not be dealt with under section 75W.

If you would like to discuss this matter further, please contact Lauren Evans on the details listed above.

Yours sincerely

*Howard Reed*

Howard Reed      21-12-18  
Director  
Resource Assessments



Professor Mary O'Kane AC  
Chair  
Independent Planning Commission  
GPO Box 3415  
Sydney NSW 2001

**Dunmore Lakes Project Modification 2 (DA195-8-2004 Mod 2)**

Dear Professor O'Kane

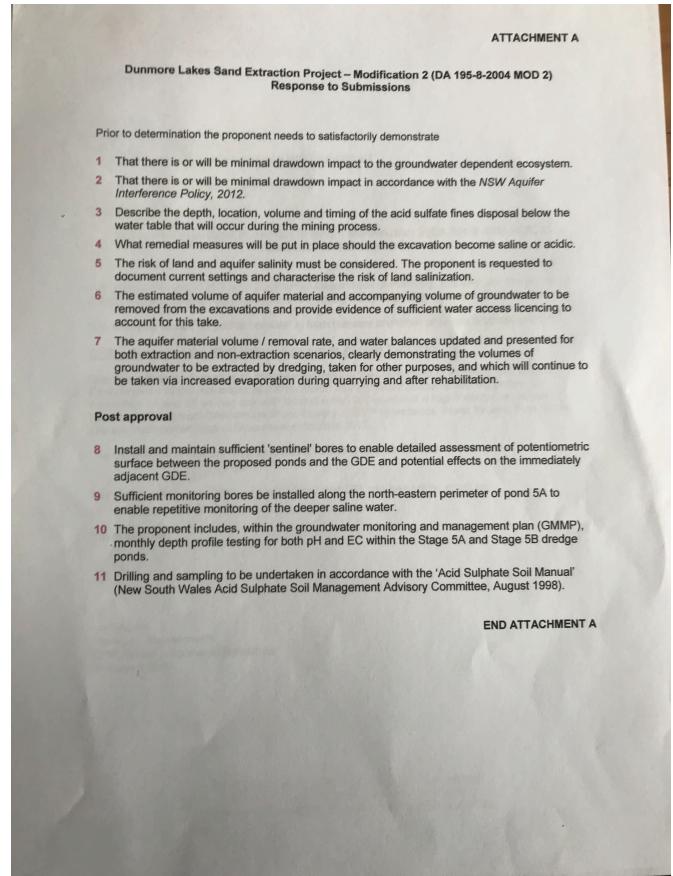
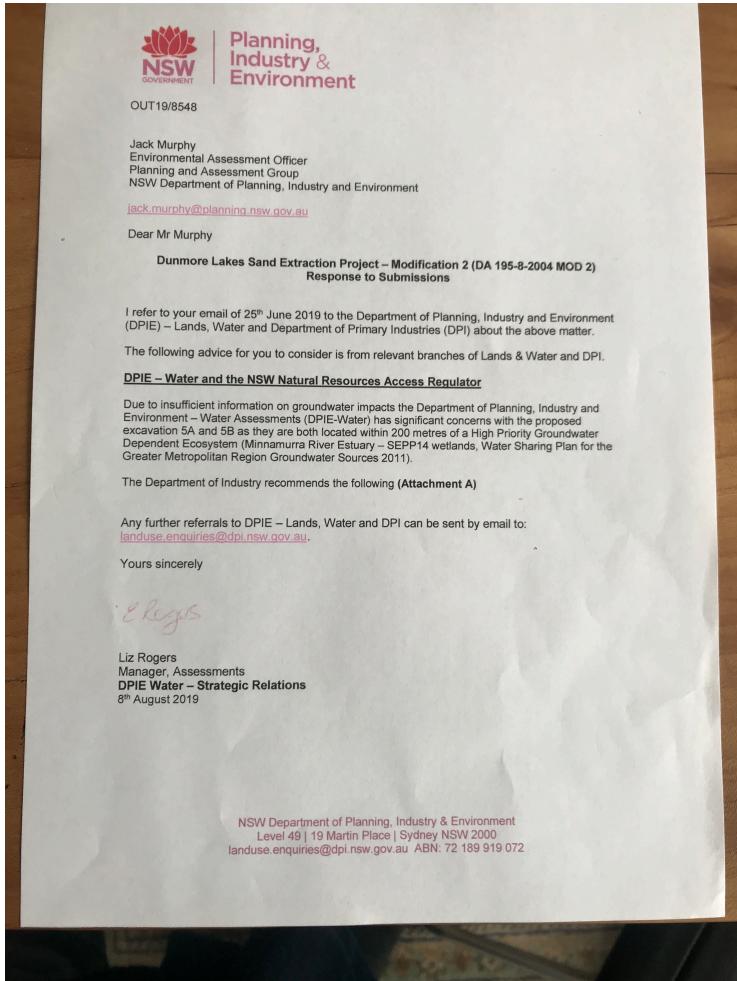
The Department has completed its merit assessment of the Dunmore Lakes Project Modification 2 (DA195-8-2004 Mod 2) – Development of Stage 5 Extraction Areas.

The Dunmore Lakes Project is an existing sand quarry owned and operated Boral Resources (NSW) Pty Ltd (Boral) in the Shellharbour City local government area. Sand extraction has occurred at the site since 2000 and is currently regulated under DA195-8-2004, which permits dredging of three separate areas (known as Stages 2, 3 and 4) at a rate of up to 800,000 tonnes per annum until 2030.

Boral is nearing completion of viable extraction within its currently approved extraction areas and is seeking to ensure the continuity of the Dunmore Lakes Project through the extraction of a further 1.35 million tonnes of product sand from two new extraction areas, known as Stages 5A and 5B.

The Department exhibited the application from 25 April 2019 to 23 May 2019 and received 149 submissions from the community, primarily in the form of objections. The submitters raised concerns about the potential interactions of the new extraction areas with the nearby Minnamurra River wetland, noise impacts from the operation of the extraction dredge and concerns about vegetation clearing and associated habitat impacts.

## Appendix 2





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Status - All

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#### Date Determined

From:  to:

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Dunmore Quarry

## Dunmore Lakes Sand Extraction Project - Modification 2

Recommendation Made

Establish two new extraction areas (Stage 5); extract sand by excavator and dredge; construct a pipeline between Stage 5 and Stage 2; pump extracted sand from Stage 5 to the Stage 2 processing area; pump processed water from Stage 2 to Stage 5; partially backfill the Stage 5 ponds with VENM; and rehabilitate the site.

Other assessments against this site:

- Modification 1 - New Amenities Block (Part4Mod)
- Modification 2 - Vegetation Offsets and Transport Route (Part4Mod)
- Dunmore Lakes Sand Extraction Expansion Project (Part4)
- Dunmore Rock Quarry Expansion (Part4)
- Modification 5 - Extension to Extraction Area (Part4Mod)
- Modification 6 - Increased Extraction Area and Road Haulage (Part3AMod)
- Modification 7 - Proposed Blending Plant (Part3AMod)
- Dunmore Lakes Sand Extraction Expansion - MOD 1 (Part3AMod)
- Dunmore Quarry - MOD 8 (Part3AMod)
- Modification 9 - Extension to extraction area (Part3AMod)
- Modification 10 - Dam capacity (Part3AMod)
- Dunmore Quarry - Modification 11 - Increased Transport Tonnage (Part3AMod)
- Dunmore Quarry Expansion (Mod 3) (Part4Mod)
- Dunmore Quarry Expansion (Mod 4) (Part4Mod)

### Attachments & Resources

- ⊕ [Dunmore Lakes Sand Extraction Project\\_ Modification 2 \(2\)](#)
- ⊕ [Application and Declaration \(1\)](#)
- ⊕ [Environmental Assessment \(2\)](#)
- ⊕ [Agency Submissions \(14\)](#)
- ⊕ [Public Submissions \(9\)](#)
- ⊕ [Special Interest Group Submissions \(7\)](#)
- ⊕ [Response to Submissions \(14\)](#)
- ⊕ [Agency Advice \(11\)](#)
- ⊕ [Additional Information \(10\)](#)
- ⊕ [Agency advice \(2\)](#)
- ⊕ [IPC Referral \(4\)](#)