



New South Wales Government
Independent Planning Commission

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Mayfield Cargo Storage Facility Modification 2

DA 8137 - Mod 2

Statement of Reasons for Decision

Chris Wilson (Chair)

8 February 2024

1. Introduction

1. On 18 December 2023, the then NSW Department of Planning and Environment (now the Department of Planning, Housing and Infrastructure) (**Department**) referred the Mayfield Cargo Storage Facility – DA 8137-Mod 2 (**Modification 2**) from the Port of Newcastle Operations Pty Ltd (**Applicant**) to the NSW Independent Planning Commission (**Commission**) for determination.
2. Modification 2 seeks to modify the development consent for the Mayfield Cargo Storage Facility (DA 8137) pursuant to section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).
3. In accordance with section 4.55 of the EP&A Act, the Minister for Planning and Public Spaces (the **Minister**) is the consent authority for Modification 2. The Minister, on 14 September 2011, delegated his determination function to the then Planning Assessment Commission (now the Commission) for applications subject to reportable political donations. As the Applicant has made a reportable political donation, the Commission will determine the modification application as the Minister's Delegate.
4. Professor Mary O'Kane AC, Chair of the Commission, nominated Chris Wilson (Chair) to constitute the Commission Panel in determining Modification 2.
5. The Department provided its Assessment Report (**AR**) and recommended conditions of consent and draft instrument of modification to the Commission on 18 December 2023. The Department concluded that the proposed Modification 2 is appropriate, in the public interest and should be approved, subject to conditions.

2. The Application

2.1 Site and Locality

6. As noted at paragraph (**para**) 1.1.1 of the AR, the site (**Site**) forms part of the former BHP steelworks site at Mayfield North, known as the Mayfield Cargo Storage Facility (**MCSF**). The Site is located in the Port of Newcastle's Mayfield Precinct, within the Newcastle Local Government Area (**LGA**).
7. The Site is zoned SP1 – Special Activities under *State Environmental Planning Policy (Transport and Infrastructure) 2021* (**Transport and Infrastructure SEPP**) and is currently used as a shipborne freight storage facility. The Site is devoid of vegetation, with the exception of a fenced non-remediated area beside the Hunter River, which contains shrubby weeds (AR para 1.2.4).
8. The location and regional context of the Site are shown at Figures 1, 2 and 3 of the AR.

2.2 Approval History

2.2.1 DA 8137

9. On 30 June 2017, the then Minister for Planning approved Development Application DA 8137 (**Existing Approval**) for the operation of a port facility for the storage of freight, including the loading, unloading, moving, and stacking of freight, at the MCSF. The Existing Approval formalised the Applicant's ability to use the Site for permanent storage of shipborne freight (AR para 1.2.1-1.2.2).

10. On 23 June 2020 the Existing Approval was modified to expand the cargo storage area of the MCSF from 12 hectares to 18.6 hectares, and permit an additional cargo type, being roll-on and roll-off cargo such as motor vehicles (**Modification 1**). The operation of the expanded cargo storage area is subject to conditions B9 and B10 of the current development consent. The Applicant has not yet satisfied a number of these conditions nor commenced operations in the expanded storage area (AR para 1.3.1 and 1.3.3).

2.2.2 Other relevant approvals and requirements

11. In 2001, following the closure of the former BHP steelworks site, the then Minister for Urban Affairs and Planning approved development application DA 293-08-00 for the remediation of the former steel mill site and development of a multi-use terminal, comprising a container terminal and a general cargo handling facility on the remediated land. The Mayfield Berth No.4 (**M4**) and general cargo handling facility is the only part of the approved development to be constructed. DA 293-08-00 regulates the operation of the general cargo handling facility, which is located immediately to the south of the Site and is the primary berth which services the MCSF (AR para 1.4.1).
12. On 14 June 2001, the NSW Environment Protection Authority (**EPA**) declared the BHP site to be a remediation site. A remedial action plan was prepared in 2004 to address legacy soil and groundwater contamination associated with the former steelworks. In 2018, remediation works were completed, with the exception of a small area of land in the north-east corner of the Site (AR para 1.4.2).
13. On 16 July 2012, the then Minister for Planning and Infrastructure approved the Mayfield Concept Plan (**MCP**) (MP09_0096) which the Site is located fully within. The MCP approved a conceptual layout of port related land uses which included five indicative precincts. The Site is located within the Bulk Liquids and Container Terminal precinct of the MCP. The MCP also specifies operational noise limits for the cumulative MCP area and all developments contained within its boundary (AR para 1.4.3 and 6.2.2).
14. As the Department notes, remediation of the Site was approved under DA 293-08-00 and was the subject of a Voluntary Remediation Agreement 26025 (**VRA**), which divides the Site into two areas according to the level of contamination and associated environmental hazard (refer Figure 5 of the AR). The MCSF is located wholly within Area 1, for which remediation works commenced in 2006. The remediation of the Site has largely been completed, except for a small portion of land to the north-east, being the former Koppers Operational Area, which was not able to be remediated during previous capping works in Area 1 due to ongoing operations at the Koppers berth at the time. These operations have now ceased. The VRA was repealed by the EPA in 2018, and the capping layer in Area 1, including the former Koppers Operational Area, has since been managed under an Ongoing Maintenance Order No. 20142802 (**OMO**) (AR para 6.4.1-6.4.3, 6.4.5, and 6.4.7) issued by the EPA.
15. The OMO was issued by the EPA on 20 April 2014 and last amended on 8 April 2020. The OMO requires the Applicant to maintain remediation action in relation to the Site and specifies that:

The EPA is satisfied that the terms of the remediation proposal were satisfactorily carried out. [...] Having reviewed the Site Audit Report [...] and associated documentation, the EPA has determined that the contamination at the land is no longer considered to be significant enough to warrant regulation. [...] The EPA considers that the risks to human health and the environment are effectively managed, provided that the Contaminated Site Management Plan, Closure Area Former BHP

Steelworks Mayfield Newcastle prepared by Hunter Development Corporation dated February 2014 (CSMP) is implemented.

2.3 Proposed modification

16. The Applicant seeks to modify the development consent for the Existing Approval as follows (AR para 2.1.2):
- ~~Condition B9 - Prior to the occupation and operation of the additional 6.6 hectares of loading/unloading area approved under DA 8137 MOD 1 the land is to be remediated in accordance with the requirements of Development Application 293-08-00 and Voluntary Remediation Agreement 26025.~~ **Prior to the occupation and operation of the additional 6.6 hectares of loading / unloading area approved under DA 8137 MOD 1, the area marked as the Uncapped Area (Excluded Area) must be isolated by the installation of a security fence as shown in Plan Ref: (Map Description: DA 8137 (MOD 2) Date: 02/11/23). A prominent sign must be placed and maintained on the security fence stating that the Excluded Area is not approved for the storage of cargo and that access to the area is restricted to PON staff or those approved by PON to enter the area.**
 - ~~Condition B10 - Upon completion of the remediation works required under condition B9 and prior to the use of that land, the Applicant must submit to the Planning Secretary, a Site Audit Report and a Section B Site Audit Statement, prepared in accordance with the NSW Contaminated Land Management – Guidelines for the NSW Site Auditor Scheme 2017, which demonstrates the site is suitable for its intended industrial use.~~ **Prior to the use of the Excluded Area, the land must be remediated in accordance with any relevant requirements of the Environmental¹ Protection Authority and the Applicant must submit to the Planning Secretary a Site Audit Report and a Section B Site Audit Statement, prepared in accordance with the NSW Contaminated Land Management – Guidelines for NSW Site Auditor Scheme 2018, which demonstrates that the Excluded Area is suitable for its intended use.**
17. The Site and proposed Excluded Area (red hatched area) are shown at Figures 1 and 2 below. As shown in Figure 2, the Excluded Area only intersects with the expanded cargo storage area approved under DA 8137-Mod 1 in two small areas, with the remainder of the former Koppers Operational Area falling outside the area subject to DA 8137 and therefore Modification 2.

¹ Sic AR para 2.1.2.

Figure 2 – Plan of the Excluded Area and immediate surrounds (Source: AR Figure 7, page 21)



18. In its Statement of Environmental Effects (**SEE**), dated 27 April 2023, the Applicant stated the rationale for Modification 2 as follows (page 1):

[Modification 2] seeks to amend these existing conditions associated with Modification 1 to permit operation to occur on the already remediated portions of the [S]ite following Site Auditor approval. The [Applicant] proposes that the currently uncapped area [Excluded Area] will remain un-remediated until it is more economic for the [Applicant] to remove the legacy BHP6 Berth and remediate the [Excluded Area]. The [Applicant] is clarifying a proposed timing for capping the '[Excluded Area]' as a separate exercise. These proposed modifications are required due to growth in the capacity requirements for the port's freight storage needs.

19. In its Meeting with the Commission on 22 January 2024, the Applicant noted the key justification for Modification 2 was the storage space required for wind farm components (such as turbines) destined for projects being developed in NSW, and the strategic location of the Port of Newcastle to these windfarm locations (refer Meeting Transcript page 3).

20. The Department has recommended minor amendments to the Applicant's proposed modifications of B9 and B10, as follows (AR para 2.1.3):

- Condition B9, to clarify the intent and timing of the security fence.

- Condition B10, to require the Excluded Area be remediated in accordance with the Contaminated Site Management Plan – Port Lands Former BHP Steelworks Mayfield, Newcastle – Hunter Development Corporation December 2016 (**CSMP**), as well as the requirements of the EPA in relation to the remediation of contaminated land.
21. The Department has also recommended (AR para 2.1.4-2.1.6):
- modification of Condition B7A to require the Operational Environment Management Plan (**OEMP**) to be updated and submitted to the Planning Secretary for approval, prior to the commencement of operation in the expanded cargo storage area;
 - new conditions in relation to the construction and certification of the security fence around the Excluded Area and reporting and auditing requirements; and
 - minor administrative changes to a number of definitions to reflect current agency names, and adding the Modification documents to condition A2 to ensure the modified development is carried out in accordance with these documents.
22. The Department's full suite of recommendations are provided at Table 1 of the AR.

3. The Commission's Consideration

3.1 Material Considered by the Commission

23. In this determination, the Commission has considered the following material (**Material**):
- the Applicant's Statement of Environmental Effects (**SEE**), dated 27 April 2023
 - all Government agency advice to the Department;
 - the Department's Assessment Report for DA 8137, dated June 2017;
 - the Department's Assessment Report for Modification 1, dated June 2020;
 - the Department's AR (Modification 2), dated December 2023;
 - the Department's recommended conditions of consent, undated;
 - the Department's recommended instrument of modification, undated;
 - the Applicant's responses to the Department's request for additional information, dated 10 November 2023;
 - the Department's response to the Commission's questions on notice, dated 22 January 2024;
 - the Department's response to the Commission's request for information, received 25 January 2024;
 - The Applicant's response to the Commission's questions on notice, dated 29 January 2024;
 - The Contaminated Site Auditor's Interim Audit Advice Letter (**Contaminated Site Auditor's Letter**) dated 30 November 2022;
 - The Applicant's existing approved OEMP, dated 4 November 2021; and
 - The EPA's OMO for the MCSF issued 20 April 2014 and last amended 8 April 2020.

3.2 Public submissions

24. The Department made the modification application and accompanying documents publicly available on its website and notified Transport for NSW (**TfNSW**), the EPA and City of Newcastle (**Council**) about the proposal on 26 May 2023. As the Department notes, there is no requirement in the EP&A Act, the *Environmental Planning and Assessment Regulation 2021* (**EP&A Regulation**) or the Department's Community Participation Plan (November 2019) for Modification 2 to be notified, advertised or made publicly available on its website (AR para 5.1.1).
25. Noting that Modification 2 involves minimal environmental impact (refer sections 3.4 and 3.5 of this Statement of Reasons), the minor nature of the proposed modifications to the Existing Approval, and given both the Existing Approval and Modification 1 were notified and advertised by the Department and did not result in the receipt of any public submissions, the Commission did not consider that inviting public submissions to inform its consideration of Modification 2 was justified. The Commission notes that all documentation relating to Modification 2 has been made publicly available on the Commission's website.

3.3 The Commission's Meetings

26. As part of the determination process, the Commission met with the Department and the Applicant, as set out in Table 2.

Table 2 – Commission's Meetings

Meeting	Date	Transcript Available on
Department	16 January 2024	21 January 2024
Applicant	22 January 2024	30 January 2024

3.4 Statutory Considerations

27. Under section 4.55(1A) of the EP&A Act, a consent authority may modify a development consent if:
- it is satisfied that the proposed modification is of minimal environmental impact,
 - it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all),
 - it has notified the application in accordance with the regulations, if the regulations so require, and
 - it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

3.4.1 Is the proposed modification of minimal environmental impact?

28. The Commission agrees with the Department's assessment (refer AR para 4.1.1) and is satisfied that Modification 2 is of minimal environment impact.

3.4.2 Is the proposed modification substantially the same development?

29. The Commission agrees with the Department's assessment (refer AR para 4.1.1) and is satisfied that that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified.

3.4.3 Has the Application been notified in accordance with the regulations?

30. As noted at section 3.2 above, the Commission agrees with the Department that there is no requirement for Modification 2 to be notified or advertised.

3.4.4 Consideration of submissions concerning the proposed modification

31. Agency advice received by the Department is summarised in Table 2 of the Department's AR. The Commission notes that TfNSW and Council raised no requirements or objections in relation to Modification 2. The Commission notes that the EPA did not object to the modification. The EPA did advise however that "all practical measures that could be taken to prevent, control, abate or mitigate water pollution and protect human health and the environment from harm are considered and implemented where appropriate" (page 2).

3.4.5 The Commission's correspondence

Department

32. The Commission wrote to the Department on 17 January 2024 seeking information on matters including the Department's view regarding the Applicant's proposal to assign updated noise quotas to the expanded cargo storage area, and whether Modification 2 is anticipated to result in any potential drainage changes to the Site.
33. The Department provided its response back to the Commission on 22 January 2024. In regard to the Applicant's proposal to assign updated noise quotas and thereby increase the Site's allocation from the MCP overall noise quotas, the Department noted that it "considers that the Applicant has provided insufficient justification for increasing the [S]ite's noise quota[s]" (page 1). Regarding potential drainage changes, the Department advised that it "considers that site establishment and operation are unlikely to impact on the efficacy of the existing drainage system" (page 2).
34. Following its meeting with the Applicant on 22 January 2024, the Commission wrote to the Department on 23 January 2024 seeking information on whether the remediation of the Excluded Area requires a separate approval under the EP&A Act including a new site remediation and verification process (noting that remediation of the Site was required under DA 293-08-00 and the now repealed VRA).
35. In its response back to the Commission received 25 January 2024, the Department advised that (page 1):

The Department considers that the remediation requirements of DA 293-08-00 continue to apply to the [S]ite, as relevant, and further approval is not required to manage the site remediation and verification process.

Remediation of the site has so far been undertaken in accordance with DA 293-08-00. Condition 4.1 of this approval requires the preparation of a contaminated site environmental management plan (CSMP). With the repeal of the VRA, the future remediation of the [Excluded Area] will be subject to the CSMP required under DA 293-08-00 and requirements of the EPA, particularly the [OMO].

36. The Commission is satisfied that the Department's two responses have adequately addressed the Commission's questions on these matters.

Applicant

37. The Commission wrote to the Applicant on 23 January 2024 seeking information on:
- the rationale for the Applicant's proposal to assign updated noise quotas to the expanded cargo storage area;
 - whether the remediation of the Excluded Area requires a separate approval under the EP&A Act including a new site remediation and verification process (noting that remediation of the Site was required under DA 293-08-00 and the now repealed VRA); and
 - the expected timeframe for remediation of the Excluded Area.
38. In its response back to the Commission dated 29 January 2024, the Applicant advised that:
- the amended noise quotas have been formulated with reference to other approvals over the Site, which regulate cumulative noise impacts across the Site and seek to prevent any individual site using up all the MCP approval noise limits and causing other developments to have overly stringent noise requirements that constrain further development. The Applicant considers that the expanded use is unlikely to have any adverse impacts on existing noise sensitive receivers surrounding the MCSF;
 - it is the Applicant's position that remediation of the subject area falls under DA 293-08-00, as this covers the entire Closure Area (former BHP Steelworks site), and that the Contaminated Site Auditor has also confirmed that that the remediation and verification works can be completed in accordance with the requirements of the existing CSMP; and
 - remediation of the Excluded Area was intended to take place when broader development of the Site occurred, so that the business could recoup the capital expenditure. The timing for broader development of the Site is largely dependent on the Independent Pricing and Regulatory Tribunal determination which the Applicant is currently awaiting, and which will impact the development of the proposed Newcastle Deepwater Container Terminal and allow the Applicant to provide more accurate timeframes for development of the Site.
39. The Commission is satisfied that the Applicant's response has adequately addressed the Commission's questions on these matters.

3.4.6 Mandatory Considerations

40. Under section 4.55(3) of the EP&A Act, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application (**Mandatory Considerations**). The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.
41. The mandatory considerations are not an exhaustive statement of the matters the Commission is permitted to consider in determining the Application. To the extent that any of the Material does not fall within the mandatory considerations, the Commission has considered that Material where it is permitted to do so, having regard to the subject matter, scope and purpose of the EP&A Act.

Table 1 – Mandatory Considerations

Mandatory Considerations	Commission’s Comments
Relevant EPIs	<p>Appendix B of the Department’s AR identifies relevant EPIs for consideration. The key EPIs include:</p> <ul style="list-style-type: none"> • Transport and Infrastructure SEPP • State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP) • Draft State Environmental Planning Policy (Remediation of Land) (Draft Remediation of Land SEPP) <p>The Commission agrees with the Department’s assessment of EPIs set out in Appendix B of the AR. The Commission therefore adopts the Department’s assessment.</p>
Relevant DCPs	<p>The Commission does not consider any development control plans to be relevant to the determination of Modification 2. As the Department notes, the Newcastle Development Control Plan 2012 does not apply to the Site as the Site is located within the Port of Newcastle lease area (AR Table 6).</p>
Likely Impacts of the Development	<p>The Commission agrees with the Department’s assessment and evaluation of the likely impacts of Modification 2 in Sections 6 and 7 of the Department’s AR and finds that these impacts are minimal and acceptable, subject to the conditions imposed by the Commission.</p>
Suitability of the Site for Development	<p>The Commission finds that the Site is suitable because it is the Site of an approved and operating development under the existing DA 8137 (as previously modified), and that Modification 2 will not significantly change or impact on the existing use of that Site.</p>
Objects of the EP&A Act	<p>The Commission has carefully considered the reasons given in Appendix B of the Department’s AR relating to the Department’s consideration of the Objects of the EP&A Act and is satisfied that Modification 2 is consistent with those Objects.</p>
Ecologically Sustainable Development	<p>The EP&A Act adopts the definition of ESD found in the <i>Protection of the Environment Administration Act 1991</i>, as follows:</p> <p><i>“ecological sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:</i></p> <ul style="list-style-type: none"> ○ <i>the precautionary principle;</i> ○ <i>inter-generational equity;</i> ○ <i>conservation of biological diversity and ecological integrity; and</i> ○ <i>improved valuation, pricing and incentive mechanisms.”</i> <p>The Commission notes that Modification 2 is minor in scope and nature and can be carried out in a manner that is consistent with the principles of ecologically sustainable development as it would:</p> <ul style="list-style-type: none"> ○ not require clearing of any native vegetation; ○ have no impact on Aboriginal cultural heritage or historic heritage; ○ have minimal environmental impact beyond what is already approved; and

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- provide associated employment opportunities and economic benefits for the Newcastle LGA and the State of NSW.

The Commission has considered the principles of ESD in its determination as set out below.

a) *The precautionary principle*

The Commission finds that the precautionary principle has been satisfied as Modification 2 is minor in scope and nature and does not pose a significant threat of serious or irreversible environmental damage.

b) *inter-generational equity*

The Commission has considered inter-generational equity in its assessment of the potential environmental, social and economic impacts of Modification 2, and finds that those impacts are negligible with respect to the health, diversity and productivity of the environment and its maintenance or enhancement for the benefit of future generations.

c) *conservation of biological diversity and ecological integrity*

The Commission finds that Modification 2's potential impacts on biodiversity and ecological integrity, including land clearing and loss of habitat are minimal. This is because Modification 2 will not require clearing or introduce other substantive threats as it is located on the site of a previously approved development where these impacts have been previously considered and addressed.

d) *improved valuation, pricing and incentive mechanisms*

The Commission finds that, due to the nature and scope of Modification 2, there is minimal potential to intersect or impact on valuation, pricing and incentive mechanisms and the proposed modification is therefore not inconsistent with the objective of improving these mechanisms.

The Public Interest

The Commission has considered whether the grant of consent to Modification 2 is in the public interest. In doing so, the Commission has weighed the predicted benefits of Modification 2 against its predicted negative impacts. The Commission's consideration of the public interest has also been informed by consideration of the principles of ESD, as set out above.

The Commission finds that, on balance, Modification 2 is consistent with ESD principles, would have minimal negative impacts and achieve an appropriate balance between relevant environmental, economic and social considerations. The likely benefits of Modification 2 – being an increase to the Port of Newcastle's freight storage capacity, the use of previously unused employment lands, and the resultant employment opportunities and economic benefits for the Newcastle LGA and State of NSW – warrant the conclusion that an appropriately conditioned approval is in the public interest.

Reasons given by the consent authority for the grant of the consent that is sought to be modified

42. Under section 4.55(3) of the EP&A Act, the Commission must take into consideration such matters referred to in section 4.15(1) of the EP&A Act that are of relevance to the proposed modification and the reasons given by the consent authority for the grant of the consent that is sought to be modified. When considering the reasons given by the consent authority for the grant of the consent that is sought to be modified, the substantive question is whether there are any reasons that would preclude the modification of that consent.
43. The Commission has considered the Department's assessment reports for the Existing Approval and Modification 1 respectively and finds that approval of Modification 2 would not be inconsistent or conflict with the reasons given by the Department for its approval of the Existing Approval and Modification 1.

3.4.7 Requirements under Part 5 of the *Environmental Planning and Assessment Regulation 2021*

44. With respect to sections 98, 99 and 100 of Division 1, Part 5 of the *Environmental Planning and Assessment Regulation 2021*, the Commission is satisfied that Modification 2 is a valid application.

3.5 Key issues

45. The Commission agrees with the Department that the key issues for assessment of Modification 2, in addition to the Mandatory Considerations assessed above, are noise, heavy vehicle traffic, and contamination.
46. The Commission agrees with the Department's assessment of other issues (air quality, visual and lighting, waste, soil, water, and social and economic) provided in Table 4 of the AR and has no further comment to provide on any of these issues.

3.5.1 Noise

47. As the Department notes, Modification 2 has the potential to increase operational noise impacts due to an increase in heavy vehicle movements and the operation of port equipment used for loading and unloading cargo to and from the expanded cargo storage area (AR para 6.2.1).
48. The Commission agrees with the Department's findings that the operation of the expanded cargo storage area (yet to commence) is unchanged from that approved under Modification 1, that the predicted noise contribution from the expanded operation will be negligible, and that the Applicant's acoustic review (submitted with the SEE) demonstrates that the operation of the expanded area will comply with the noise limits established under the MCP and in DA 8137 (AR 6.2.4).
49. Noting this, the Commission considers that the existing noise limits for the MCSF under the MCP are reasonable and adequate. The Commission further considers that the Applicant has not provided sufficient justification to support its proposal to increase the noise quotas allocated for the expanded cargo storage area. The Commission finds that Modification 2 is unlikely to generate significant noise impacts and therefore considers that there should be no change to condition B2 in relation to operational noise limits.

50. The Commission agrees with the Department's recommended amendment to impose condition B7A, which requires the Applicant to update and submit the OEMP to the Planning Secretary for approval, prior to the commencement of operation in the expanded cargo storage area approved under Modification 1.

3.5.2 Heavy Vehicle Traffic

51. As the Department notes, the proposed increase in the cargo storage area under Modification 2 will increase heavy vehicle movements along Selwyn/George Streets and the intersection of George Street and Industrial Drive (AR para 6.3.1).
52. The Commission agrees with the Department's finding that the operation of the expanded cargo storage area is unchanged from that approved under Modification 1, that the traffic impacts of Modification 2 are well within the truck movement limits established under the MCP, and hence the potential traffic impacts on the road network and the locality are acceptable (AR para 6.3.5).
53. The Commission notes that condition B7 as imposed requires the Applicant's OEMP to include, among other requirements, details of a monitoring program to be provided annually to the Port of Newcastle that demonstrates compliance with the MCP's *Traffic Monitoring and Review Plan* and reports on traffic movements to and from the Site (during peak periods and daily volumes).
54. The Commission considers that Modification 2 will not create any adverse heavy vehicle traffic impacts for the Port of Newcastle or the Newcastle LGA.

3.5.3 Contamination and remediation

55. As noted at section 2 of this Statement of Reasons, part of the broader MCSF site (the proposed Excluded Area) has not yet been fully remediated and there is no certainty as to when this might occur. One of the key implications of amending condition B10 as proposed is that it removes the incentive to remediate the Excluded Area so that storage can occur on the expanded MCSF area approved under Modification 1.
56. While the Commission considers that the remediation of the Excluded Area as soon as practicable would be in the public interest, it accepts the amendment to B10 for the following reasons:
- Only two small portions of the Excluded Area are located within the land to which DA 8137 applies;
 - The Applicant has adequately justified that the cost of remediating the Excluded Area is significant and inextricably linked to major development proposals yet to progress. In this respect, the Commission accepts that Condition B10 and the requirement to remediate the whole of the Excluded Area is currently hindering the utilisation of the expanded storage area approved under Modification 1;
 - The Applicant's Contaminated Sites Auditor considers that the risks associated with the delay in remediating the Excluded Area are not significant (refer to para 59 below); and
 - The Excluded Area is regulated by the EPA under an OMO and the EPA has not objected to the Modification.
57. The Commission therefore agrees with the Department's finding that the creation of an Excluded Area, and the installation of fencing along its boundary, is an appropriate measure to restrict access and minimise the likelihood of impact to Site users. The proposed exclusion fence will be located 10 metres from the Excluded Area and will restrict access and prevent cargo from being stored in this area (AR para 6.4.8-6.4.9).

58. As outlined at section 3.4.5 of this Statement of Reasons, the Commission sought further information from both the Applicant and the Department and is satisfied with the responses provided to its questions regarding contamination and remediation impacts associated with the Excluded Area.
59. Further to this, the Commission notes the advice provided in the Contaminated Sites Auditor's Letter (Appendix C to the SEE), as follows (page 2):
- Risks to receptors from this area of the [S]ite relate to*
- 1) *the infiltration of groundwater causing migration of contaminants to the Hunter River. This aspect is minor when considering the area of this small section relative to the [S]ite area and the capping works completed previously and that the river interface likely means contaminants have largely been flushed from this area previously. This is consistent with the conclusions stated in the CSMP and agreed to in the previous Audit.*
 - 2) *direct contact with soils by site users and inhalation of potential vapours by site users. In this regard [the Applicant] propose[s] to fence the area from access thereby restricting human occupation. This management control is considered to negate these risks adequately.*
- [...]*
- On the basis of the above, I consider that delay of remediation of the [Excluded] Area until such time as the [S]ite is permanently developed is not significant in terms of the management of risks from the area to site receptors.*
60. The Commission additionally notes that the Applicant must undertake annual monitoring of groundwater in accordance with the OMO's maintenance requirements.
61. Subject to conditions B9 and B10 as amended by the Department, particularly the amendment to condition B10(a) which ties the remediation of the Excluded Area to any relevant requirements of the EPA, the Commission is satisfied that Modification 2 should be supported.
62. The Commission is satisfied that the remediation of the Excluded Area must be undertaken prior to any future use and occupation of this area, and that the deferral of this remediation under Modification 2 does not present any significant risk to the environment or human health.
63. The Commission acknowledges that it remains unclear precisely when the Excluded Area will be remediated and whether this remediation will ultimately require a separate approval under the EP&A Act (including a new site remediation and verification process), noting that the SEE identifies that the Applicant "will address remediation of this area as part of separate approval processes" (page 24). The Commission does not consider however, that this precludes approval of Modification 2.

4. The Commission's Findings and Determination

64. The Commission has carefully considered the Material before it as set out in section 3.1 of this report. Based on its consideration of the Material, the Commission finds that Modification 2 should be approved subject to conditions of consent for the following reasons:
- the Application is consistent with the NSW Government's regulatory framework;
 - the Site, being that of an existing operational cargo storage facility, is suitable for the proposed development and is an effective and compatible use of the land;
 - the Application will result in minimal environmental impact;
 - these impacts are capable of being effectively managed through the conditions of consent amended by the Department and supported by the Commission, which will ensure that the use and development of the Site continues to operate in accordance with the MCP, the Existing Approval, and the relevant maintenance requirements of the EPA;
 - the Application is consistent with ESD principles and would achieve an acceptable balance between environmental, economic and social considerations;
 - the Application is in accordance with the Objects of the EP&A Act; and
 - the Application is in the public interest.
65. For the reasons set out in paragraph 64 above, the Commission has determined that Modification 2 should be approved subject to conditions. These conditions are designed to:
- prevent, minimise and/or offset adverse environmental impacts;
 - set standards and performance measures for acceptable environmental performance
 - require regular monitoring and reporting; and
 - provide for the on-going environmental management of the development.
66. The reasons for the Decision are given in the Statement of Reasons for Decision dated **8 February 2024**.



Mr Chris Wilson (Chair)
Member of the Commission



New South Wales Government
Independent Planning Commission

**For more information, please contact
the Office of the Independent Planning
Commission NSW.**

ipcn.nsw.gov.au

Phone (02) 9383 2100

Email ipcn@ipcn.nsw.gov.au

Mail Level 15 135 King Street Sydney NSW 2001

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