



Office of
Environment
& Heritage

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Mr Phil Jemison
Sustainable Urban Planning Manager
Warringah Council
DX 9118
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Attention: Janelle Brooks

Dear Mr Jemison

Planning Proposal for Ralston Avenue, Belrose - Biodiversity Certification advice

I refer to your letter dated 2 February 2016 inviting the Office of Environment and Heritage (OEH) to comment on the 'exhibition package' for the Ralston Avenue Planning Proposal. OEH understands that the material was provided in advance of the exhibition period, which is to commence at a later date.

OEH understood that Council had decided not to progress with a Biodiversity Certification application and that the Planning Proposal would be exhibited in accordance with the Gateway Determination. OEH notes however, that the 'exhibition package' contains the 'Biodiversity Certification Assessment Report and Strategy' marked "For Public Exhibition", an associated Expert Report, and that both the Planning Proposal and 'Ecological Assessment' refer to the lands being Biodiversity Certified.

Please note, in accordance with OEH advice provided as part of the Gateway consultation stage, dated 27 February 2015 (see section 6 of that advice), a certain process needs to be followed before the Biodiversity Certification documents can be exhibited. This process is summarised below and can also be found in Part 12 of the OEH *Biodiversity Certification Operational Manual* (<http://www.environment.nsw.gov.au/resources/biocertification/150310-biocert-manual.pdf>).

1. Applying for Biodiversity Certification is voluntary. Council would be the Applicant in this case.
2. Early liaison with OEH is recommended to discuss key points.
3. Once a draft Biodiversity Assessment Report and draft Biodiversity Certification Strategy¹ have been formulated, Council should submit these to OEH for adequacy review. All relevant GIS

¹ OEH may accept a combined report where all relevant criteria of the 'Biodiversity Certification Assessment Methodology' has been addressed, and in a logical way.

shapefiles, .xml files for the credit calculator and field data sheets should also be submitted. A draft Biodiversity Certification application form (available from OEH's website) may or may not be submitted at this point.

4. Once OEH is satisfied that the draft Biodiversity Assessment Report and draft Biodiversity Certification Strategy are appropriate for public exhibition, OEH will advise Council of this. OEH will ask Council to formally lodge its application.
5. Formal lodgement of the application will require Council to submit the following to OEH:
 - Completed and signed application form for Biodiversity Certification. The application form must be signed by the legal representative(s) of Council, the accredited assessor responsible for the biodiversity assessments, and other parties to the Biodiversity Certification.
 - Pre-exhibition final draft Biodiversity Assessment Report (the version OEH advised is adequate for exhibition).
 - Pre-exhibition final draft Biodiversity Certification Strategy (the version OEH advised is adequate for exhibition).
 - Pre-exhibition final draft relevant GIS shapefiles, .xml files and field data sheets (the versions used to inform the above reports).
6. OEH will provide Council with a confirmation of receipt. Please note OEH's issuing of a receipt does not guarantee the application will be approved. Only the Minister for the Environment can approve the application.
7. Council may now notify the public of the Biodiversity Certification application in accordance with section 126N of the *Threatened Species Conservation Act 1995* (TSC Act). Notification requirements include:
 - Being published in a newspaper circulating generally throughout NSW.
 - Being published on Council's website.
 - Inviting the public to make submissions, specifying a closing date.
 - Having a submission period of not less than 30 days.
 - Having copies of the application available at Council's principal office and on its website throughout the submission period.

Public exhibition of a Biodiversity Certification application may, or may not, occur at the same time as the exhibition of a Planning Proposal. As previously advised by OEH (see email dated 27 August 2015 in Attachment 1), OEH recommends exhibiting the Biodiversity Certification application (once the above procedure has been followed) at the same time as the Planning Proposal. The reasons for this include:

- OEH is unlikely to support the Planning Proposal (required to be exhibited via the Gateway Determination) given the significant environmental impacts that would result from the rezoning.
- Biodiversity Certification provides a systematic assessment methodology to consider the biodiversity values across the entire site upfront and to inform the development footprint so that impacts can be avoided and/or minimised.
- To clearly and transparently demonstrate the assessment of biodiversity impacts and securing of offsets for any residual impacts.
- A Voluntary Planning Agreement (VPA) made at the Planning Proposal stage (previously suggested by Council) cannot require Biodiversity Certification of land. Nor could a VPA that requires the purchase and retirement of Biodiversity Banking credits switch off threatened species assessment or concurrence requirements at the development application stage.
- That all relevant information is available for public comment at the same time.

Although an application for Biodiversity Certification may be exhibited after the Planning Proposal, OEH identifies the following risks:

- Should the Applicant of the Planning Proposal have their proposed rezoning approved, they may no longer agree to be a party to Biodiversity Certification and the offsets may not be secured. This scenario may result in small, stand-alone, site-by-site development applications that assess biodiversity and threatened species issues in accordance with section 5A of the *Environmental Planning and Assessment Act 1979* (i.e. Seven Part Test). Such an approach may not trigger a requirement for biodiversity offsets or may result in lengthy offset negotiations that do not lead to offsets being secured in perpetuity.
- Should the Applicant of the Planning Proposal have their proposed rezoning approved, they may decide to assess biodiversity and threatened species issues via the 'Biodiversity Banking Assessment Methodology' (under Part 7A of the TSC Act). Whilst this could result in adequate and secured offsets, the Applicant should note that the Red Flag variation requirements are not as flexible as they are under Biodiversity Certification. If Red Flag variations cannot be approved, a BioBanking Statement will not be issued. This may result in assessment of biodiversity values via the Seven Part Test method, and as mentioned above, less certainty around the securing of offsets.

OEH seeks clarification from Council as to whether Biodiversity Certification will be pursued at this stage.

If you have any further questions regarding this matter please contact Jennifer Charlton, Conservation Planning Officer, on 8837 6311 or at Jennifer.charlton@environment.nsw.gov.au.

Yours sincerely

S. Harrison 09/02/16

SUSAN HARRISON
Senior Team Leader Planning
Greater Sydney Region

Enclosure

Attachment 1: Email from OEH to Warringah Council dated 27 August 2015

From: Lonie Rachel <Rachel.Lonie@environment.nsw.gov.au>
Sent: Thursday, 27 August 2015 3:21 PM
To: Janelle Brooks
Cc: Giddins Ray; Harrison Susan; Bonner Richard
Subject: FW: TRIM: HP TRIM Internal Record : 2015/250616 : Minutes - Meeting between Warringah Council, OEH & the Applicant - Ralston Avenue Planning Proposal

Thanks Janelle

I just wanted to clarify what we were speaking about over the phone recently.

If Council decides to progress this planning proposal, but to not proceed with a biocertification proposal at the time of exhibition, OEH is likely to have significant concerns about the biodiversity impacts of the proposal as per the previous OEH comments.

You suggested that a VPA could be used to require the creation and retirement of a certain number of biobanking credits. I assume that these would be calculated using the Biobanking Assessment Methodology (BBAM) methodology. This would require the development (impact) site to be clearly determined including APZs. The BBAM requires the proponent and assessor to demonstrate how the project has avoided and minimised impacts on biodiversity (Section 8). There are current unresolved red flag issues with this proposal. OEH would not be able to comment on the adequacy of any offsets until the red flag matters are resolved.

It is noted that the retirement of credits under a planning agreement at the rezoning stage would *not* switch off threatened species assessment or concurrence requirements at the development application stage. Also, requiring the establishment of a biobanking site under a planning agreement at the rezoning stage would *not* switch off threatened species assessment or concurrence requirements at the development application stage.

The Biocertification Assessment Methodology (BCAM) offers the proponent greater flexibility in the trading rules and a reduced number of credits compared to BBAM and therefore is recommended for use at a larger strategic planning stage such as this. However, a VPA cannot require the proponent to biocertify the land.

A biocertification proposal cannot be considered until an application, including an assessment report and strategy, is received by OEH. OEH does not consider that the preliminary biocert assessment adequately demonstrates that the impacts have been avoided and minimised or that the red flag variations can be supported. Even when OEH considers the biocert assessment would be supported, it is the Minister's decision whether it will be approved or not. If this was a requirement in the VPA it could be seen to 'fetter' a decision of the Minister for the Environment who determines whether to approve or not a biocertification. It is contrary to administrative law to require the entry into an agreement which involves the exercise of statutory discretionary powers of the Minister. This would introduce the risk that the decision could be challenged in court.

The proponent could apply for a biobank statement for the development area at development assessment stage in order to give certainty for the development (i.e. to switch off the need for site by site threatened species assessments). Again, this would be done under the BBAM methodology and there may be red flag variations that OEH may not support. Also, the proponent has to demonstrate how the maintain and improve issues have been considered and addressed.

If Council decides to progress this planning proposal and a VPA is being considered that will include the retirement of credits this clause should be drafted in consultation with OEH.

I trust this advice is of assistance but if you require any clarification or further advice please do not hesitate to contact me.

Kind regards

Rachel Lonie
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 Please note I do not work Wednesdays