

Undertaking Given Under Section 9.5 of the Environmental Planning and Assessment Act 1979 (NSW) by Mr David Owen Towers

This is an Enforceable Undertaking given under Section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)* (Act) by Mr David Owen Towers (Mr Towers).

1 Person(s) giving the Undertaking

- 1.1. This Undertaking is given to the Department of Planning and Environment (the department) by Mr David Owen Towers, for the purposes of section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)*.

2 Background

2.1 Planning Approval on the Premises

- 2.1.1. On 29 October 2010, the then A/Deputy Director-General, as delegate for the Minister of Planning, issued Project Approval 07-0094 (consent) under the Act, for the Salt Ash Sand Project (project) on Lot 4042 DP 1090633, Lot 632 DP 609506 and Lot 633 DP 609506 (site), subject to conditions. The Applicant to the consent was ATB Morton Pty Limited, however Mr Towers relied on the consent to carry out the development subject of the consent. The project was subsequently modified on five separate occasions by the Department on 30 March 2011, 11 August 2011, 21 August 2014, 10 October 2018, and 7 September 2022. The project involved clearing, sand extraction, processing, and transport of extractive material on the site, including Lot 633 DP 609506, also known as 2942 Nelson Bay Road, Salt Ash (**premises**).

2.2 The Alleged Offences

- 2.2.1. The project, subject to conditions, approved clearing, sand extraction, processing, and transport of extractive material (sand) as described in the relevant assessment documents and consent. In addition, a number of other conditions were required to be complied with in accordance with the consent.
- 2.2.2. Following an investigation, the department has found the following conduct, which was carried out by Mr Towers, or at his direction, to be in breach of the consent.
- 2.2.3. Vegetation was cleared and/or disturbed on the premises between about 27 December 2019 and about 5 October 2021.
- 2.2.4. Vegetation clearing and/or disturbance occurred outside the approved site extraction boundary, and in areas not to be disturbed including (Swamp Schlerophyll Forest Endangered Ecological Community (EEC), a 50 metre buffer zone to the EEC, and the northern powerline easement and buffer zone (130 metres)) as described in Schedule 3, Condition 21 of the consent.
- 2.2.5. The vegetation that was cleared and/or disturbed on the premises included Swamp Schlerophyll Forest EEC, a 50 metre buffer zone to the EEC, the northern powerline easement and buffer zone, which includes threatened flora species. Threatened fauna was previously identified on the premises and immediate surrounds.
- 2.2.6. No monitoring or maintenance was undertaken prior to, during or after vegetation clearing and disturbance, in accordance with the Landscape Management Plan.
- 2.2.7. Extraction of sand material, including excavation and/or loading into trucks, commenced between about 2 January 2020 and about 11 February 2020, and ceased on or about 15 October 2021. This included transport of material from the premises via the driveway on the northern boundary of the premises adjoining Nelson Bay Road, which is not an approved access road for the project.
- 2.2.8. On 21 October 2021, the department issued an Order to cease all extraction, loading and transport activities on the premises.
- 2.2.9. On 24 November 2022, the department inspected the premises and noted that it

appeared that no further extraction had occurred after about 15 October 2021.

2.2.10. Approximately 90,000 tonnes of sand material had been extracted and transported from the premises during the dates noted above. The department conducted an aerial survey and estimated that approximately 72,000 cubic metres of sand material had been extracted from the premises.

2.2.11. No plans, reports, monitoring records, etc as required by the consent, have been prepared or submitted to the department, to satisfy the requirements of the consent, in relation to the clearing, extraction and transport activities described above.

2.2.12. As such, the department has found the above conduct to be in breach of the following conditions of the consent:

- a) Failed to implement all reasonable and feasible measures to prevent and/or minimise any material harm to the environment (Schedule 2, Condition 1);
- b) Failed to carry out the development generally in accordance with the Environmental Assessments and Statement of Commitments (Schedule 2, Condition 2);
- c) Failed to carry out the project in accordance with the conditions of consent, and the project as described in the Environmental Assessments (Schedule 2, Condition 2A);
- d) Failed to pay Section 94 Contributions to council (Schedule 2, Condition C13);
- e) Failed to mark out boundaries of the extraction area, submit a survey plan to the department, and ensure boundaries are clearly marked (Schedule 3, Condition 1);
- f) Failed to implement the Noise Management Plan, including undertaking noise monitoring (Schedule 3, Condition 7);
- g) Failed to implement the Air Quality Management Plan, including undertaking air quality monitoring (Schedule 3, Condition 10);
- h) Failed to implement the Soil and Water Management Plan, including the monitoring of surface water, groundwater and acid sulfate soils (Schedule 3, Condition 14);
- i) Failed to implement a Biodiversity Offset Strategy (Schedule 3, Condition 19);
- j) Failed to maintain and prevent disturbance of the vegetation in the Swamp Schlerophyll Forest EEC, Swamp Schlerophyll Forest EEC buffer zone, and the Northern Powerline Easement buffer zone (Schedule 3, Condition 21);
- k) Failed to implement the Landscape Management Plan (Schedule 3, Condition 23)
- l) Failed to submit a Rehabilitation Bond (Schedule 3, Condition 26);
- m) Failed to implement the Aboriginal Cultural Heritage Management Plan, including pre-disturbance surveys and salvage (Schedule 3, Condition 28);
- n) Failed to implement the Traffic Management Plan, including a driver's code of conduct (Schedule 3, Condition 33);
- o) Failed to implement transport operating conditions, including minimising traffic safety issues and disruption to local road users (Schedule 3, Condition 33A);
- p) Failed to prepare and submit an Annual Review (Schedule 5, Condition 3); and
- q) Failed to report non-compliances to the department (Schedule 5, Condition 7).

2.2.13. In response to the department's investigation, Mr Towers has:

- a) admitted that his conduct contravened Section 9.5 of the *Environmental Planning and Assessment Act 1979 (NSW)*, and
- b) offered this Undertaking to the department.

3 Commencement of this Undertaking

3.1. This Undertaking comes into effect when:

- c) this Undertaking is executed by Mr Towers, and
- d) this Undertaking so executed is accepted by the Planning Secretary of the department or delegate.

(the Commencement Date).

4 Undertaking

Mr Towers undertakes for the purposes of section 9.5 of the Act that he will do the following:

A. Payment to beneficiaries:

1. Pay the sum of \$20,000 (excluding GST) to Landcare NSW (ABN: 24958819359) within 1 month of the Commencement Date
2. Pay the sum of \$130,000 (excluding GST) to NSW Department of Planning and Environment, Biodiversity and Conservation Division, Hunter Central Coast Branch, Ecosystems and Threatened Species (ABN: 20770707468) in accordance with the following payment schedule of five instalments:
 - a) Instalment one of \$26,000 within 2 months of the Commencement Date;
 - b) Instalment two of \$26,000 within 3 months of the Commencement Date;
 - c) Instalment three of \$26,000 within 4 months of the Commencement Date;
 - d) Instalment four of \$26,000 within 5 months of the Commencement Date; and
 - e) Instalment five of \$26,000 within 6 months of the Commencement Date.

B. Nominated bank account details of beneficiaries:

1. The payment to Landcare NSW as referenced above will be made into the following bank account details:
 - a) BSB: 032-621
 - b) Account number: 368947
2. The payment to NSW Department of Planning and Environment, Biodiversity and Conservation Division, Hunter Central Coast Branch, Ecosystems and Threatened Species as referenced above will be made into the following bank account details:
 - a) BSB: 032-001
 - b) Account number: 203420

C. Conservation projects:

1. The funds will be utilised by Landcare NSW for applicable Hunter/Tilligerry Landcare conservation projects such as:
 - a) Improve koala habitat including pine tree removal and revegetation in the Girum bit State Conservation Area
 - b) Improve koala habitat including pine tree removal and weed/pest control in the Bobs Farm area
2. The funds will be utilised by NSW Department of Planning and Environment, Biodiversity and Conservation Division, Hunter Central Coast Branch, Ecosystems and Threatened Species on applicable Saving Our Species conservation projects such as:
 - a) Planting Habitat for Glenrock Squirrel Gliders
 - b) Green and Golden Bell Frog Habitat Ponds

- c) Hunter River Red Gums Genetic Study
- d) Sand Doubletail (*Diuris arenaria*) and Rough Doubletail (*Diuris praecox*) conservation projects in Port Stephens LGA
- e) Migratory Shorebirds in the Port Stephens and Lower Hunter Estuaries

D. Reporting:

1. Mr Towers will provide a status report of this Undertaking to the department (email to compliance@planning.nsw.gov.au), within the following timeframes, including a receipt of all payments made to date in accordance with the Undertaking:
 - a) Within 2 months of the Commencement Date; and
 - b) Within 7 months of the Commencement Date.

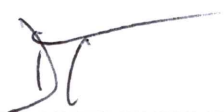
5 Acknowledgments

Mr Towers acknowledges that:

- a) the department will make this Undertaking publicly available including by publishing it on the department's public register of section 9.5 undertakings on its website
- b) there is no conflict of interest with beneficiaries
- c) the department will, from time to time, make public reference to this Undertaking including in news media statements and in department's publications
- d) this Undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct, and
- e) the department is not barred from future enforcement or other actions arising as a result of any contraventions or incidents in the future, including with respect to the enforcement of this undertaking.

6 Executed as an Undertaking

Executed by Mr David Owen Towers:

Signature	
Name (print)	D Owen Towers
Date	11 10 23

Accepted by the Planning Secretary of the Department Planning, Industry and Environment pursuant to Section 9.5 of the *Environmental Planning and Assessment Act 1979* on:

Date

and signed on behalf of the Department:



Planning Secretary or delegate

Date 11/10/2023