

**INQUIRY AND ADVISORY COMMITTEE  
APPOINTED BY THE MINISTER FOR PLANNING  
PLANNING PANELS VICTORIA**

**IN THE MATTER OF THE EDITHVALE AND BONBEACH LEVEL CROSSING  
REMOVAL PROJECT ENVIRONMENTAL EFFECTS STATEMENT**

**IN THE MATTER OF DRAFT AMENDMENTS C155 AND C156 TO THE  
KINGSTON PLANNING SCHEME**

BETWEEN:

LEVEL CROSSING REMOVAL AUTHORITY

PROONENT

AND

KINGSTON CITY COUNCIL AND OTHERS

SUBMITTERS

**SUBMISSIONS ON BEHALF OF  
LEVEL CROSSING REMOVAL AUTHORITY**

**PART B OPENING**

**INTRODUCTION**

1. The role of this opening is to introduce the projects for the purposes of the hearing and to address certain key themes that have emerged in the submissions and evidence to date.
2. LXRA's case consists of:
  - (a) The Environment Effects Statement ('the EES');
  - (b) The Part A submission;
  - (c) This Part B;
  - (d) The expert evidence (including presentations) relied upon by LXRA;
  - (e) The Response to Submissions set out in the Part A submission, as well as any updated response included in the Reply;
  - (f) The EPRs (including any amended EPRs proposed by LXRA);
  - (g) Draft Planning Scheme Amendments C155 and C156 to the Kingston Planning Scheme (including any amendments proposed by LXRA); and
  - (h) LXRA's Reply and closing submissions.

**THE ROLE OF THE EES AND THE IAC**

3. The role of IAC is governed by its Terms of Reference ('the Terms'). Clause 18 of the Terms states that, in its capacity as an Inquiry under the *Environment Effects Act 1978*, the IAC is to:
  - a. *consider and report on the potential significant effects of the project investigated in the EES, taking into account the procedures and requirements of the Minister for the preparation of the EES under section 8B(5) of the EE Act (see Attachment 1) and the controlling provisions under the EPBC Act (see Attachment 2) as outlined in paragraph 12;*

- b. *recommend necessary avoidance, mitigation or management measures for the development of the project to balance project objectives with environmental, economic and social outcomes; and*
  - c. *assess the adequacy of the proposed environmental performance requirements and their suitability to achieve project-wide environmental outcomes, as described in the scoping requirements.*<sup>1</sup>
4. In terms of its role as an Advisory Committee under the *Planning and Environment Act 1987*, the IAC is required to ‘assess whether the planning controls proposed by the draft [planning scheme amendments] are appropriate to facilitate the use and development of the project’.<sup>2</sup>
  5. The ‘project investigated in the EES’, as referred to in paragraph 18(a) of the Terms, is the removal of the Edithvale and Bonbeach level crossings and their replacement with rail under road solutions.<sup>3</sup> Further, the Terms themselves define ‘the project’ as being the removal of the existing level crossings and their replacement with a rail-under-road solution.<sup>4</sup>
  6. This is consistent with the requirements of the Minister’s decision to require an EES<sup>5</sup> and the Scoping Requirements for the development of the EES,<sup>6</sup> both of which contemplated a rail-under-road project.
  7. Given this, the EES was not required to, and did not, assess the impacts of adopting any alternative solution, including a rail-over-road solution. The *Ministerial guidelines for the assessment of environmental effects under the Environment Effects Act 1978* specifically state that an EES

*will not normally be required to document alternatives **to** a project proposal, as opposed to alternatives **for** a project. ... The only*

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<sup>1</sup> Terms of Reference, [18].

<sup>2</sup> Terms of Reference, [20].

<sup>3</sup> EES, Executive Summary, pp. 1 – 3; Chapter 1, pp. 1.2, 1.4 and 1.6.

<sup>4</sup> Terms of Reference, [5].

<sup>5</sup> Minister's Reasons for Decision under *Environment Effects Act 1978* dated 5 April 2017.

<sup>6</sup> Scoping Requirements, Section 1.1.

*alternative to a project proposal that will be routinely described in detail in an EES is the 'no project' scenario. (emphasis original)<sup>7</sup>*

8. It is respectfully submitted that there is nothing inappropriate about this. The State Government has made a decision that, subject to the delivery of acceptable environmental, social, and economic outcomes, it is preferable that the Edithvale and Bonbeach level crossings should be replaced with a rail-under-road solution.
9. Accordingly, and consistent with paragraph 18 of the Terms, the fundamental question for the IAC is whether, and how, the environmental, social, and economic outcomes sought can be delivered?
10. It follows that, to the extent various submitters have suggested that IAC should recommend the adoption of a rail-over-road option, the LXRA would respectfully submit that such a course is simply not open.
11. Even if it were, LXRA would submit that such a course is not warranted as the EES and the evidence indicates that a rail-under-road solution can deliver appropriate outcomes, including in particular in relation to groundwater and groundwater dependent ecosystems.

#### **GROUNDWATER IMPACTS**

12. As the IAC will appreciate, the central questions in this case concern the impact of the Projects on groundwater flows, particularly in the Edithvale area.
13. In this context, the heart of the EES is the Groundwater Impact Assessment ('GIA'). The GIA is central to the assessment of the environmental effects of the Projects, both because groundwater is significant in its own right but also because the conclusions drawn elsewhere in the EES – in particular, the conclusions relating to ecological impacts and those in relation to acid sulfate soils and contamination – are based on the modelling undertaken as part of the preparation of the technical assessments.

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<sup>7</sup> Department of Sustainability and Environment, Seventh Edition 2006, p. 15.

14. Modelling is a critical part of any groundwater impact assessment because it is not practically possible to empirically observe actual flow of groundwater through an area for the purposes of determining the consequences of any given intervention. Rather, any impact must be inferred from a finite number of known pieces of information coupled with established principles about how groundwater behaves.
15. Two rounds of modelling have occurred in the development of the Projects:
  - (a) First, preliminary modelling was undertaken prior to the Minister's referral decision to identify potential risks associated with the Projects.
  - (b) Second, as part of the preparation of the EES, more detailed modelling was undertaken to determine the likely effect of the construction of the Projects.
16. Different modelling approaches were taken in each of the stages which reflected both the purpose of the relevant modelling and the state of the knowledge then available to LXRA.
17. Although Mr Cauchi will address this in more detail, it is useful to briefly summarise the differences:
  - (a) At the preliminary stage, a relatively 'coarse' model was utilised, described in the preliminary GIA as a 'simplified box model'. That model:
    - (i) was not calibrated to reflect established conditions; and
    - (ii) relied upon regional, rather than site specific data, to inform its conclusions.
  - (b) The use of such a model was entirely appropriate, however, given that the purpose of the modelling was to identify potential impacts so that they could be considered further. In those circumstances, it was preferable to 'cast a wider net' and identify risks that a more refined model might have determined were unlikely.

- (c) At the EES stage, a significantly more refined model was used. That model:
    - (i) was calibrated using available hydrological data; and
    - (ii) was informed by site specific data gathered as part of the EES process.
  - (d) Uncertainty analysis was also undertaken to gain an understanding of the likely 'outer bounds' of potential groundwater impacts from the Projects.
  - (e) The use of a more refined model was appropriate for the EES stage where the aim of the modelling process is to identify not just what *might* occur, but what is *likely* to occur.
  - (f) The modelling for the EES stage can be further subdivided into the 'initial' modelling – which modelled the impact of the Edithvale trench assuming no mitigation was undertaken – and the 'mitigated' modelling – which modelled the impact of the Edithvale trench with the 'passive horizontal drain' in place.
18. This difference of approach at different stages is important for the IAC's analysis because a number of submitters have referred to the conclusions drawn in the preliminary GIA to suggest that the Projects will impact on the Edithvale Wetlands.
19. In addition, it should be recognised that even the more refined modelling undertaken for the EES is – deliberately – conservative. In particular, the modelling is based on conservative assumptions about trench geometry. It is expected that refinements to the trench geometry could, without any other mitigation being applied, result in a reduction in the extent of mounding by in the order of 30%.
20. LXRA does not dispute that the modelling undertaken for the preliminary GIA showed a potential impact on the Edithvale Wetlands. This possibility, in fact, was what prompted the referral of the Projects to the Commonwealth and the Minister for Planning to determine whether further assessment was required. What LXRA does say, however, is that

the modelling that was undertaken for the purposes of preliminary GIA has been superseded by the modelling for the EES which suggests that there is a negligible risk of groundwater mounding associated with the Projects impacting on the Edithvale Wetlands even if no mitigation is undertaken.

#### **THE PRECAUTIONARY PRINCIPLE**

21. Related to the above, a number of submitters have sought to invoke the precautionary principle to argue that any risk of an impact on the Edithvale Wetlands is unacceptable and should result in a rail-over-road option being pursued.
22. As the Victorian Supreme Court and the NSW Land and Environment Court have said, however, this is not how the precautionary principle operates. Both courts emphasised that a 'zero risk' approach to the precautionary principle is inappropriate<sup>8</sup> and that what is required is a proportionate response to the risk that exists.<sup>9</sup>
23. Here, the EES modelling shows that, even unmitigated, the risk to the Edithvale Wetlands posed by the Projects is extremely low. None of the modelling shows significant mounding (i.e. 0.1m) intersecting with the Edithvale Wetlands and it is only in extreme scenarios (less than 1%) that such mounding comes within 200m of the Wetlands. More relevant risks, in terms of groundwater impacts, are in relation to risk of water logging and potential impact of groundwater drawdown.
24. Notwithstanding this, the EES and the Projects do adopt a precautionary approach when it comes to protection of the Edithvale Wetlands:
  - (a) The first step is the use of conservative assumptions in the modelling. This means that the extent of mounding likely to occur is expected to be less than that modelled.

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<sup>8</sup> *Environment East Gippsland v VicForests* [2010] VSC 335, [203]; *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, [157] – [158].

<sup>9</sup> *VicForests*, [207] ; *Telstra*, [166].

- (b) The second step is the adoption of the 'passive horizontal drain' mechanism to reduce groundwater impacts. While the primary purpose of this is to reduce waterlogging and groundwater drawdown in the vicinity of the Edithvale Project, it is also a precautionary measure vis-à-vis any impact on the Edithvale Wetlands as it means that mounding is expected to be greatly reduced so that the 0.1m mounding occurs over a kilometre from the Edithvale Wetlands.
- (c) The third step is the adoption of EPRs GW3 and FF8 which require monitoring and mitigation of groundwater impacts, including specifically impacts on the Edithvale Wetlands, notwithstanding that none are anticipated. The adoption of an 'adaptive management approach' has been recognised as a precautionary response by the courts.

#### **THE CONCEPT DESIGN**

- 25. In assessing the Projects, it should be noted that the design of the Projects is, subject to certain constraints relating to fitness for purpose, not fixed. This is deliberate. Like many projects in this State, the assessment is carried out in the context of a concept design allowing the ultimate design to be optimised by the State appointed contractor for the Projects.
- 26. It is LXRA's intention that tenderers should be able to interrogate and challenge the proposed design with the objective of delivering better outcomes than anticipated.
- 27. In this approach there is no final or comprehensive design showing actual built form outcomes. Obviously in the circumstances of the rail alignment the undefined aspects of the proposal more concern building detail and urban design works. Reasonable assumptions can be made in this case to provide sufficient information. The visualisation prepared by Urban Circus is useful in this context.

**URBAN DESIGN**

28. Related to the above, it is important to appreciate that the design of the Projects in the urban design sense – e.g. materials, etc. – is not intended to be resolved as part of this hearing. Again, it is expected that there will be a detailed urban design assessment as part of the broader detailed design phase. That assessment will involve consideration of the views of a range of stakeholders and will be carried out in discussion with the Office of the Victorian Government Architect ('OVGA').
29. What does need to be considered as part of this hearing is the proposed Urban Design Guidelines for each Project. These Guidelines are intended to give site specific guidance as to what should be delivered on each site and are to be read in the context of the broader LXRA Urban Design Framework, which applies to all level crossing removals.
30. This approach reflects the recommendations of the OVGA in its *Level Crossings Removal: Lessons Learned* document in 2014. In particular, that document made the follow recommendations:

*Develop site-specific urban design guidelines. This is particularly important for level crossing removal projects with indirect procurement routes to reinforce the ambition for urban design excellence before going to market. Guidelines can also be used during the evaluation of bidding teams and to monitor design progress.*

*Allow a reference design to be revised and challenged by the project/bidding team. Creative urban design solutions can be generated if bidders are not penalised for deviating from, and improving, the reference design. This is an opportunity for the client to improve value for money. The opportunity to improve the reference design must be explicit in the documentation.*

**THE ENVIRONMENTAL MANAGEMENT FRAMEWORK**

31. Environmental impacts arising from the Projects are proposed to be managed through the Environmental Management Framework ('the EMF'). Details of the EMF are set out in Chapter 9 of the EES. For present purposes, the key elements of the EMF will be:
- (a) The EPRs;
  - (b) The Urban Design Guidelines;
  - (c) The Groundwater Management and Monitoring Plan;
  - (d) The Groundwater Dependent Ecosystem Monitoring and Mitigations Plans;
  - (e) The Groundwater Quality Plan;
  - (f) The Construction Environmental Management Plan;
  - (g) The Construction Noise and Vibration Management Plan;
  - (h) The Transport Management Plan; and
  - (i) The Community and Stakeholders Engagement Management Plan.
32. A Cultural Heritage Management Plan will also form part of the EMF, but is approved through a separate process under the *Aboriginal Heritage Act 2006*.
33. Compliance with the EMF (including the Plans identified above) is a requirement of the draft Incorporated Documents under the proposed planning scheme amendments. As such, compliance could be enforced by the relevant responsible authority, if need be.

*Principles to be applied*

34. One important task for the IAC is to satisfy itself that the EPRs are appropriate for the management of any impacts arising from the Projects.
35. As part of that task, the IAC may choose to consider amendments to the EPRs. In doing so, LXRA would emphasise that the EPRs are drafted to be 'performance based' – that is, to require the achievement of any outcome without requiring the adoption of any particular method.

36. LXRA adopts this approach because it recognises that, despite the extensive work that has gone into the EES, LXRA is not the fount of all wisdom and that it is possible that the contractor may be able to identify different or better ways of achieving the same outcome, for example, at a lower cost. As such, LXRA respectfully submits that the EPRs should be drafted in a way the preserves the flexibility required to allow for this.
37. That said, LXRA notes that the submissions and evidence of Kingston City Council and the submissions of the Environment Protection Authority are broadly supportive of the EPRs in their current form, albeit with some refinements.

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