

MODIFYING DEVELOPMENT CONSENTS

Modifying development consents granted under NVC Act and NV Act

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Modifying Development Consents

This circular provides Catchment Management Authorities (CMAs) with information about the requirements, policy and process for assessing applications to modify development consents granted under the former *Native Vegetation Conservation Act 1997* (NVC Act) and the *Native Vegetation Act 2003* (NV Act).

Introduction

Development consent under the NVC Act and the NV Act is granted through the *Environmental Planning and Assessment Act 1979* (EPA Act).

A landholder wishing to modify development consent under either the NVC Act or the NV Act must comply with the requirements of the EPA Act and the Environmental Planning and Assessment Regulation 2000 (EPA Regulation).

The focus of this Circular is on modifying NVC Act development consents, but some specific information is also included on modifying NV Act consents.

Note: If a landholder wants to negotiate a PVP to replace their development consent, the consent will need to be surrendered rather than modified (refer to CMA Circular 06-012 on the voluntary surrender of development consents).

1. Can a consent granted under the NVC Act be modified at the applicant's request?

Yes. Section 96 of the EPA Act allows applicants to apply to modify a development consent.

The process varies depending whether the proposed modification involves:

- correcting a minor error, misdescription or miscalculation (see section 6), or
- minimal environmental impact (see section 7), or
- more substantial impact (see section 8).

The consent authority (either a CMA or DNR) can modify a development consent provided that it follows the steps in the relevant subsections of section 96.

2. Which organisation determines requests to modify development consent?

CMAs will be the consent authority for consents approving the clearing of native vegetation.

DNR will be the consent authority for private native forestry (PNF) consents or for consents approving clearing on State protected land.

Note: For CMAs, a decision to modify a development consent must be made by the General Manager or the Board.

3. What information must the landholder provide?

Clause 115(1) of the EPA Regulation requires applications to modify development consents to include the following information:

- i) name and address of the applicant
- ii) a description of the original development to be carried out under the consent
- iii) the address and title details of the land
- iv) a description of the proposed modification
- v) a statement indicating the purpose of the modification
- vi) a description of the expected impacts of the modification
- vii) an undertaking that the development will remain substantially the same as that originally approved
- viii) if the applicant is not the owner, a statement signed by the owner consenting to the application

Note: If the consent was originally granted by the Land and Environment Court, additional requirements will apply. Contact the Service Centre if this is the case.

4. Is there a fee?

Clause 115 of the EPA Regulation provides for payment of a fee. However, a consent authority can choose not to charge a fee. If a fee is charged this cannot exceed the maximum amounts listed in clause 258 of the EPA Regulation.

5. Receiving and checking a modification application.

For all applications to modify a development consent the consent authority must ensure that the application contains all the information required by the EPA Regulation (see section 3). If any information is missing or insufficient the necessary information should be requested prior to taking further action.

A copy of the original development consent may be downloaded from the Vegnet database to provide further information on the original proposal.

6. Modifying a development consent to correct minor errors, misdescription and miscalculation

The consent authority must be satisfied that there has been a mistake in the original consent. Assuming this is the case, the authority may approve the modification.

Note: This procedure is only available to rectify mistakes in the original consent. It cannot be used where an applicant decides subsequently to change their proposed clearing area.

7. What steps are required for modification involving minimal environmental impact?

The consent authority must take the following steps set out in section 96(1A) of the EPA Act:

Step 1: Consider the following factors:

- i) whether the proposed modification is of minimal environmental impact (if not, the application will have to be dealt with as described in section 8 below)
- ii) whether the development as modified is substantially the same as the original development (if not, the landholder will require a new consent or PVP).

Step 2: Consider any matters listed in section 79C(1) of the EPA Act that are relevant to the application.

Once these steps have been satisfactorily completed the consent authority may determine the application.

8. What steps are required where the modification will involve more substantial environmental impact?

The consent authority must take the following steps set out in section 96(2) and (3) of the EPA Act:

Step 1: Consider whether the development as modified is substantially the same as the original development (if the development as modified isn't substantially the same, the landholder will need a new consent or PVP).

Step 2: Consider any matters listed in section 79C(1) of the EPA Act that are relevant to the application.

Since more substantial environmental impact is involved, the consent authority must consider the likely environmental impacts of the modified proposal. This will mean undertaking a 7 part test for threatened species. Other section 79C matters must also be considered, including any social and economic impacts of the modified proposal.

Once these steps have been satisfactorily completed the consent authority may determine the application.

9. How is an applicant notified of the determination?

Clause 122 of the EPA Regulation requires that written notice of a determination must be given to the applicant as soon as possible after the decision is made.

The notice of determination must include a copy of any relevant plans for the modification. It should also include a note to the effect that any conditions in the original consent which were not changed by the modification approval will continue to apply.

If the application is refused, or if conditions are added, the reasons must be given. The notice must state that there is a right of appeal against the determination. DNR's Compliance and Licensing Policy and Strategy Branch can check any proposed conditions for enforceability.

Note: The consent authority should also update the details in the Vegnet database. In order to get write access to do this, you can email Veg.Net@dnr.nsw.gov.au, or contact DNR's Vegetation and Land Management Branch in Wellington.

10. What if some clearing has already taken place?

Where some clearing has already taken place, the consent authority should ascertain whether the clearing has complied with the conditions of consent.

If the landholder has not complied with the consent conditions this does not mean that the modification application must be refused. It is however something that should be taken into account when making that decision. DNR's Compliance and Licensing Policy and Strategy Branch can be contacted to discuss any aspects of non-compliance.

11. Are there different requirements for modifying a development consent granted under the NV Act?

All the requirements of the EPA Act and Regulation outlined above apply to

applications to modify development consents granted under the NV Act.

A development consent granted under the NV Act would have passed the 'improve or maintain' test using the PVP Developer. While there is no legal requirement to undertake PVP Developer assessment for a proposed modification, CMAs may choose to do so in order to compare the impacts of the original proposal and the modified proposal. Note however that a CMA is not bound by the assessment using the PVP Developer.

If the modified proposal does not pass the 'improve or maintain' test, the CMA may decide not to approve the modification. In that event, if the landholder wants to proceed with their proposal, an option would be to surrender the existing development consent and negotiate a PVP requiring offsets to compensate for native vegetation loss. Any offsets required for clearing that took place under the existing consent should also be incorporated into the PVP.

12. Policy aspects of modifying consents issued under the NVC Act and the NV Act

In some cases the effect of a proposed modification may be very minor, for example where an applicant wishes to carry out the same amount of clearing of the same vegetation in a similar area to the original consent. In this scenario a CMA may be quite happy to approve a modification.

For cases where the modified proposal is not regarded as substantially the same as the original development, the consent authority must refuse the application. This would in most cases include applications to extend the area to be cleared. It will then be up to the applicant to apply for a new development consent or PVP under the NV Act.

A third category of cases includes those where the impacts of the proposed changes may be significant, even though the development as modified may be regarded as substantially the same as the original development. In these cases CMAs may wish to encourage applicants to apply for a new development consent or PVP

rather than to apply to modify their existing consent. If an application to modify an existing consent is submitted, a CMA may decide to refuse the application on the grounds of likely impact

Ultimately it is the responsibility of a consent authority to consider each application on a case by case basis.

Further information

For further information about the modification of development consents, please contact the PVP Service Centre at 02 9895 5999 or PVPServiceCentre@dnr.nsw.gov.au

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Important note

This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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