

Appendix B

Guidance notes for applicants and licensees

These guidance notes have been developed to assist applicants and licensees when applying to the EPA for a new Environment Protection Licence for transport infrastructure construction or a licence variation. The guidance notes are to be read in conjunction with the model transport Infrastructure Licence (model licence) and Appendix A – Additional Conditions. The information is for guidance only and all obligations under the licence, *Protection of the Environment Operations Act 1997* (POEO Act) and any other relevant legislation continue to apply.

The guidance notes have been developed following feedback during stakeholder consultations in 2021. The guidance notes were requested by stakeholders:

- further guidance in relation to the EPA's process for approving works outside of standard construction hours, including more certainty of the EPA's requirements for approving such works at different stages of a projects licence
- further guidance relating to Community Agreements
- further guidance relating to what EPA considers a 'Competent Person' for the purpose of noise monitoring requirements, and
- further EPA guidance and clarity relating to Water Pollution Discharge Impact Assessments.

The EPA will review the guidance notes, along with the model licence conditions after the first 12 months of implementation. The EPA will consider any feedback received during the initial 12 months as well as engage stakeholders for any further feedback.

Works outside of standard construction hours

Large scale transport infrastructure construction projects, such as motorways and railways, have the potential to significantly impact on nearby communities. The construction of large infrastructure projects can take extended periods to complete (sometimes 5 years or more), with significant periods of construction taking place outside the recommended standard construction hours, often over the duration of the project.

This can result in significant disruption and noise impacts on the community, particularly when night-time and weekend work is frequent and ongoing and involves particularly noisy activities.

Under the POEO Act, construction of major transport infrastructure projects in NSW is required to be licensed by the NSW Environment Protection Authority (EPA). Environment Protection Licences (EPLs) issued by the EPA for major projects typically include requirements relating to noise management and mitigation, including approved hours of operation and restrictions on night-time works.

It is not unusual during the lifecycle of major transport infrastructure construction projects for there to be circumstances in which works must be undertaken that fall outside the scope of standard licence conditions. In these instances, licence holders may request specific conditions from the EPA to undertake these works or alternatively seek agreement from the local community under Licence Condition E1.

Transport infrastructure construction licences generally allow for certain (usually low noise impact) works to be undertaken outside of standard construction hours without a separate approval. In some instances, such as where certain circumstances are permitted by the Conditions of Approval and detailed in the

relevant Environmental Assessment/s, the EPA may include additional conditions permitting these works (see Appendix A – Condition L5.7 – L5.9).

A key component of undertaking any works outside of standard construction hours is an appropriate level of engagement with the potentially affected community. The type and level of engagement required is proportional to the level of impact from the proposed works.

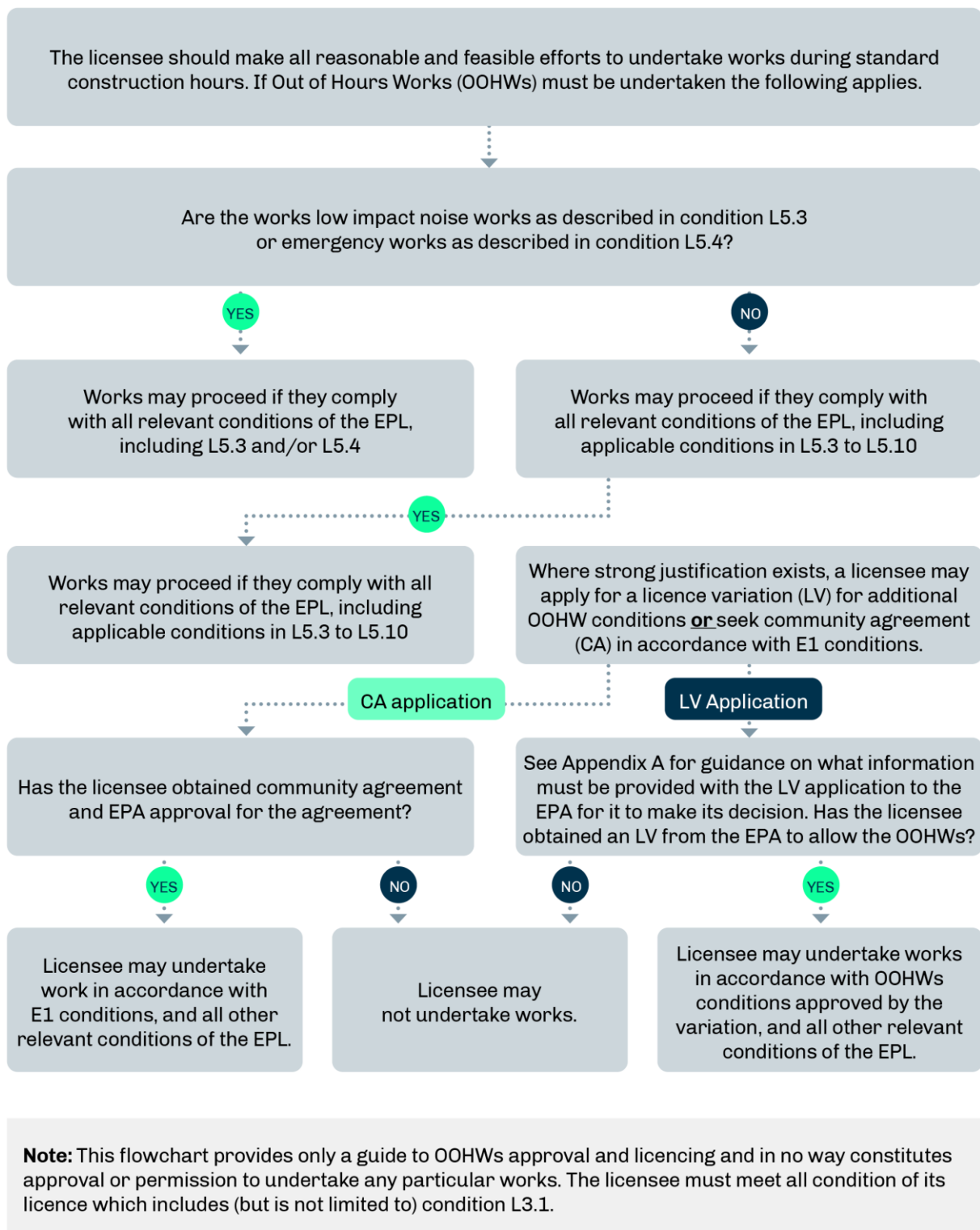
Works outside of standard construction are generally regulated by the following conditions:

Figure 1 – conditions permitting works outside of standard construction hours

Condition	Type of works and activities	Scheduling
L5.3 (standard)	Low noise impact works This is a standard condition	Anytime
L5.4 (standard)	Emergency works and delivery over oversize plant, structure and materials This is a standard condition	Anytime
E1 (standard)	Community Agreements This is a standard condition	Anytime (where agreement from community and approval from EPA is obtained)
L5.7/L5.8 (must be applied for)	Critical and essential works and activities that due to particular circumstances cannot be undertaken during standard construction hours This condition must be applied for by the licence applicant or licensee (see guidance notes in Appendix A)	Mon–Fri evenings/nights (pursuant to respite provisions of L5.8)
L5.9 (must be applied)	Special Requirements for Rail Possessions permitting works over weekends/public holidays This condition must be applied for by licence applicant or licensee (see guidance notes in Appendix A)	Weekends/Public holidays (pursuant to respite provisions of L5.9)
L5.10	Project specific conditions for works outside of standard construction hours for critical works and activities This condition must be applied for by licence applicant or licensee (see guidance notes in Appendix A)	Anytime (pursuant to the approved special condition)

To assist a licensee to determine which works and activities are permitted outside of standard construction hours – and if not, the process for seeking approval – the EPA provides the following flowchart in Figure 2.

Figure 2: Out of Hours Works (OOHWs) approvals flowchart



Community Agreements

Community Agreement conditions may be used by the licensee when works outside of standard construction hours are not permitted by another condition of the licence. In this case, the licensee must be able to demonstrate that it has engaged with the potentially impacted community and established agreement for the works with the substantial majority of that community.

Community Agreements should aim to balance the scheduling of works outside of standard construction hours by licensees with the legitimate expectation of the community for reasonable amenity. The process for negotiating agreements must be transparent and consistent, and final agreements need to be publicly available.

Agreements must be prepared and implemented in accordance with the requirements of the E1 conditions (see model licence). An application to the EPA to approve a Community Agreement should demonstrate that:

- the agreement is based on the ‘informed consent’ of the affected community
- agreement between the licensee and a ‘substantial majority’ of noise sensitive receivers has been reached, and
- The licensee has met the requirement of the E1 conditions.

Informed consent, in this context, is defined as permission granted by the impacted community in full knowledge of the likely impacts and benefits of any proposed works. The management of construction noise impacts requires effective public involvement and communication strategies to enable everyone to understand the impact of the works on the community. This is best approached by the licensee providing the community with full details about the proposed works and a means of ongoing communication once the works begin (such as complaint and response mechanisms).

Substantial majority

Substantial majority is defined as the greater part of the local community predicted to be impacted by the works. For works with significant predicted noise impacts, the EPA would expect “substantial majority” to approach 100% community agreement, especially in the noise catchments predicted to experience the greatest impacts. The EPA notes that there are multiple variables to consider when determining if a substantial majority of noise sensitive receivers have consented to the works and activities. These variables include:

- the size of the impacted community
- how many noise sensitive receivers were successfully contacted
- the predicted impacts to the community
- the response and consent rates (based on sub-catchments that are delineated by the severity of impact), and
- any benefit to the community from providing consent (e.g. a shorter duration of works).

For these reasons, the EPA is unable to provide definitive limits of the consent levels a licensee must obtain to demonstrate a substantial majority. As per condition E1.3, community response and consent rates (including where no contact could be made) must be reported against the total community-affected catchments, and must be broken down into response and consent rates based on sub-catchments that are delineated by the severity of impact.

The licensee should consult with all residents and other sensitive non-residential receivers (e.g. hospitals) predicted by modelling to be impacted by noise greater than 5dB(A) above the evening and night Rating Background Level (RBL), as applicable. This includes noise sensitive receivers that have declined to participate in previous agreements unless a community member has explicitly requested to not be involved in any future consultation.

When determining whether agreement with the substantial majority has been reached, the EPA requires that the application refers to the number of households rather than the number of individuals within a

given household. Applications that consider a registered address – including each numbered unit within an apartment complex as a separate sensitive receiver – are considered appropriate.

If a licensee is unable to contact some affected residents, or some residents do not wish to engage, these residents are to be assumed to have not agreed with the proposed community agreement. If the response rate during consultation is insufficient to demonstrate that a substantial majority has agreed, the licensee should investigate alternative communication options. The onus at all times is on the licensee to ensure effective engagement and communication with impacted residents. The number of residents unable to be contacted should be noted in any application to the EPA.

If the EPA considers that the licensee has undertaken adequate community engagement relative to the risks posed by the works and activities, a substantial majority of the affected community has consented to the works and activities, and the requirements of the E1 conditions have been met, the EPA is likely to approve the works and activities.

Content of community agreements

Condition E1.2 provides the requirements for community consultation and agreements.

Agreements must be written in plain English, with a clear non-technical explanation of expected noise impacts and should accommodate culturally and linguistically diverse communities. This includes providing contact details for interpreter services for any languages other than English prevalent in the local community.

Any community agreement must define the nature of the works proposed and their expected duration and timing. Any benefits to residents should be clearly stated, along with details of how these benefits may vary as the works progress. Any proposed high noise impact works should be identified, and details of any relevant respite offers that will be provided by the contractor must be included (e.g. movie tickets, café vouchers or alternative accommodation).

Details of any other concurrent works outside of standard construction hours permitted under the licence which will impact noise sensitive receivers effected by the community agreement must also be provided. Where a licensee is aware of other proximate concurrent construction projects being undertaken by other contractors, the EPA considers it prudent for the licensee to advise the impacted community if it is aware of any such works.

Recording residents' consent

The EPA's preference is for consent to be obtained in writing with residents, rather than by phone/in person, for transparency purposes. This particularly applies to those residents who are highly noise affected (i.e. >20 dB(A) above RBL or 65 dBA, whichever is the lower). However, the EPA acknowledges this may not always be possible (or the preference of all community members), and alternative communications strategies will be considered by the EPA. Written consent can either be signed by residents or recorded by email. Written consent should include acknowledgement that the resident understands the nature of the works and may include acknowledgement of respite offers received. These written consents are to be maintained for the duration of the community agreement and made available to an EPA authorised officer on request.

Where phone consents have been used or the engagement has been undertaken in person, the script used to describe the proposed community agreement (including details of the works) is to be provided to the EPA with the community agreement report for approval. The script is to include a clear question requesting consent to the proposal. Detailed records are to be maintained by the licensee of all community consent phone conversations. These records are to be maintained for the duration of the community agreement and made available to an EPA authorised officer on request. If a person contacted for a phone consent requests a copy of the proposed community agreement before agreeing to the proposal (e.g. by email), this is to be provided by the licensee.

The EPA acknowledges that in many instances it can be difficult for the licensee to gain access to properties such as apartment blocks in order to undertake notification or consultation. Furthermore, during the COVID19 pandemic, it may not always be appropriate to engage in face to face

communications. In this case, the EPA will consider whether the proponent has made all feasible and reasonable attempts to engage with impacted receivers, including use of alternative communication strategies.

If during the consultations, the licensee identifies any particularly sensitive receiver(s) that would be significantly impacted by the works (e.g. a resident with a medical condition that cannot be readily relocated), and the person does not consent to the works, this information must be included in the report provided to the EPA, along with a description of how the licensee intends to mitigate these impacts.

Verifying predicted noise impacts

Validation monitoring of the predicted noise levels by a competent person is to occur pursuant to the monitoring plan required by condition E1.4 and the monitoring requirements of conditions E1.5. If the monitored noise levels are higher than predicted, work practices are to be modified so that noise levels are no higher than predicted. These modified practices are to be validated by subsequent monitoring.

If monitoring by the licensee or the EPA indicates that noise levels are higher than those predicted in developing the community agreement, the licensee must modify the works to as soon as practicable to reduce noise levels to predicted levels or below and carry out validation monitoring.

Where it has been determined that works cannot be modified to achieve the predicted noise levels, the licensee must report immediately to the EPA, and after considering the circumstances the EPA may withdraw its permission under E1.1.

The EPA's approval and timeframes

The EPA requires 15 business days to review the community agreement and makes its decision. Where the community agreement only impacts a small number of receivers, or the licensee can provide strong justification for a shorter timeframe of review, the EPA will consider the request and respond in writing as quickly as possible.

The notification requirements of condition L5.5 apply to community agreements. This includes "notification must be given not less than 5 calendar days and not more than 14 calendar days before those works are to be undertaken, unless otherwise agreed with the affected community and notified to the EPA". The EPA acknowledges the time constraints can be present and community agreements are often scheduled to begin soon after EPA approval. To meet the requirements of L5.5, the licensee may wish to notify the affected community of its intention to undertake works and activities under the community agreement, noting that the agreement is currently being reviewed by the EPA.

Licensees can have more than one agreement in place simultaneously which may include the same or different impacted noise sensitive receivers. For example, there may be a short-term agreement for weekend day works, and a longer-term agreement for weekend night works.

Re-engagement with impacted communities for longer term agreements

For longer term community agreements (those predicted to go on longer than 28 calendar days), a licensee must re-engage the impacted community to ensure consent is maintained and continuing. This re-engagement period must be consulted with the community and details in the report provided to the EPA.

The frequency of re-engagement should be proportional to both the number of sensitive receivers impacted, and the level of impacts predicted. The onus is on the licensee to consult the community on an appropriate re-engagement period, however the EPA will provide feedback should it consider the re-engagement period not appropriate.

If the licensee intends to change the scope of works and activities to be carried out under the agreement and this will materially increase noise levels or duration of impacts, a new agreement must be negotiated before these works and activities begin.

Early engagement with the EPA

The EPA is happy to meet with a licensee early to discuss any community agreement proposal. This includes the process for undertaking a community agreement, the requirements of the licence conditions and the particulars of any proposed community agreement.

Competent Person

All noise and vibration monitoring for the purposes of determining compliance with the conditions of the licence must be undertaken by a competent person as defined in the special dictionary of the licence.

During consultations, stakeholders provided feedback to the EPA that further guidance is required in relation to what EPA considers constitutes a competent person under the definition, in particular to **“be able to demonstrate competence through professional experience and/or technical expertise to the satisfaction of the EPA”**. Furthermore, stakeholders advised they considered site personnel, such as environmental staff (or similar), who have suitable skills and experience in noise monitoring, should be considered competent for the purpose of this condition and definition.

The EPA considers the purpose of ensuring a person is competent to measure and evaluate environmental noise is so that the EPA can have confidence that the reported measurements and conclusions drawn from them are credible and can be relied upon for regulatory purposes. For a person to **“be able to demonstrate competence through professional experience and/or technical expertise to the satisfaction of the EPA”**, that person will need to be able demonstrate their competence based on a number of considerations, including academic qualifications, formal training, competency based training, licensee’s procedures and field forms and examples of monitoring reports that demonstrate the person’s competence.

The EPA is currently updating the Approved Methods and a full explanation of these considerations will be included. The Approved Methods are expected to be published in early 2022 however the EPA is happy to provide further detail of the requirements via email to stakeholders upon request.

Water Discharge Impact Assessment

EPA is currently exploring development of guidance material on how to conduct a water pollution impact assessment consistent with s45 POEO Act requirements. It is noted that discharge limits are derived on a case and site-specific basis.

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