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TWEED SHIRE COUNCIL	
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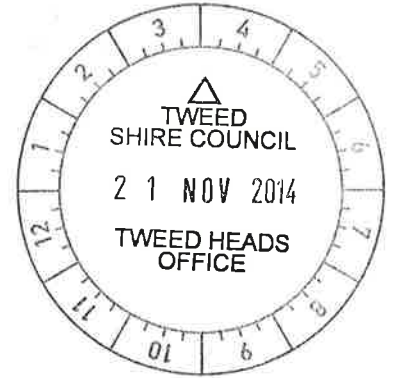
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17 November 2014

Our Ref: WIL 14/120

The General Manager
Tweed Shire Council
PO Box 816
Murwillumbah NSW 2484

Dear Sir



Construction of a Farm Road at Lot 11 DP 1192473 No. 389 Dulguigan Road, Dulguigan

1.0 Introduction

We refer to Council's letter dated 1 October 2014 requesting clarification of work undertaken on the abovementioned property. On behalf of our client Mr Derek Williams, we submit the following formal response.

2.0 Background

Since purchasing the property the current land owner has been undertaking improvements including maintenance to the main farm road on the western boundary, installation of new culvert crossings to the drain located within the site and the erection of a new dwelling house and shed (DA13/0160).

Given the limited economic return from the cultivation of sugar cane, the owner intends to pursue alternative agricultural activities. In this regard the proposal is to undertake extensive agriculture comprising the growing of stock feed crops to be bailed and used on site to supplement feed for grazing cattle.

The cattle, and possibly other livestock, are to be managed and rotated through a number of paddocks to be created on the property. Construction of a new farm road has been commenced to provide access throughout the site.

A brief chronology of events is provided as follows:

- **In 2011** the owner received a number of complaints regarding works undertaken on the farm road and crossings over the drain.
- **On 13 September 2011** Tweed Shire Council Officers, Steve Bishop (Development Assessment Planner-Compliance Officer) and Ian Dinham (Flood and Stormwater Engineer) attended the site. The TSC File Note dated 15 September 2011 is provided as **Attachment 1**. At that time, the owner notes that advice from Council Officers was that the future farm roads (i.e. which would use the installed crossings across the drain) do not require approval so long as it does not interrupt the overland flow of water.

- **In January 2014** the owner completed the first layer of road base, as shown in **Photograph 1**. The alignment of the farm road was marked with white tipped pegs. These pegs marked the alignment of the farm road in its entirety, and remained in place for a number of months.



Photograph 1 – The subject farm road, viewed from the west on 1 February 2014

- **In early February 2014** Steve Bishop the Development Assessment Planner-Compliance Officer and another Council Officer attended the site following a further complaint. It is understood that the basis of the complaint was that the farm road was being made too high. At that time the advice from Council Officers was that if the farm road was below the level of the existing driveway there is no issue.
- **In late September 2014** the farm road was "primed".
- **On 1 October 2014** a letter was issued by Tweed Shire Council. That letter is the subject of this response.
- **On 16 October 2014** Lindsay McGavin, Manager of Development Assessment and Steve Bishop inspected the site. The owner was advised that the sealing of the farm road could be completed so as to protect the "prime".
- **On 24 October 2014** DAC made an application for a meeting with Council's Development Assessment Panel to discuss the subject farm road and future work.
- **On 29 October 2014** Tweed Shire Council by email advised that DAP was not an appropriate forum given that the farm road has already been constructed and Council Compliance Officers are already liaising with the owner in regards to this matter.

3.0 Description of the Work Undertaken and Comment

The work undertaken to date comprises the construction of a farm road. Road base material, bitumen and gravel have been imported to the site.

The farm road is 10m wide and is constructed over a distance of approximately 2400m.

Culverts have been installed in the artificial drain within the site to facilitate crossing of the drain.

We are instructed by our client that the level of the farm road is below that of the main property access farm road, which in turn is lower than property access farm roads located on neighbouring properties.

In relation to the comment in Council's letter of 1 October 2014 that the farm road is of a more significant size and finish than previously anticipated, the owner notes that the extent of the farm road had been pegged and formed since January 2014. He also notes that the extent of the track was clearly visible when Council Officers inspected the site in February 2014 and that he advised those Officers of his intention to seal the farm road. No issues were raised at that time.

4.0 The Proposed Use of the Farm Road and the Statutory Planning Context

The existing road has been constructed for the movement of farm machinery and equipment to the various parts of the property. The farm road is almost completed with minor additional gravel and bitumen sealing to be applied. Short lengths of "link" roads are to be constructed to improve accessibility throughout the property.

Construction of the farm road, being development for the purpose of extensive agriculture is permissible, without development consent in the subject RU1 Primary Production and RU2 Rural Landscape Zone under Tweed LEP 2014.

The NSW Office of Water has indicated by letter dated 4 November 2011, that a controlled activity approval is not required (see **Attachment 2**). We submit that no other approvals, licences or permits are required and accordingly there is no determining authority for the activity. The existing farm road is therefore lawful and does not require any further approvals.

5.0 Future Work

Given the history of complaints received by Council in relation to works on this property, we take this opportunity to inform Council of other intended work to be undertaken.

Future work includes the completion of the farm road sealing work and the erection of structures, including a new hay shed as a skillion roof extension to the existing shed constructed in accordance with DA 10/0826 and the erection of a number of stock shade shelters. The proposed structures will be exempt development pursuant to SEPP Codes 2008 being farm buildings, each less than 200m².

The existing and proposed work is indicated on the Concept Plan provided as **Attachment 3**. It is submitted that no other approvals are required in relation to that work.

6.0 Conclusion

In summary, on the basis that the subject work has been undertaken as development for the purpose of extensive agriculture, we submit that no other approvals are necessary and that the farm road may remain and be completed as described in Section 5 above, without any further approvals.

It is acknowledged that if the farm road were used for purposes other than for agriculture, then a Development Consent may be required for that use. This is considered a separate issue to the construction of the farm road.

Given the ongoing nature of Council's enquiries and inspection of work on the site we request a written response to this submission confirming Council's position on this matter.

Please do not hesitate to contact Darryl Anderson or Brad Lane should you require any further information in relation to this matter.

Yours faithfully
Darryl Anderson Consulting Pty Ltd

A handwritten signature in black ink, appearing to read 'Darryl Anderson', written over a horizontal line.

Darryl Anderson
Director

Encl.

cc: Mr Derek Williams

Attachment 1

TSC File Note dated 15 September 2011

File Note

Subject: Alleged roadworks
Address: 389 Dulguigan Road
Date: 15 September 2011
File: LN:76096 L12SB1

Background:

This matter has been raised previously by a neighbour. Accordingly, Council's Flood/Stormwater Engineer, Ian Dinham and I inspected the site and concluded that there was no particular evidence of any unreasonable change to the existing internal driveway whereby it would definitely affect floodwaters. The new owner was seeking to upgrade the property, introduce some difference forms of cropping (other than the historical sugarcane) and ultimately build a replacement dwelling to live in on the property. The resurfacing of the roadway was part of that initial upgrade.



Inspection:

- I inspected the site at 3pm on 13 September 2011 and observed the following:
 - The driveway was essentially in the same state as it was when Ian Dinham and I had previously inspected it earlier in April 2011. It was not higher or different to that previously observed.
 - The piped cross-overs over the drain were the same as previously observed.

- I rang the owner, Derek Williams (0412 843 369) and had the following conversation:

I said "Are you doing further roadworks?"

He said "No, I simply upgraded the old driveway because when we bought the property, it was quite worn out and pot-holed. We intend to live here and develop the farm."

I said "but have you raised it?"

He said "no, although in places it was depressed so we simply made it more uniform. In any case, we have run a laser level over it and its approximately 100mm lower than the neighbouring driveway 50m away which runs parallel to ours...and its approximately 300mm lower than Boyds Lane piped drain cross-over which is only a kilometre away to the west. Our driveway is lower than both these upstream roadways and will not affect any floodwaters."



I said "Apparently the Dulguigan Drainage Union gave you approval to install a 'single pipe cross-over' but they now complain you built three."

He said "No, I sought permission from them to build cross-overs 'plural' – I did not want to be restricted to the existing cross-over as I want the flexibility to allow movement of some larger farm machinery I will be getting soon."

I said "There is an accusation that the angle is wrong and consequently slowing water and causing erosive whirlpools. This has caused erosion and a 'banking up' of flood flows".

He said "This is all nonsense. As you can see there is no erosion or any affect of any imaginary 'whirlpool'. This has become a personal attack and quite vindictive. They can't win one argument, so they invent another."





- The current complaint has enclosed a copy of correspondence to the NSW Office of Water (within the DECCW), together with that department's written response dated 12 May 2011. It is interesting to note that the letter does not confirm any breach, but simply states that it will be investigated. Apparently two officers have attended the site and found no basis for complaint in relation to water use and drainage.

Conclusion:

- I did not observe any difference in the driveway from last inspection with Ian Dinham. I do not consider the works to be any more than maintenance and upgrade of an existing farm driveway. It is the legitimate and sole access to the farm and in any case, would be exempt under 2.27 & 2.28 of the SEPP (Exempt and Complying Development Code). Consequently, no DA would be required.
- The owner alleges that laser levels have proven the driveway is still lower than other local roadways. Even if this is not accurate, there is no obvious variation of Mr Williams driveway when compared to other local roadways and the level of the surrounding paddocks.
- I saw no evidence of any erosion in any section of the drainage canal. In particular there was no evidence of any erosion near the pipes entry/exit points which suggests there are no whirlpools created.

Steve Bishop
DEVELOPMENT ASSESSMENT PLANNER – COMPLIANCE

Attachment 2

Letter from NSW Department of Primary Industries, 4 November 2013



Department of Primary Industries

Office of the Director General

DGPO13/362

Mr Anthony Abbott
A K Abbott & Co
Solicitors
PO Box 733
ELANORA QLD 4221

Dear Mr Abbott

Mr D B Williams - Dulguigan Drainage Union

I refer to your letters dated 30 July 2013 regarding your client's communications with the NSW Office of Water (NOW) in relation to the Dulguigan Drainage Union (DDU) and a watercourse located on his property.

On 4 March 2013, your client, Mr Williams, was issued with a warning letter for carrying out works without a controlled activity approval (CAA). The letter was issued following a compliance investigation conducted by officers from NOW and was based on the best information available to the officers at that time.

NOW recently conducted a review of the matter, including a new assessment of the watercourse located on Mr Williams' property. The review determined that the watercourse constitutes a drain and does not fall within the definition of a river, under the *Water Management Act 2000* (WM Act).

Accordingly, Mr Williams did not require a CAA for the work carried out on the drain and the warning letter issued to him for contravention of section 91E of the WM Act will be retracted and NOW's internal database updated to indicate that Mr Williams did not commit an offence.

Your letter enclosed a number of emails between Mr Williams and officers from NOW and requested a response to the queries raised in those communications. Responses to the issues raised are included in the attachment to this letter.

I trust the above and attached information clarifies the Department's position on these matters and addresses your client's concerns.

If you have any further questions in relation to this matter, please contact Mr Viv Russell on 02 6841 7428.

Yours sincerely

MICHAEL BULLEN
ACTING DIRECTOR GENERAL

4.11.2013

Encl.

Issues raised in separate communications with the NSW Office of Water

Communication dated 6 March 2013 – From Aluma-Lite.com.au to Andrew Mannall, NOW

Since NOW is claiming the drain as their own, is it going to remedy the damage done by the DDU to my property or seek a remedy by the executive of the DDU for the same?

NOW is not "claiming the drain as their own." The WM Act makes provision for drainage approvals, however these provisions have not yet commenced. Accordingly, a drainage approval is not currently required and the drain is not regulated by NOW. Any remedy that Mr Williams is seeking in relation to damage to the drain is a matter that he should resolve with the DDU.

Communication dated 22 April 2013 – From dbwilliams to Jamie Morgan, NOW

Questions for Jamie Morgan

1. Why was I cautioned?

On 10 May 2012, Mr Williams participated in an audio recorded interview with NOW investigating officer, Andrew Mannall. At this time, Mr Williams was cautioned in regards to the offence of carrying out a controlled activity without a CAA. An investigating officer will issue a caution where they determine it is appropriate to do so.

At the completion of the investigation, NOW issued a warning letter to Mr Williams for an offence against s91E of the WM Act for carrying out a controlled activity without an approval. At the time the warning letter was issued the watercourse was considered to be a "natural channel artificially improved" and to come within the definition of a river under the WM Act. Investigating officers from NOW made this determination based on information obtained from a cadastre map, a 1:25000 topographical map, a site inspection and interviews with members of the DDU.

Whilst the investigating officer considered Mr Williams had committed an offence, NOW opted to issue Mr Williams with a warning letter rather than a penalty infringement notice due to mitigating circumstances.

The mitigating circumstances were that Mr Williams had sought approval from the DDU to carry out the works, and the DDU had purported to approve the works. Mr Williams was under the impression that his works had been legally authorised.

2. I would like a letter stating that my crossings are allowed to stay as there is no adverse effect on the water course.

NOW confirms that it will not be taking any action in relation to the three crossings over the drain that were constructed in early 2010.

3. Are you going to or do you have the authority to make the DDU reinstate the drain to its previous dimensions?

There is no legislative basis for NOW to compel the DDU to restore the drain to its previous dimensions. This is a matter for the DDU.

4. Did the DDU have the authority to allow me to construct my crossings?

At the time the DDU authorised Mr Williams to conduct the work on the drain, NOW investigating officer considered the watercourse to be a river and the works to require a controlled activity approval which could not be issued by the CAA.

Following NOW's recent determination that the watercourse constitutes a drain and not a river, it is accepted that no controlled activity approval was required to construct the crossings. In future, when the drainage approval provisions of the WM Act have commenced, a drainage approval may be required.

Did the DDU as they were, have the authority to do any works on the drain, e.g. widen it?

Following NOW's recent determination that the watercourse constitutes a drain and not a river, no authority is required under the WM Act to carry out works on the drain.

Questions for Patrick Pahlow

A. How wide and deep should the drain be?

When the drain was originally constructed many decades ago, no approval was required. The dimensions of the drain listed in the 1936 Gazette (as referred to in Mr Williams' email to Patrick Pahlow dated 7 June 2013) reflect the size of the drain at the time the map was drawn but are not measurements that have been specified by legislation. The appropriate width and depth of the drain is not a matter for NOW.

B. Should the bottom of the drain be deeper than the concrete apron of floodgate 188?

This is not regulated by NOW. It is recommended that this issue be raised directly with the DDU.

C. Should the DDU have consulted an engineer before doing any works on the drain in relation to what the drain dimensions and heights should have been?

The drain does not fall within the remit of NOW so this is a question that should be directed to the DDU.

D. How deep and wide was the drain when it was originally designed/installed? This design is required under the old Act and was required to be lodged with your office.

NOW does not keep information regarding the depth and width of agricultural drains. There is no requirement for NOW to keep that information.

E. Can you forward me that design?

See point D above. NOW do not have a record of this design.

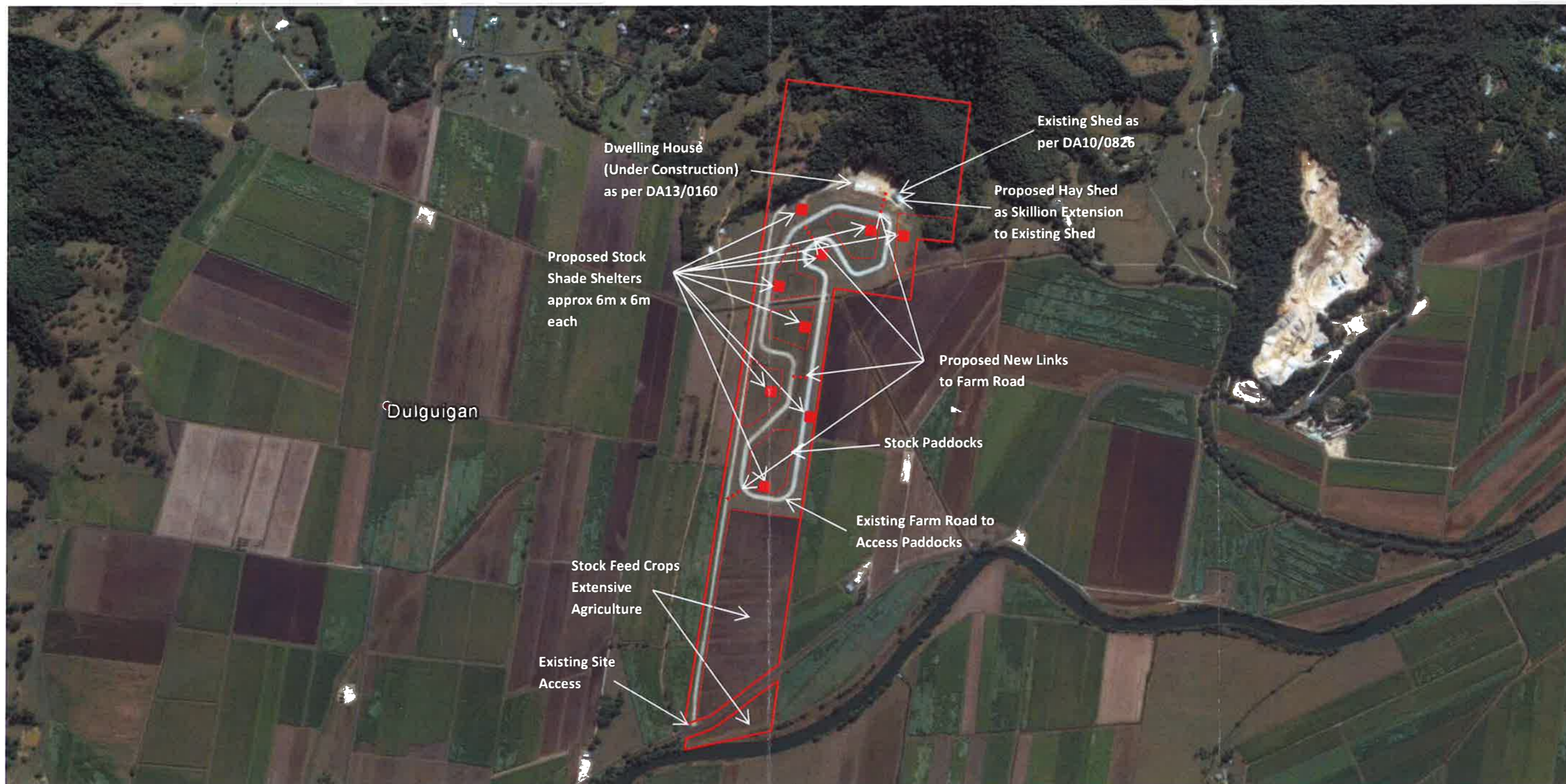
Communication dated 24 April 2-13 – From dbwilliams to Jamie Morgan, NOW

1. What is the minimum sized pipe I would be required to put in the drain by NOW when I put in another crossing? Could you please provide reasons.

As stated above, NOW does not regulate agricultural drains. Accordingly, NOW does not stipulate any dimensions for the construction of this type of drain.

Attachment 3

Concept Plan



<p>Date: 21.10.2014</p>	<p>Site: Lot 11 DP1192473 No.389 Dulguigan Road, Dulguigan</p>	<p>Title: SITE CONCEPT PLAN</p>	<p style="text-align: center;">  </p>
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