Dear Mr O’Brien

RE: Development Application: 10.2019.41.1
Water Recreation Structure / Wharf or Boating Facility Construction of pontoon and walkway structure connected to existing boardwalk with associated lighting, filtered water connection and sewer dumping facility

I refer to your letter dated 25 March 2019 to the Office of Environment and Heritage (OEH) seeking comment on the above development application. This response relates to statutory matters in applying the National Parks and Wildlife Act 1974 and the Biodiversity Conservation Act 2016 with reference to our comments provided to Council on the 6 February 2019.

We have reviewed the development application documents and provide the following comments.

Biodiversity
The pontoon will be adjacent to a stand of Eucalyptus camaldulensis riparian vegetation, based on OEH mapping. From the information provided with the application none of this existing native vegetation is proposed to be removed for the construction of the pontoon. In relation to biodiversity, we consider it unlikely that the proposed development would significantly affect threatened species or their habitat.

We recommend including a condition, if development consent is granted, to ensure that all existing native vegetation is protected during construction of the pontoon.

Aboriginal cultural heritage
With regard to Aboriginal cultural heritage (ACH), we reiterate our advice to Council on 6 February 2019. The proponent should conduct, as a minimum, an assessment in accordance with the ‘Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales’ (DECCW 2010) to determine whether the proposed activity will harm Aboriginal objects with potential to occur in the area of impact.

We also recommend inclusion of the following condition, if development consent is granted, to ensure compliance with legislation in place to protect Aboriginal sites and objects in NSW and ensure that no additional harm is caused if ACH is encountered:
If any Aboriginal object is discovered and/or harmed in, or under the land, while undertaking the proposed development activities, the proponent must:

- Not further harm the object;
- Immediately cease all work at the particular location;
- Secure the area to avoid further harm to the Aboriginal object;
- Notify OEH as soon as practical on 131555, providing any details of the Aboriginal object and its location; and
- Not recommence any work at the particular location unless authorised in writing by OEH.

In the event that skeletal remains are unexpectedly encountered during the activity, work must stop immediately, the area secured to prevent unauthorised access and NSW Police and OEH contacted.

Should you wish to discuss these matters further please contact Daris Olsauskas on (02) 6022 0644, or at daris.olsauskas@environment.nsw.gov.au.

Yours sincerely

MIRANDA KERR
A/Senior Team Leader Planning
South West Branch
Conservation and Regional Delivery Division
Office of Environment and Heritage

OEH has a statutory role under the National Parks and Wildlife Act 1974 (NPW Act) for the protection and preservation of Aboriginal sites. It is an offence to do any of the following things without an exemption or defence provided for under the NPW Act and penalties apply:

- knowingly harm or desecrate an Aboriginal object (the ‘knowing’ offence)
- harm or desecrate an Aboriginal object or Aboriginal place (the ‘strict liability’ offence)

Despite prior advice provided by OEH, the information provided does not address Aboriginal cultural heritage (ACH) and provides no details on the impacts, or otherwise, that the proposed activity may have on ACH with potential to occur.

The Murray River is a landscape feature considered archaeologically sensitive and indicative of past Aboriginal occupation with significant potential to contain Aboriginal sites/objects. As a minimum we recommend the proponent undertake an assessment in accordance with the ‘Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW’ (the Code) and in particular the generic Due Diligence process on pages 10-14 of the Code -

- To identify whether or not Aboriginal objects are, or are likely to be, present in the proposed development area;
- To determine whether or not the proposed activities are likely to harm Aboriginal objects (if present);
- To determine whether further assessment in the form of an Aboriginal Cultural Heritage Assessment (ACHA) and/or an Aboriginal Heritage Impact Permit (AHIP) application is required.

A copy of the Code can be found at the following link: 

Anyone who exercises due diligence in determining that their actions will not harm Aboriginal objects has a defence against prosecution for the strict liability offence if they later harm an object. As stated on Page 9 of the Code, OEH “will not approve or certify a person’s compliance with their due diligence requirements carried out under this or any other code” as this is the responsibility of the company or individual undertaking the activity.

Investigations under the code include the following:

- A search of AHIMS to assist in the identification of previously recorded Aboriginal objects or places in the project area
- Identification of landscape features including land within 200 metres of water (e.g. Murray River)
- Desktop assessment including a review of previous archaeological and heritage assessments and any other relevant material
- Visual inspection of the project area for the identification of Aboriginal objects (if present)
- Assessment as to whether an AHIP is required.

It is important that due diligence measures are documented clearly and that all statements and conclusions made in relation to ACH are confirmed with appropriate supporting material. If Aboriginal objects are found to be directly or indirectly adversely affected by the proposed development, the proponent will need to apply for, and be issued, an Aboriginal Heritage Impact Permit (AHIP) by OEH to comply with the NPW Act. Details on how to apply for an AHIP can be obtained from the OEH website at:

OEH keeps a register of notified Aboriginal objects and declared Aboriginal places in NSW (AHIMS). You can search AHIMS to discover if an Aboriginal object has been recorded, or an Aboriginal place declared, on any parcel of land. More information about accessing AHIMS, is available on the OEH website at www.environment.nsw.gov.au/licences/WhatInformationCanYouObtainFromAHIMS.htm.
It is also important to note that the information in AHIMS may not be up-to-date, and as identified on page 16 of the Code, only remains valid for a period of up to 12 months. Please also note that surveys for Aboriginal objects have not been done in many parts of NSW and, although not previously recorded in AHIMS, ACH may occur within the landscape.

We recommend inclusion of the following protocol to ensure compliance with legislation in place to protect Aboriginal sites and objects in NSW and ensure that no additional harm is caused if ACH is encountered:

*If any Aboriginal object is discovered and/or harmed in, or under the land, while undertaking the proposed development activities, the proponent must:*

- Not further harm the object;
- Immediately cease all work at the particular location;
- Secure the area to avoid further harm to the Aboriginal object;
- Notify OEH as soon as practical on 131555, providing any details of the Aboriginal object and its location; and
- Not recommence any work at the particular location unless authorised in writing by OEH.

*In the event that skeletal remains are unexpectedly encountered during the activity, work must stop immediately, the area secured to prevent unauthorised access and NSW Police and OEH contacted.*