Submission No 52

INQUIRY INTO PERFORMANCE OF THE NSW ENVIRONMENT PROTECTION AUTHORITY

Organisation: Dungog Shire Council

Date received: 26/08/2014

DUNGOG SHIRE COUNCIL

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Ref: EF14/5

26 August 2014

Director
General Purpose Standing Committee No. 5
Parliament House
Macquarie House
SYDNEY NSW 2000

Dear Sir

Re: Inquiry into performance of NSW Environmental Protection Authority (EPA)

Dungog Shire Council wishes to make a submission to your Committee's Inquiry into the performance of the NSW Environmental Protection Authority (EPA) in relation to its grant of an amended Environmental Protection Licence number 1378, initially to Railcorp and subsequently to Buttai Gravel Pty. Ltd. in respect of a quarry known as the Martins Creek Quarry currently operated by Buttai Gravel Pty. Ltd. on certain land situated in the Shire of Dungog.

Council has previously made representations to both the EPA and the then Minister as regards a clear deficiency in their assessment process associated with this Quarry, the regional office of the EPA rejected Councils submission and has effectively stonewalled the Council ever since and in some circumstances the behaviour of certain officers of the Authority was bordering upon bullying.

Dungog Shire Council (the Council) contends that in granting the EPL Variation the EPA failed to comply with the provisions of the *Protection of the Environment Operations Act* (the POEO Act), particularly the following provisions:

Section 45(i) provides inter alia that: in exercising its licensing functions the EPA was required to take into account:

> "*any relevant environmental impact statement, or other statement of environmental effects prepared or obtained by the applicant under the Environmental Planning and Assessment Act 1979*".

Section 50(2) provides inter alia that:

> *"A licence that relates to controlled development must not be granted or varied (other than on the initiative of the EPA) by the appropriate regulatory authority, unless development consent has been granted for the controlled development...."*
>
> Note a "controlled development" is relevantly described as being a development which cannot be carried out without development consent being granted under the *Environmental Planning and Assessment Act* (the EPA Act).

Section 58(6) provides inter alia that:

> *(6) If:*
>
> *(a) the variation of a licence will authorise a significant increase in the environmental impact of the activity authorised or controlled by the licence, and*
>
> *(b) the proposed variation has not, for any reason, been the subject of environmental assessment and public consultation under the Environmental Planning and Assessment Act 1979,*
>
> *the appropriate regulatory authority is to invite and consider public submissions before it varies the licence.*

The Council contends that the EPA's failure to comply with the above provisions of the POEO Act amounts to a failure not only to comply with its statutory duties but amounts to a failure to comply with the objects of the EPA as set out in Section 6(1)(a) of the *Protection of the Environment Administration Act 1991* and Section 7(1) of the same Act.

Background

Dungog Shire Council is a small rural Council with limited financial and other resources.

Martins Creek Quarry is a quarry originally operated by Railcorp and its predecessors in the Shire of Dungog.

The quarry currently comprises the following lands:

1. Lot 1 DP1006375 and Lot 1 DP204377 on which is situated a crushing plant. Railcorp previously contended that the crushing and processing operations taking place on that land were protected by virtue of the activity being a "continuing use" of the land pursuant to the EPA Act.

   Railcorp at all times conceded that the maximum permitted capacity of the processing activities taking place on the land was to output a maximum of 310,000 tonnes per annum of processed gravel (input 449,000 tonnes of bulk material), accordingly any intensification of the use of the plant to process more than 449,000 tonnes of bulk material per annum required development consent. Any extension beyond this amount required development consent.

2. Lots 5 and 6 DP242210. Development Consent was granted for this land on 7 March 1991 to Railcorp. The Consent was for *"an extractive industry being a quarry winning material primarily for railway ballast"*.

   The consent contained inter alia the following conditions:

   1 the development being conducted in such a manner so as not to interfere with the amenity of the neighbourhood in respect of noise, vibration, smell, dust, waste water, waste products or otherwise

   6 The applicant shall not permit the transport of more than 30% of the quarry products by road without the further specific approval of the Council.

   7 (b) The applicant shall ensure that all environmental safeguards proposed for the development and required by this consent and other statutory approvals are in force.

   Council takes the view that condition 7(b) invokes the safeguards and limitations proposed in the EIS and makes the EIS part of the Consent.

It is Council's contention that the combination of the consent conditions and the assurances contained in Railcorp's EIS make it clear that the extractive operations are limited to the following:

A. Production of no more than 300,000 tonnes per annum *(the EIS clearly limited production to this amount)*
B. Truck movements, no more than 24 truck movements a day; *(the EIS clearly limited production to this amount)*
C. Extraction and transportation and processing to be limited primarily to the production of a railway ballast; *(see EIS & Consent)*
D. Imposing limits on the annual transportation of quarry products by road to no more than 30% of the annual production of the quarry *(see EIS & Consent)* and;
E. Limiting extractive operations to Lot 5 and to a maximum depth of 40.0 R.L. as depicted in the plan forming part of the EIS (*the EIS clearly limited production to Lot 5 only)*

Plans in the EIS clearly show that extraction was not permitted to take place on Lot 6 which was simply to be used as an internal haul route. Aerial photographs show that extraction has in fact taken place on Lot 6 and Council takes the view that the extractions taking place on Lot 6 is unlawful.

3. Lot 42 DP815628. Prior to the grant of the EPA Variation in 2007, the Consent for any quarrying activities on the abovementioned Lot had expired. Accordingly there was no basis on which any licence could be granted for extractive operations or indeed any operations to take place on the land, as the development consent did not exist at the time of the EPL Variation.

The EPL Variation

Prior to the variation of the EPL in 2007, the Licence over the subject quarry was limited to the processing of no more than 500,000 tonne of material and the extraction of no more than 500,000 tonnes of material.

On 22 December 2006 Railcorp, as the occupier of the Martins Creek Quarry, lodged an Application with the EPA to vary the scale at which the activity could be carried out from a maximum of 500,000 tonnes to a maximum of 2,000,000 tonnes. A 400% increase in the processing and extractive output of the quarrying activities on the above lots.

Information recently obtained by Council indicates that in 2003/2004, 2004/2005 and 2005/2006 (prior to an application being made for the EPL Variation) Railcorp had exceeded its production limits and processing limits of 500,000 tonnes authorised under the then existing EPL.

It appears that the EPA was aware of these transgressions and did nothing to enforce the limit.

In January 2007 the EPA requested Railcorp to confirm that the current Consents permitted 780,000 tonnes per annum to be processed and extracted.

On 8 January 2007 Railcorp provided to the EPA a copy of Dungog Council's Minutes of a meeting dated 18/5/1999 which clearly showed that the processing of material was limited to 449,000 tonnes of bulk material per annum. Railcorp also enclosing a copy of the Development Consent for the extractive industry on Lots 5 and 6 which clearly contained the conditions of consent including condition 7 which Council says invoked the limitations proposed in the EIS.

Council concedes that the terms of the Development Consent over Lots 5 and 6 granted on 7 March 1991 did not specifically limit the extraction volumes, however, this is plainly because clause 7(b) provided that the Consent was subject to a requirement that the *developer ensure that all environmental safeguards proposed for the development were* enforced. The EIS was the document that proposed these safeguards.

On a clear reading of the Consent it is Dungog Council's legal advice that clause 7(b) has the effect of incorporating the environmental safeguards proposed (EIS) into the Consent.

It is clear that at all material times the EPA had in its possession the EIS lodged with the relevant Application for Lots 5 and 6 and it was recently acknowledged at a public meeting by representatives of the EPA that the EPA **did not look** at the EIS at the time of granting the EPL Variation.

Had the EPA looked at the EIS it would have noted the following:

a. That no extractive operations were proposed on Lot 6 and accordingly the Licence could not authorise extraction on Lot 6.
b. That the estimated annual production was between 250,000 and 300,000 tonnes, with 24 truck movements per day with only 80,000 tonnes being transported by road.

There was no basis on which it could be said the Consent authorised extraction of more than 300,000 tonnes of material.

The Council has obtained certain documents from EPA under the provisions of the *Government Information (Public Access) Act 2009* and it is noted that on 5 February 2007 an officer of the Dungog Council advised Mr Ross Bylinsky that Dungog Council took the view that processing was limited to 449,000 per annum.

It is noted that on 8 February 2007 there is a record of a conversation between an officer of the EPA and Brad Hartley from Railcorp, which indicated that the EPA could not proceed with the Licence variation until the EPA was satisfied that there was an approval to process more than 449,000 tonnes per annum.

In purported answer to this request on 20 March 2007 Railcorp forwarded to Mr Bylinsky a copy of a Development Consent over Lot 42 DP815628, which was for a limited extractive industry (no processing) on lot 42.

It appears that that document satisfied the EPA that processing was not limited to 449,000 tonnes. This was despite the fact that the document clearly indicated in the conditions that the Consent had expired in October 2006 and in any case did not authorise the processing of material.

Shortly after the receipt of that document on 2 April 2007, the EPA granted the Licence Variation allowing the processing of material up to 2,000,000 tonnes per annum and the extraction of material of up to 2,000,000 tonnes per annum.

Council subsequently protested the grant of the Variation and pointed out to the EPA that in granting the variations to the EPL the EPA had failed to comply with the objects and Sec 45 and Sec 52 of the POEO Act, in that it had not considered the EIS, which clearly restricted the amount of extraction to 300,000 tonnes per annum. The Council pointed out that this amounted to a fourfold increase in the extractive and processing capacity of the quarry which would necessarily mean a fourfold increase in the impact of the activities on the environment, including the road network in surrounding areas and requested that the variation be reversed so as to only permit extraction and processing of up to 500,000 tonnes of material.

From documents received under the GIPA application, it is clear that the EPA completely ignored the provisions of the EIS, did not seek its own legal advice and belatedly relied on legal advice provided by Railcorp (which in Council's view was plainly wrong) about 1 year after granting the variation but did not give the public or council an opportunity to comment on the legal advice or rebut it.

It is clear that the EPA did not seek its own legal advice (which it refuses to disclose to Council) until well after the EPL Variation was granted.

The grant of the EPL Variation without any public consultation and without looking at the previous EIS means that various townships, including the township of Martins Creek and Paterson and the Dungog Shire Council, are severely impacted by traffic noise and vibration and the townships have had to endure an increase in traffic movements from the 24 trucks originally envisaged to 600 truck movements a day in some instances, an intolerable burden on residents who were deprived of their statutory rights to comment on the variation.

In addition the increased traffic has resulted in substantial damage to the roads and adjoining buildings, including heritage buildings.

In the circumstances that the EPA has not complied with its obligations under the POEO Act, the Council has requested the EPA to vary the Licence back to the original maximum of 500,000 tonnes per annum but the EPA has failed to do so.

The Council takes the view that the EPA's failure to comply with the provisions of Sections 45(i), 50(2) and 58(6) of the POEO Act not only deprived the public of substantial statutory rights but also vitiates the EPL and renders it a nullity.

In the circumstances, unless the EPA varies the Licence, Council will have to spend its scarce resources on litigation in the Land and Environment Court to have the EPL Variation declared invalid.

Since it is within the EPA's power to vary the Licence that was mistakenly granted, Council asks that this Inquiry consider whether in all the circumstances the EPA has discharged its statutory functions in a proper manner and if not, make recommendations to remediate the current problem posed by the unlawful variation and make a recommendation that the government compensate the Council for the cost of repairing and mitigating the damages caused to the road network and surrounding buildings.

Yours faithfully

Craig Deasey PSM
GENERAL MANAGER