

Submission
No 169

INQUIRY INTO 'ENERGY FROM WASTE' TECHNOLOGY

Organisation: Mountain Districts Association

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Mountain Districts Association

27 May 2017

To:

The Hon Paul Green

Chair

Portfolio Committee No 6 - Planning & Environment

Inquiry into matters relating to the waste disposal industry in New South Wales, with particular reference to 'energy from waste' technology.

Submission made by:

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Submission authorised by:

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KEY ISSUE

The NSW Government has responded to the projected population growth in NSW and the burgeoning problem of waste generated in NSW by committing extensive funds from the waste levy over a nine year period (2012-2021).

The *Waste Less, Recycle More* initiative is being facilitated through funded programs delivered by the Environment Protection Authority (**EPA**) and the Environmental Trust.

To date a total in excess of \$802 million has been announced.

The initiative includes nine areas of funding through the EPA and a further six contestable grant programs through the Environmental Trust.

One of the objectives of the initiative is to drive innovative regulatory approaches to protect the environment and support investment in new waste programs.

In his foreword to the announcement of the \$337 million extension to the Waste Less, Recycle More initiative, the Minister for the Environment said *"By creating an innovative and robust waste and recycling sector, we can establish best-practice systems and empower local communities to create and maintain clean environments and reduce landfill."* (Emphasis is that of Mountain District Association)

A target for the NSW Waste Avoidance and Resource Recovery Strategy over 2014-2021 is to *"increase the proportion of waste diverted from landfill to 75%."*

It is clear that in the first quarter-century of this millennium, the NSW Government is intent on tackling the problem of waste head on, including through the *Energy from Waste* program, yet its own regulatory involvement is, in the main, not supporting it in the manner that it should.

One of the problems is that in collecting huge amounts of money from the waste levy, it is in the EPA's interest to ensure the continuation of this lucrative service and it appears to the general public to be less committed to its charter to Protect the Environment.

The community has developed a cynical disregard for the EPA and the failure of the regulatory system in NSW and this is something that the Committee needs to address and seek to reverse.

A CASE STUDY OF A FAILURE IN THE REGULATORY SYSTEM ASSOCIATED WITH THE WASTE INDUSTRY

Mangrove Mountain Landfill on the NSW Central Coast (Lot 584 DP 809570, Hallards Road, Central Mangrove NSW 2250) is an example of a gross failure of process regulating the waste industry, which has allowed a hazardous solid waste landfill to develop and to proceed unrestrained, without effective regulation, for almost 11 years.

Mangrove Mountain Landfill is presently operated by Verde Terra Pty Ltd and Mangrove Mountain Landfill Pty Ltd, both with the same business address (c/- JAG BUSINESS, Jacobs St, BANKSTOWN) and sole Director and Secretary, Mr Damien Ryan.

The 40ha site involving the Mangrove Mountain Golf Course and Landfill was purchased by Mangrove Properties (NSW) Pty Ltd, also with the same business address and sole Director and Secretary, Mr Damien Ryan, as the two companies above, in September 2014, immediately following the conclusion of the case in the Land and Environment Court between the former Gosford City Council and the two operators mentioned above and other parties.

Interestingly, Bingo Pty Ltd, registered 28 April 2016 and also known as Bingo Industries Pty Ltd, shared the same business address as the three companies above during the period 28 April 2016 to 31 May 2016, before transferring to a separate address.

The environmental risk of this solid waste landfill is to the drinking water supply of the Central Coast region comprising 330,000 people. This population is estimated to rise a further 75, 000 by 2036.

On 6 October 1998, the former Gosford City Council (**GCC**) approved DA 23042/1998 for a minor remodelling project of the Mangrove Mountain golf course involving a small amount of inert fill. The

development consent included an Environmental Impact Statement 1992 and a Landfill Environmental Management Plan 1997.

The development consent approved a total over the life of the project of 240,000 m³ of material over the site. The material was to be in four locations with Area B, regulated by EPL 11395, receiving a maximum of 80,000 m³ (approximately 50,000 tonnes) of inert fill.

In 2001, Environmental Protection Licence (EPL) 11395 was issued by the NSW EPA, with a further 13 variations to it in the period 2002 - 2012.

The landfill site regulated by EPL 11395 sits in the catchment of the Ourimbah Creek system that supplies water into Mardi Dam and Mangrove Creek Dam. These two water storage facilities provide drinking water to the Central Coast population.

The EPA's Environmental Guidelines: Solid Waste Landfills, first released in January 1996, identified sites *within watercourses or within 40m of a permanent or intermittent watercourse* as environmentally sensitive and inappropriate areas for landfilling. This site had permanent watercourses running through it, which have been destroyed, and it sits above pristine groundwater aquifers. While it was never the intention of the development consent for this site to become a solid waste landfill, this is what has been allowed to happen through multiple failures in governance by the EPA and GCC.

EVIDENCE OF FAILINGS IN THE REGULATORY PROCESS

These are the simple facts, but unfortunately over the years it has become an incredibly complex matter. Due to the negligence of GCC and the EPA, the issue has become mired in controversy with a history of non-compliance, deliberate avoidance and denial of responsibility. To add to the complexity the Land and Environment Court became involved and instead of providing a resolution to the issue, its Court Order has added to the confusion.

As a result of all of this, the site has become a regional waste facility licensed to accept solid waste in the classification of general solid waste (non-putrescible), creating an irrefutable risk to the Central Coast drinking water supply. It has and continues to operate outside the law. As an example, photographic evidence shows that this landfill has accepted illegal waste such as chemically treated timber, despite it being prohibited in the development consent.

This is one example of alleged illegal activity and there are others. It has flouted the Water Act and Water Management Act. It has ignored the conditions of its licence and Amended Landfill Environmental Management Plan 2013, Leachate Management Plan 2013 and Soil & Water Management Plan 2009. It has totally ignored development consent DA23042/1998.

The following outline some of the negligence and statutory failings that have occurred since 2001 and exemplify the failed system that is meant to protect the community from environmental harm.

1. The Licence (EPL 11395) issued on 21 November 2001 was consistent with the development consent issued by Council. Under section 4.4 of the Environmental Impact Statement (EIS), it states:

Areas affected by the phased construction are coloured brown on Plan No 3. It is calculated that fill volumes totalling 240,000 cu.metres will be required to complete the reconstruction. Areas of fill per construction phase zone are as follows

Zone A	South-eastern depression	60,000 cu.mtrs
Zone B	North-western depression	80,000 cu.mtrs
Zone C	North-eastern boundary	30,000 cu.mtrs
Zone D	Northern sector mounds	50,000 cu.mtrs
	Tees and greens rebuilding	20,000 cu.mtrs

Conditions O10 and O11 of EPL 11395 state: *'The licensee must manage the disposal of waste at the premises in accordance with the progressive filling plan contained in section 4 of the LEMP'* and *'The licensee must ensure that the landfill cells are capped progressively and in accordance with condition O15 during operations and specifically at time when the level of waste reaches the final heights as detailed in section 4 of the LEMP'*.

These two conditions both refer to the final contour plan contained in section 4 of the LEMP. An examination of the final contour plan in section 4 of the LEMP as it relates to Plan No 3 in the EIS and the text in section 4.4 of the EIS confirms that the amount of waste authorised to be deposited into Area B was limited to 80,000 m³.

In July 2003, the EPA amended the EPL by deleting reference to section 4 of the original LEMP and referenced a second LEMP that was never submitted to the GCC. By deleting reference to section 4 of the original LEMP the EPA removed the condition to limit the amount of fill in Area B to 80,000 m³. **EPA failed to consult with CCC or implement the requirements under the *Protection of the Environment Operations Act 1997 (POEO Act)* that the second LEMP had no consent from Council.**

2. Notwithstanding that, it is the development consent which dictated that the amount of waste approved for the site in Area B was 80,000 m³. An examination of the registered survey plans submitted to the EPA confirms that as of 31 January 2012 that 753,188 m³ of material was in Area B (the area regulated by EPL 11395). This is 9.4 times above the volume of material permitted by the consent issued by GCC into Area B. **Contrary to the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, GCC failed to monitor compliance with DA23042/1998.**
3. Further, information obtained through GIPA identified that total waste exceeding 120, 000 tonnes was transferred by GCC from its waste management facilities at Kincumber and Woy Woy to Mangrove Mountain Landfill. **Contrary to the *EP&A Act*, GCC contravened its own DA23042/1998.**
4. Despite being specifically prohibited in the development consent, chemically treated timber containing arsenic and chromium is known to have been deposited at the landfill. Further EPL 11395 fails to exclude this product in the specification of permitted waste. **Contrary to the *EP&A Act*, GCC failed to monitor compliance with DA23042/1998 and the EPA failed to implement the requirements of the consent under the *POEO Act* .**
5. In 2012, GCC took the landfill operator to the Land and Environment Court (LEC), not to modify the 1998 Development Consent, but to rectify a breach of development consent under section 124 of the *Environmental Planning and Assessment Act 1979*. A Court Order was issued on 29 August 2014.

In it, order 3 stated:

"The Amended LEMP 2013 and the LMP 2013 referred to in orders 1 and 2 cannot be further altered except to:

- (a) amend the documents to reflect the consequences for a 6m reduction in the Mound on Area B in lieu of a 7.4m reduction, and
- (b) subject to subparagraph (a), any future amendments will only occur with the consent of Gosford City Council pursuant to operation of the statutory process available under the Environmental Planning & Assessment Act 1979 (or any equivalent replacement statutory scheme in the future). (MDA note: The responsibilities of GCC have been taken over by Central Coast Council (CCC).)

In the period since the LEC Order was made (29 August 2014), there have been substantial changes to both documents, but despite this having been brought to the attention of CCC, it has declined to take any action claiming that it did not have any statutory authority to require an s96 amendment. **Contrary to the EP&A Act, CCC has refused to take necessary statutory action.**

6. However, there is another twist in the tale of the Court Order. A reputable legal opinion has recently confirmed that, based on irrefutable evidence, the LEC Order **cannot be implemented**. A 5 page explanatory letter with a 39-page Appendix documenting key points of *prima facie* evidence has been submitted to CCC and the EPA advising them of this legal impasse.

The LEC case was based on the understanding that the regulated site was environmentally safe and that the EPL was valid. However, it is alleged, based upon overwhelming evidence, that neither was correct. This requires the LEC Order to be set aside. Documentary evidence can be made available to the Committee to support this claim.

The inability to implement the LEC Order means that the EPA cannot issue a further variation of EPL 11395, because there is no valid development consent.

The EPA was formally advised of this on the 23 February 2017.

MDA received a response from the EPA on 23 May 2017, three months later, and considers it unsatisfactory.

This represents a statutory failure of CCC under the EP&A Act and in not recognising this and acting upon it, complicit behaviour by the EPA and a failure under the POEO Act.

7. In the sixth to 13th renewals of EPL 11395 inclusive, amendments to the POEO Act in 2006 required the EPA to consider the Council consent and the contents of the EIS prior to renewing the licence on each occasion. An examination of the registered survey plans submitted to the EPA confirms that as of 31 January 2012 that 753,188 m³ of material was in Area B regulated by EPL 11395. As stated previously, this is 9.4 times above the volume of material permitted by the consent issued by GCC. In the view of MDA, the EPA failed to consider sections 45(i) and 50 of the POEO Act as required, thus rendering the EPL issued on 3 May 2012 **allegedly invalid**. **These represent numerous statutory failings by the EPA under the POEO Act.**

These all represent statutory failings of the consent and regulatory authorities that should not have happened and should be investigated.

INITIAL ACTION BY MOUNTAIN DISTRICTS ASSOCIATION REPRESENTING THE COMMUNITY

A complaint made against GCC and the EPA was detailed in a submission to the NSW Premier by Mountain Districts Association (**MDA**) in January 2016 in which a Commission of Inquiry to investigate this whole issue was requested.

The reason for making the submission to the Premier was to have it independently assessed. In its wisdom, the Premier's department decided that as it was a technical matter that it should go to the relevant portfolio Minister, the Minister for the Environment, who in turn referred it to the EPA for advice. The EPA should have disqualified itself given that it was a subject in the complaint.

The 163-page document contained a 13-page letter outlining the issues, a 54 page photographic dossier of water and leachate management issues at the Mangrove Mountain Landfill following the major rainfall event of January 2016 (Appendix 1) and 96 pages of supporting information (Appendix 2).

This was a comprehensive submission that detailed the statutory negligence of the two government bodies that had consent and regulatory authority of the Landfill activities. It did not require expert technical knowledge to assess the veracity of the claims, but rather the time and effort to read through the material and to make a decision on the request for an Inquiry.

The Minister for the Environment subsequently advised MDA that "*Given the Land and Environment Court determined in 2014 to allow the Mangrove Mountain landfill to remain and expand over the next decade, and that water sampling in the catchment has not shown any evidence of impact from the landfill, I do not consider an inquiry into the operation and regulation of this facility necessary.*"

In addition to the extensive material presented in the Submission there was other information that was confidential to the LEC case that could not be presented, but which could be presented to a Commission of Inquiry.

EPA ENGAGEMENT IN MANGROVE MOUNTAIN LANDFILL

Having advised the Minister for the Environment that the landfill presented no environmental risk, senior management of the EPA immediately embarked on a strategy clearly aimed at addressing the community criticism of this issue. They have to be commended for this proactive action. In an interview with Central Coast ABC on 24 February 2016 the EPA acknowledged that the EPA had lost the confidence of the community on this matter and would like to regain it.

Subsequently the same EPA officials agreed to meet with the Landfill Subcommittee of MDA on a regular basis, which has continued for over a year. Arising out of this was the offer by the EPA to conduct an independent environmental review (**IER**) to advise the EPA and MDA (the Community) on the suitability of the proposed management controls and monitoring framework for the Verde Terra landfill expansion and of the management controls and compliance with regard to the previous landfill activity, in the context of protecting the environment and the community.

The EPA claimed that this undertaking with the community was a precedent for them.

The community (MDA) was offered the opportunity to contribute to the development of the Terms of Reference (ToR) and, also to select a consultant from a list of industry experts in landfill engineering design and who were independent of the EPA. MDA was grateful for these opportunities and feels that the ToR benefitted from the community's contributions and it has been particularly impressed with the competence and independence of the consultant engaged to undertake the review. The review involved technical assessment of 30 documents and other parcels of information provided to the consultant by the EPA, MDA and the operator.

The IER has been completed and the Report has been submitted to the EPA. In the interview with the ABC on 24 February 2016, the EPA said that it **"would not sign off on any of the future engineering controls and designs for the site until (it) was absolutely satisfied that it's adopting best practices and is going to protect the local water quality and the community."**

MDA would hope that this applies to both the proposed expansion detailed in the LEC Order and the historical landfill.

While the consultant has undertaken a thorough review of the submitted information, of the 61 recommendations contained in the IER Report, only four relate to the existing waste mound and none of these removes the risk of leachate in the mainly unlined waste mound from penetrating into the groundwater aquifer that supplies the drinking water reserves. This remains a continuing concern for the community.

Since the completion of the IER, at the suggestion of MDA the EPA has agreed to commission an Independent Risk Assessment of the site including its operational plans and the physical stability of the existing waste mound.

Given the extensive non-compliance record at Mangrove Mountain landfill, MDA has little confidence that the risk presented by past and present operators can be sufficiently mitigated by the recommendations of the IER to remove the threat to the drinking water supply. MDA does believe however, that the involvement of the EPA with the local community (MDA) should set a benchmark in community engagement in the regulatory process.

The MDA continues to maintain its position in calling for a Commission of Inquiry into the Mangrove Mountain Landfill.

PARLIAMENTARY INQUIRY TERMS OF REFERENCE

This submission addresses TOR:

a) the current provision of waste disposal and recycling, the impact of waste levies and the capacity (considering issues of location, scale, technology and environmental health) to address the ongoing disposal needs for commercial, industrial, household and hazardous waste, and

h) any other related matter.

A vast amount of documentary and photographic evidence obtained through the GIPA Act by MDA has identified failings of both GCC and the NSW EPA to meet their statutory obligations under the *Environmental Planning and Assessment Act 1979* and *Protection of the Environment Operations Act 1997*, respectively.

An approach to the NSW Government for an inquiry into the alleged failings of both GCC and the EPA were rejected by the Minister for the Environment without proper explanation.

Since the LEC Order was issued on 29 August 2014, the Amended Landfill Environmental Management Plan 2013 and Leachate Management Plan 2013 have been substantially altered requiring a new statutory process by the consent authority CCC.

But, the confirmation that the LEC Order cannot be implemented has cast a shadow over the development consent that has to be resolved to the satisfaction of the Central Coast community.

MDA would like to draw the attention of the Committee to the support being provided to it in the matter of Mangrove Mountain Landfill by the Shadow Minister for the Environment, the Hon. Penny Sharpe MLC. Ms Sharpe made a speech about the Mangrove Mountain Landfill to the Legislative Council on 6 April 2017 as well as asking a question to the Minister for Primary Industries, Minister for Regional Water, and Minister for Trade and Industry on the same day and a number of additional questions to the Minister representing the Minister for the Environment, Local Government and Heritage on 4 May 2017. Replies are still outstanding on all questions.

Further a dissenting report to a previous Parliamentary Inquiry of General Purpose Standing Committee No. 5 into the performance of the NSW Environment Protection Authority, Greens Committee member Dr Mehreen Faruqi concluded that *NSW needs a strong, independent and effective environmental regulator to protect the environment and human health. The EPA needs significant improvements to achieve this, not only through increased resourcing, but an expansion of its regulatory scope to match the community's expectations. Crucially, the EPA needs to make a shift to more effective community engagement and providing transparent access to information.*

The amendments in the committee report will go some way towards strengthening the EPA and regaining public trust. However, some of the Greens' proposed recommendations that were not accepted by the Committee are critical to addressing core issues raised by the community.

MDA Comment:

MDA strongly agrees with the final sentences in both paragraphs. MDA would draw the Committee's attention to the strident criticism of the EPA in the articles in the Sydney Morning Herald Saturday 27 May 2017.

MDA would particularly like to draw the attention of the Committee to the following rejected recommendations of the above inquiry and suggest that if at all possible, they might be reconsidered.

Consultative Committees, public engagement and communication

The committee has made a number of recommendations regarding the use of consultative committees, in particular for the EPA to make greater use of them. However, many stakeholders have questioned the effectiveness of these community consultation committees.

Recommendation: That the EPA develops a protocol and principles for community consultations that ensure genuine and transparent engagement and that adherence to this is monitored and reported on publicly.

MDA Comment:

Although unaware if this has been formally adopted by the NSW Government, senior management in Waste and Resource Recovery of the EPA have shown initiative by engaging with the community

(MDA) in a transparent manner in the matter of Mangrove Mountain Landfill. This included entering into a joint undertaking with the community (MDA) in an Environmental Review of the landfill by an independent, technically qualified consultant, plus in addition to this, agreeing to conduct a Risk Assessment study also by an independent, technically qualified consultant.

Independence and Integrity

The perceived closeness of the EPA to industry could be addressed by developing a transparent 'Independence and Integrity Charter'. The Charter could be similar to the Scientific Integrity Policy established by the US EPA which promotes a culture of scientific integrity for all employees and is intended to improve the internal management and operation of the Agency.

Recommendation: That the EPA develop and implement an 'Independence and Integrity Charter' to give guidance to staff and minimise perceived conflicts of interest.

Recommendation: That an independent and transparent mechanism be established for investigation of complaints against the EPA that is easily accessible, and developed in consultation with the community.

MDA Comment:

The apparent conflict between the lucrative nature to the NSW Government of the waste levy and the EPA charter to Protect the Environment makes it difficult for the EPA to enjoy community confidence when decisions adverse to the wishes of the community are made. Implementation of the recommendation would assist EPA staff to minimise perceived conflict of interest.

Scientific expertise

Given the breadth of technical cases that the EPA deals with, the separation of the authority from an in-house scientific capacity in 2012, is concerning and may have contributed to some of the issues raised by the community.

Recommendation: That the EPA be resourced to establish a scientific division within its structure.

The EPA also generally relies on information provided by holders of Environmental Protection Licences (EPL) to monitor their own compliance with licence conditions.

Recommendation: That the EPA develop a regular, independent sampling program to undertake compliance monitoring to ensure that the data provided by EPL holders is correct and has integrity.

MDA Comment:

MDA was highly critical of the delay between the occurrence of an alleged uncontrolled discharge from the Mangrove Mountain Landfill site in July 2015 and the appearance of scientific staff from the Office of Environment & Heritage to take downstream water samples, and samples of sediment and leaf tissue on 30 September 2015. Ensuing data contained no indicators of contamination from the landfill resulting in the EPA and Minister for the Environment claiming that there were no adverse impacts from the landfill on water quality. If this recommendation had been adopted a faster scientific response would have been possible and the likelihood of a more credible outcome.

MDA has also been highly critical of the practice of allowing the operator and licence holder Verde Terra to monitor its own compliance with licence conditions and report these annually to the EPA. MDA has complained about this to the EPA.

CONCLUSIONS

Mangrove Mountain Landfill History

MDA has shown that the objectives of the NSW Government's *Waste Less, Recycle More* initiative to drive innovative regulatory approaches to protect the environment and support investment in new waste programs, the Minister's claims to empower local communities to create and maintain clean environments and reduce landfill and the targets of the NSW Waste Avoidance and Resource Recovery Strategy 2014-21, have little in common with the past practices at Mangrove Mountain Landfill.

MDA has also demonstrated that Mangrove Mountain Landfill is a complex situation, and alleges that this was caused solely by the failure of the former Gosford City Council and NSW EPA to meet their statutory obligations under the EP&A Act and POEO Act, respectively.

Mangrove Mountain Landfill Future Expansion

While the EPA has gone out of its way to bring the engineering design for the proposed expansion to best practice through the IER initiative, it is still faced with a number of challenges to resolve before a final satisfactory outcome can be reached.

Closure of Landfills

MDA has provided the Committee with significant evidence that the process of regulating landfills in NSW is not functioning as it should. Non compliant landfills can and should be closed.

In the Local Government Waste and Resource Recovery Program, one of nine programs funded from the waste levy by the EPA, it is claimed that 31 landfills in regional NSW have been closed. Yet there appears either, little political will to close Mangrove Mountain Landfill in the interests of restoring a clean environment to the site and to protect the regional drinking water supply or, the POEO Act is incapable of empowering the EPA to do so.

The same can also be said for CCC in its delivery of the EP&A Act.

RECOMMENDATIONS

MDA recommends that this Inquiry authorises an investigation into the statutory practices that regulate the waste industry using the Mangrove Mountain Landfill as a case study to identify any systemic failings.

MDA recommends that this inquiry authorises an independent investigation into the circumstances surrounding Mangrove Mountain Landfill with a view to determining its future.

MDA repeats its request for a Commission of Inquiry into the Mangrove Mountain Landfill.

MDA would be prepared to give evidence to the Committee to substantiate the claims and allegations made in this submission.