



**general
purpose
committee**

**1
section**

environment

GENERAL PURPOSE COMMITTEE - ENVIRONMENT

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ITEM: 140 **Transfer of Septage Effluent****FILE NUMBER:** P209/535/GMA/ENG25LAX.G09

REPORT:

The following is the basis of the legal advice received from Abbott Tout Solicitors in this matter:

"Provided the necessary approvals from the EPA and any other relevant authority for the transfer of the septage are in place and provided the requirements of the *Environmental Planning & Assessment Act 1979* are complied with, there would appear to be no reason why the proposal could not proceed. Care must be taken to ensure no leakage occurs during transfer as such leakage can expose Council to a pollution prosecution.

Council currently holds 3 licenses from the EPA in relation to the Blaxland's Ridge, McGrath's Hill and South Windsor plants. Those licenses are issued under the Protection of the Environment Operations Act 1997 ("the Act").

Those licences impose load limits not to be exceeded. Notwithstanding the advice set out above in the EPA letter of 10 July 2000 we strongly recommend that Council pursue variation of the load limits at McGrath's Hill and South Windsor plants so that they will operate at all times in accordance with licence conditions. The EPA's suggestion that it will not prosecute Council is not unlimited in time and is dependent on negotiations to agree to methods for not exceeding the current load limits. Those negotiations may well then be designed to reduce the load capacity of the plant, especially if Council has no alternative means or funding available for alterations to the plant.

Pursuant to section 64 of the Act if any condition of a licence is contravened by any person, each holder of the licence will be guilty of an offence under the Act. The maximum penalty in the case of a corporation (ie Council) is \$250,000 and in the case of the continuing offence a further penalty of \$120,000 for each day the offence continues. In the case of an individual the maximum penalty is \$120,000 and in the case of a continuing offence a further penalty of \$60,000 for each day the offence continues.

Apart from anything else it would be a legal as well as public relations disaster for the Council if it was found to be operating outside its licence conditions notwithstanding any indication of non-prosecution by the EPA.

As noted above section 64(1) of the Act provides that if any condition of a licence is contravened by any person, each holder of the licence is guilty of an offence.

Section 219 of the Act is akin to section 123 of the Environmental Planning & Assessment Act and provides:

- "(1) Any person may institute proceedings in the Land and Environment Court for an offence against this Act or the Regulations if the court grants the person leave to bring the proceedings.*
- (2) The Land and Environment Court is not to grant leave unless satisfied that:*
- (a) the EPA has decided not to take any relevant action (as defined in sub-section (3) in respect of the Act or omission constituting the alleged offence or has not made a decision on whether to take such action within 90 days after the person requested the EPA to institute the proceedings; and*
 - (b) the EPA has been notified of the proceedings; and*
 - (c) the proceedings are not an abuse of the process of the Court; and*
 - (d) the particulars of the offence disclose, without any hearing of the evidence, a prima facie case of the commission of the offence.*
- (3) Relevant action for the purposes of sub-section (2) is not limited to the institution of criminal proceedings but includes action under this Act to require the defendant to prevent, control, abate or mitigate any harm to the environment caused by the alleged offence or to prevent a continuance or recurrence of the alleged offence."*

It will thus be seen that notwithstanding any forbearance on the part of the EPA to prosecute, Council would still be at risk of third party proceedings pursuant to section 219 of the Act if the Court was prepared to grant leave in the circumstances set out under section 219(2).

It is, in our opinion, therefore imperative that Council secure variation of the licence conditions before the proposal proceeds and we note to this end that application has already been made for the appropriate variation of the licences pursuant to section 58 of the Act.

We note as well in this respect that there should be some "bonuses" or "trade offs" available to Council in relation to the licence variations arising out of the closure of Blaxland's Ridge as far as the EPA is concerned.

The other matters which will need to be considered by Council arising out of the proposal are:

1. The terms and conditions of existing development consents granted in respect of McGrath's Hill and south Windsor. It may be necessary to either modify those development consents or obtain new consents in respect of either or both plants to enable the proposal to proceed. Close attention should be paid to the terms and conditions of those existing development consents.

2. Council should also consult with its insurance brokers or insurance company holding the relevant policies in respect of each plant to determine whether the proposal will impact prejudicially upon existing policies including any policies Council may hold in respect of clean up action, claims for compensation or damages etc. resulting from pollution from the two plants.

Under section 72 of the Act conditions of a licence may require the holder of the licence to take out and maintain a policy of insurance for the payment of costs of clean up action, claims for compensation and damages resulting from pollution in connection with the activity or work authorised or controlled by the licence.

In our opinion (and we accept that there may be cogent reasons why the following cannot be implemented) the applications to vary the load limits under the licences for the existing two plants should, if at all possible, be so calculated to take into account not only the increased loads resulting from the closure of Blaxland's Ridge but also the likely development of land pursuant to development consents already granted but not implemented and the potential for future development having regard to existing zonings in the areas involved.

We appreciate Council's concern in this respect however if the EPA was to inform the Council that other development within either or both of the areas involved could not proceed or that loads could not be extended to accommodate existing and likely future development potential and that the EPA would not impose such extended loads on any licence, there is little else that the Council could do.

Our copy of Council's LEP 1989 has been updated and reprinted as at September 1999 and we assume that for the purposes of what follows it is still current however that should be checked.

Clause 18 of the LEP provides:

- “(1) The Council shall not consent to any development on land to which this plan applies unless arrangements satisfactory to the Council have been made for the provision to the land of water, sewerage, drainage and electricity services.*
- (2) The Council shall not consent to any development on land to which this plan applies as shown on the map by red diagonal hatching, unless and until arrangements satisfactory to the Water Board have been made for the provision to the land of water and sewerage services or, in the case of land within the Windsor Sewerage scheme Catchment Area, to the Council for the provision to the land of sewerage services.”*

Council needs to be satisfied in respect of Clause 18 at the time of determination of any development application. It is, essentially, a condition precedent to the grant of development consent.

If, due to circumstances beyond the control of the Council, at the time a particular application was to be determined Council could not be so satisfied then it would have no option in our opinion than to refuse the development application pursuant to clause 18.

If the EPA was not prepared to increase load limits so as to accommodate existing and future development potential pending the construction of a new facility (possibly 8 years away) then it seems to us that Council would have no alternative other than to implore a moratorium upon development in those areas until adequate capacity was available.

The provisions of clause 18 would be as binding on the Court on hearing an appeal against Council's refusal of an application as they would be upon the Council.

In order to be liable in damages in such circumstances it would need to be shown by a claimant that Council either had a duty of care to the claimant which it had negligently breached or, alternatively, there was a contract between the claimant and the Council which had been breached arising out of the circumstances discussed above. In our opinion, in the existing circumstances there is neither a duty of care nor any contract. Even if there was, it is our opinion that the statutory requirements of clause 18 would be a defence available to Council.

Obviously, in respect of future development potential (ie, where no consents have yet been granted), Council would, having regard to clause 18, need to refuse development consent in the circumstances where the EPA was not prepared to cater for potential development loadings. In the event that development consent was so refused there would be, we assume, no obligation on the developer to pay the capital contribution referred to."

RECOMMENDATION:

That the information be received.

ATTACHMENTS:

There are no supporting documents for this report.

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