



15 June 2015

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David Mooney  
Team Leader – Industry Assessments  
Department of Planning and Environment  
GPO Box 39  
SYDNEY NSW 2001

Dear Sir

**SSD 5300: Kembla Grange Resource Recovery Facility 50 Wyllie Road, Kembla Grange (Site)**

## **1. Introduction**

- 1.1 This submission is made in relation to State significant development application SSD 5300 lodged by Bicorp Pty Ltd (**Proponent**) in September 2014 (**SSD Application**) and the supporting Response to Submissions Report prepared by TCG dated 20 May 2015 (**RTS**).
- 1.2 We also refer to our letter of objection dated 7 November 2014 regarding the Environmental Impact Statement prepared by TCG dated 17 September 2014 (**Objection**).

## **2. Summary**

- 2.1 As many of the issues raised in the Objection have not been adequately addressed by the Proponent in the RTS, this submission sustains many of the statements made in the Objection. Our outstanding issues are as follows:
  - (a) it appears that there are unresolved issues regarding the carrying out of unlawful development on the Site, particularly in relation to annual throughput of material which is not addressed in the RTS;
  - (b) there is a lack of regulatory supervision in respect of the extent of works that have already been constructed and that are now said to be approved by the Proponent. This should be addressed by the Department by carrying out a site visit and requiring a full set of certification under Part 4A of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) before development is allowed to proceed;

- (c) the Proposed Development remains inconsistent with the zone objectives;
- (d) despite our comments in the Objection, the RTS does not address deficiencies and non-compliances in respect of the Director-General's requirements; and
- (e) in light of the above and the Proponent's compliance record, there are serious questions as to whether the Department can trust that the Proposed Development will lawfully be carried out if approval is granted.

### **3. Development has been carried out unlawfully**

- 3.1 The Objection provided support for the submission that the Proponent has carried out development unlawfully on the Site for some time for the purposes of commercial gain. We indicated that the Proponent had doubled the development footprint and increased the approved annual throughput on the Site without obtaining development consent. We referred to the significant disparity between the existing development and approved development on the Site.
- 3.2 In response to this submission, the Proponent now suggests that it has obtained planning approval in respect of all existing development on the Site by way of a modification of DA-2009/1153/D granted on 7 May 2015 for the reconfiguration of the Site layout and additional Site facilities. It notes that the current application, SSD 5300 therefore does not seek the approval for the authorisation of any existing works on the Site following the issuing of DA-2009/1153/D.
- 3.3 We would have the following comments in response to this statement of the Proponent:
  - (a) there are significant doubts as to whether a section 96 modification was lawfully approved having regard to the test of '*substantially the same development*' in section 96. As we indicated in our Objection, the pre-existing development on the site had included a significant extension of the approved development footprint to the east and south, stockpiles to the east well outside the existing development footprint, and significant deviations from the approved plans including a site re-orientation and a failure to construct an approved workshop in the west of the Site. Whilst it is not the role of the Department to determine this issue conclusively, considering the significant disparity between the previously approved development on the Site, and the development that is now said to be approved pursuant to the section 96 modification, we recommend that the Department form its own view as to whether all aspects of the existing development are subject to planning approval;
  - (b) there is no reference to the throughput of the existing development in the RTS. In accordance with our letter of Objection it appears that this aspect of the Site's operations has been in breach for some time. We also recommend that the Department form its own view as to whether the Proponent is complying with the conditions of its approvals;
  - (c) At page 11 of the RTS, the statement is made that in 2014 Wollongong City Council took legal action in relation to non-compliances with conditions of consent. It notes that as a result of this enforcement action, Council in accordance with the Land and Environment Court judgment issued a fine to Wollongong Recycling Pty Ltd on 31 July 2014. We have found no evidence of these proceedings or this penalty on the public record during the period in which we have been invited to respond to the RTS. We would advise the Department to

satisfy itself that a fine has indeed been imposed and that regulatory action was taken; and

- (d) the issue of identifying, enforcing and regularising any unlawful development on the Site is made more complex by the fact that the Council has used the Site for some time to dump waste as reported in the Illawarra Mercury on 1 May 2015 (provided at Annexure A).

- 3.4 At a minimum, in order to fully comprehend the extent of unlawful development and confirm any approved development on the Site, the Department should conduct a full site visit and survey to determine the extent of works that have already been constructed and that are now said to be approved. This should include an inspection of approved plans and relevant construction and occupation certificates.

#### **4. Regularisation of unlawful development**

- 4.1 In our letter of Objection we noted that there were relevant considerations under the EP&A Act which would be inconsistent with the grant of development consent for unlawful development already carried out. This in particular was section 5(a)(ii) which is the *'promotion and co-ordination of the orderly and economic use of land.'*
- 4.2 With this in mind, if the Department determines that it will recommend the grant of consent to the SSD Application, such a consent should be conditioned (by way of a deferred commencement condition) to ensure that all relevant construction certificates and final occupation certificates have been obtained prior to the carrying out of any works the subject of the SSD Application.

#### **5. Inconsistency with provisions of LEP including zone objectives**

- 5.1 Our Objection at section 5 suggested that the LEP contained several objectives in respect of land zoned IN2 Industrial which the proposed development is not consistent with.
- 5.2 We do not consider it necessary or appropriate to repeat the submissions that we made in our Objection, however we consider it self-evident that a resource recovery facility exceeding 200,000 tonnes per annum is not a 'light industrial' land use, or a warehouse, or a related land use and does not satisfy the relevant objectives for land zoned IN2 Industrial. In our view this is relevant to whether the grant of consent is appropriate.

#### **6. EIS does not comply with Director-General's requirements**

- 6.1 In the Objection we submitted that the EIS does not comply with the Director-General's requirements (**DGRs**) for several reasons. Several of these issues appear to have been addressed.
- 6.2 However, the RTS does not address a number of these insufficiencies or failures. Namely, the RTS does not:
- (a) justify inconsistencies with planning instruments; or
  - (b) describe the cumulative impacts of the proposed development.
- 6.3 In addition, the DGRs in respect of the SSD Application require that if an EIS is not lodged for the development within two years of the issue date of the DGRs the Proponent must consult with the Director-General in relation to the requirements for lodgement. Neither the EIS or the RTS show evidence of further consultation despite the fact that
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there was over a two year delay between the issue of the DGRs and the lodgement of the EIS. This is a significant legal issue that has not been addressed by the Proponent.

## **7. EIS does not comply with EPA's requirements**

- 7.1 In our Objection at section 7 we indicated that the DGRs annexed an extensive 24 page list of requirements prepared by the EPA dated 17 May 2012 in respect of the preparation of the EIS. Neither the EIS nor the RTS refers to or addresses any of these requirements. This is a significant non-compliance issue which would in our view leave any consent granted in respect of the SSD Application vulnerable to legal challenge.

## **8. Unacceptable environmental impacts**

- 8.1 The EIS described environmental impacts that we considered to be unacceptable considering the features and limitations of the Site and the surrounding environment. Whilst the Proponent has attempted to address several of these issues, we do not consider that the quadrupling of traffic movements on the local road network has been sufficiently dealt with by the Proponent. Further, we again raise concern in relation to the operation of the development on a Sunday between 8.00 am and 4.00 pm.
- 8.2 Finally, we reiterate our concerns that insufficient measures have been taken in the statement of commitments to adequately protect land immediately adjacent to the operation of the Site which is residential in nature.

## **9. Commitments made by Proponent cannot be trusted**

- 9.1 In part 9 of our Objection, we raised questions in relation to the trustworthiness, environmental performance and compliance record of the Proponent.
- 9.2 In light of the above, we recommend that the Department make its own enquiries in relation to whether the Applicant is a fit and proper person to have the benefit of the planning approval sought and in particular whether it is still in breach of its existing development consents.

Please contact [REDACTED] if you have any queries in relation to the above.

Yours faithfully

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