

9 September 2021

**Modification to DA19/1081, 842 Mulgoa Road, Mulgoa
Statement of Environmental Effects**

General Manager
Penrith City Council

By Email:
council@penrith.city

I refer to the above application and advise we have been requested to assist with a Section 4.55 modification of the approved development. This submission is to be considered as a Statement of Environmental Effects for the application.

1. Existing Approval

Applicable to Lot 201 DP804405 and Lot 22 DP537922, DA09/1081 was approved by Council on 16 April 2010, amended on 1 October 2010 and was described as follows:

Land Restoration and Rehabilitation of Mulgoa Landfill & Quarry.

Our Ref: 19.071
Your Ref: DA09/1081

Some 23 conditions of consent were imposed on the approval.

Relevant to this application specifically, Condition 14 states the following:

14. The remediation and validation of Lot 201 DP 804405 is to be undertaken in accordance with the Department of Environment, Climate Change and Water approved Closure Plan. The approved Closure Plan is to be provided to Council within fourteen days after the Closure Plan has been approved.

A Landfill Closure Plan, by Consulting Earth Scientists, dated 21 June 2011, was submitted to the Department of Environment, Climate Change & Water in accordance with Condition 14 and subsequently approved.

The Landfill Closure Plan included the installation of a gas mitigation system to address the issue of methane being emitted from the final landform. The passive system involves the gas naturally leaching from the landfill through a series of 'drains'.

2. Proposed Modification and Pre-DA Meeting

The proponent seeks to modify the method of gas extraction from the current passive system to an active gas mitigation system. Referred to as gas extraction and flaring, the proposed system involves the installation of a series of vertical pipes (collection wells) on the landfill waste mass. An array of pipes are connected to the wells and are reticulated by a blower fan installed on the flare unit, creating a vacuum. Methane that is directed to the flare combusts at very high destruction temperatures. The accompanying plans and documentation from the manufacturer are provided for Council's consideration.

The proponent met with Council for a pre-DA meeting in February 2019. A range of issues were discussed at that meeting, mainly around potential environmental impacts of the proposed development. Council also raised the question whether the application was Designated or Integrated Development. Consultation with Council progressed significantly beyond the pre-DA meeting notes, so they are almost redundant. The application does not require any new licences (rather minor conditions to be added – see accompanying advice from the EPA) and is therefore not integrated development. Additionally, the proposal does not trigger any of the Designated Development provisions.

3. Required Amendments to Consent

We have identified the following amendments that would need to be made to the Notice of Determination as part of this application.

Condition	Description of Amendment
1	Documents to be added as per this application.
14	Suggested additional wording might be “...The approved Closure Plan, <i>as amended by this modification consent</i> , is to be provided to Council...”.

If Council was of the view other amendments were needed then we are happy to discuss those changes.

4. Section 4.55 - Modification of Consents Generally

Clause 115 of the Environmental Planning and Assessment Regulation 2000 establishes several requirements relevant to this application (not all clauses included below):

- (1) An application for modification of a development consent under section 4.55(1), (1A) or (2) or 4.56(1) of the Act must contain the following information—
 - (a) the name and address of the applicant,
 - (b) a description of the development to be carried out under the consent (as previously modified),
 - (c) the address, and formal particulars of title, of the land on which the development is to be carried out,
 - (d) a description of the proposed modification to the development consent,
 - (e) a statement that indicates either—
 - (i) that the modification is merely intended to correct a minor error, misdescription or miscalculation, or
 - (ii) that the modification is intended to have some other effect, as specified in the statement,
 - (f) a description of the expected impacts of the modification,
 - (g) an undertaking to the effect that the development (as to be modified) will remain substantially the same as the development that was originally approved,

The impacts from this proposed modification are zero and this is supported by the accompanying consultant reports. No changes are proposed, other than the method of gas extraction.

The following legal background demonstrates that this application:

1. can be determined via a Section 4.55 (1A) modification; and
2. is substantially the same development as that which was approved.

The Land and Environment Court consistently describes the Section 4.55 modification provision as “beneficial and facultative”. It is designed to assist the modification process rather than to act as an impediment to it. “It is to be construed and applied in a way that is favourable to those who seek to benefit from the provision”. (See *North Sydney Council v Michael Standley & Associates Pty Ltd (1998)*). The consent authority must therefore be mindful if suggesting a new DA be lodged that the ability to modify a consent is there for a reason, namely, to avoid the full DA process that is otherwise available.

Moreover, this proposal does not “radically transform” the quarry restoration and rehabilitation on the site as set out in *Sydney City Council v Ilence Pty Ltd (1984)*. This Court finding supports the broad use of Section 4.55.

Modifications such as this can be determined under Section 4.55(1A) or (2). A modification pursuant Section 4.55(1A) is to be of “minor” impact. Minor is a subjective judgement however can be construed as meaning negligible or insignificant. The Court has determined that modifications have nothing to do with the extent of changes but rather, the extent of impact. In comparison, Section 4.55(2) is reserved for “Other Modifications” which, by inference, can have a greater level of impact beyond what is considered as “minimal”.

In this instance we submit that, as a result of this amendment, any potential impacts would be at most negligible, even imperceptible. Accordingly, we believe it can be considered as a 4.55(1A). The Act details the relevant Section as follows.

4.55 Modification of consents—generally

(1A) Modifications involving minimal environmental impact

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

- (a) it is satisfied that the proposed modification is of minimal environmental impact, and
- (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and
- (c) it has notified the application in accordance with:
 - (i) the regulations, if the regulations so require, or

- (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
- (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1), (2) and (5) do not apply to such a modification.

Each of the matters listed above are dealt with in turn:

Minimal Environmental Impact

To consider the potential environmental impacts a number of consultant reports were commissioned and accompany the submission.

Bushfire Impacts

Advice has been obtained from Eco-logical in relation to the proposal. The advice considers the type of development proposed, against the physical characteristics of the locality. Whilst it acknowledges that existing management of bushfire exists, it is recommended such management activities be formalised through a Bushfire Management Plan. A Bushfire Management Plan has been submitted for consideration and could form the basis on an additional condition of consent to formalise this action.

The potential for fire from within the proposed plans has also been considered in the accompanying RiskCon report. The conclusions and recommendations from that consideration have been incorporated into the Bushfire Management Plan.

Air Quality Impacts

An Air Quality Assessment (AQA) was commissioned to consider the potential impacts on air quality. The assessment considers the pollutants of concern, the process proposed, and the existing conditions. The assessment concludes by confirming all outputs are below the relevant criteria and that there are no air quality impacts that would constrain the development.

Acoustic Impacts

An Acoustic Impact Assessment was commissioned to consider the potential acoustic impacts arising from the development. The assessment considers the NSW EPA Noise Policy for Industry requirements and the most recent EPA Licence for the site. The gas flare must comply with the existing Licence conditions as they relate to noise. The acoustic performance of the gas flare was modelled in consideration of the requirements and the nearest receptors.

The assessment demonstrated that the proposed gas flare can operate within the existing noise conditions of the sites Licence.

Flora and Fauna Impacts

A Flora and Fauna Assessment was commissioned to consider relevant potential impacts. This assessment was requested by Penrith City Council at the pre-DA meeting on the basis that the site is located adjacent to an area mapped as high biodiversity under the Biodiversity Values Map. The following was specifically noted:

- No vegetation of any significance is proposed to be removed.
- The proposal will not impact any areas shown on the BSW Government Biodiversity Vale Map.
- No threatened flora or fauns were recorded during the field survey within the study area.
- The 5-part test and significant impact criteria concluded that the proposed development is unlikely to result in any significant impact.
- Consequently, a BDAR was not required.

Minor mitigation measures are recommended and could form the basis of an additional consent condition.

Substantially the Same Development

The proposed amendment relates to one specific aspect of the approved development – the method of gas extraction. Rather than being a passive gas extraction system as approved, the amendment would result in an active system.

Apart from recognising the proposed method of gas extraction, there are no other amendments required for the EPA licence.

The amendment in no way changes the purpose of the consent, or the outcomes that were envisaged by the granting of the consent. In this context we submit that the development would remain substantially the same as that which was originally approved.

5. Section 4.15 - Evaluation – Statement of Environmental Effects

Section 4.15 of the Environmental Planning and Assessment Act 1979 contains matters that need to be considered for any development application. Section 4.15 reads:

Matters for consideration—general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:
 - (i) any environmental planning instrument, and
 - (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Director-General has notified the

- or consent authority that the making of the proposed instrument has been deferred indefinitely has not been approved), and
- (iii) any development control plan, and
 - (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
 - (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
 - (v) any coastal zone management plan (within the meaning of the Coastal Protection Act 1979), that apply to the land to which the development application relates,
 - (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
 - (c) the suitability of the site for the development,
 - (d) any submissions made in accordance with this Act or the regulations,
 - (e) the public interest.

The development will continue to satisfy the consideration against Section 4.15 even after the amendment as:

- a) The amendment does not affect the proposal's compliance with Council's LEP.
- b) There are no Draft EPI's relating to the land relevant to the consent or this proposal.
- c) There are no planning agreements that apply to the land that directly impact this modification.
- d) There will be no change in any potential impacts arising as a result of the proposed amendments, noting the accompanying consultant reports, the recommendations made within, and the discussion earlier in this submission.
- e) The site will continue to be suitable for the approved use after the amendments are made.
- f) The public interest will not be diminished as a result of this application.

6. Summary

The amendments are considered insignificant in the overall context of the development with no impact arising in relation to how the site will function or the potential impacts arising from it. The proposal will remain substantially the same as that which was approved. Council can therefore support the application in its current form.

Please contact me on 0401 449 101 if you would like any further information.

Sincerely

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