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1 February 2018

Project Manager
Proposed Regulatory Amendments to Categories 63-66, 89
Department of Water and Environmental Regulation
Locked Bag 33
CLOISTERS SQUARE WA 6850

Dear Sir/Madam

CONSULTATION PAPER: AMENDMENTS PROPOSED FOLLOWING THE DECISION ON ECLIPSE RESOURCES PTY LTD V THE STATE OF WESTERN AUSTRALIA

Thank you for the opportunity to comment on the above consultation paper, the matters raised within the paper are of significant importance to recycling within Western Australia.

We have commercial interests in the Construction and Demolition (C&D) material recycling and residential and commercial land development industry. We are also members of the UDIA and the WRIWA.

We endorse the need for amendments to waste definitions following the "Eclipse" decision to achieve the following -

- Ensure the greatest possible and highest value re-use is derived from recovered materials within the C&D industry sector.
- Ensure the C&D industry is fully informed of different waste definitions, the criteria for acceptance at different premises, and is able to observe a compliance process at least cost for the benefit of customers. Application of the landfill levy for C&D material should depend on the potential environmental impact from the usage or activity of the material.
- Ensure the environment is least affected from the re-use or disposal of C&D materials.

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Our comments and suggestions to improve the proposed amendments to EP Regulations and Waste Definitions

1. We agree with the proposition contained in the Consultation Paper that the "use of 'clean fill' and 'uncontaminated fill' as defined in the amended Waste Definitions document will not pose any risk of harm to human health or the environment."

2. We agree that the amendments should not apply to sites "using fill that does not pose a risk of harm to the environment or human health."

3. We do not agree that use of 'clean fill' and 'uncontaminated fill' within category 63 to 66 and 89 licensed premises or premises that is required to be licenced as a category 63 to 66 and 89 licensed premises should automatically attract a landfill levy.

   Use of 'clean fill' and 'uncontaminated fill' (meeting the specifications detailed at Appendix B of the Consultation Paper) within category 63 to 66 and 89 licensed premises should not be subject to the landfill levy. This material is acknowledged to "not pose any risk of harm to human health or the environment". There is no change in human health or environmental impact if 'clean fill' or 'uncontaminated fill' is disposed of in a site that has only accepted this material, or alternatively within licensed landfill sites.

   To prevent levy avoidance, the use of 'clean fill' and 'uncontaminated fill' for the proposed levy exempt purposes within licensed landfills should require declarations of mass and in the case of 'uncontaminated fill' the provision of documents to the landfill operator demonstrating the minimum sampling and testing standards for uncontaminated fill (Table 2, Appendix 2 of the Consultation Paper).

4. **Clean fill** is to be defined as "*raw excavated natural material such as clay, gravel, sand, or rock fines*" that also satisfies four other criteria, which include that the area from which the material was excavated or removed was not contaminated with manufactured chemicals or with process residues as a result of industrial, commercial, mining or agricultural activities, and that the material has not been used or subject to processing of any kind since being excavated or removed from the earth. In essence, this is referring only to "virgin" material.

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An issue with this definition of **clean fill** is that any form of virgin material that requires any form of processing (ie. roadbase, gravel, sands) will be subject to the landfill levy if buried unless it is tested in accordance with the requirements of Appendix B and does not exceed the maximum concentrations of substances specified in Table 1 of Appendix B. This will create significant cost burdens to producing any processed virgin material and only further drive up development costs. The definition of clean fill should remove reference to "subject to processing of any kind since being excavated or removed from the earth".

5. **Uncontaminated fill** is to be defined as "inert waste type 1 (excluding asphalt and biosolids) that meets the requirements set out in Table 1, as determined by sampling and testing carried out in accordance with the requirements set out in Table 2".

6. Of note, the Proposed Amendments do not exclude either clean fill or uncontaminated fill from being "waste". In accordance with findings of the Supreme Court and the Court of Appeal in the Eclipse Resources Pty Ltd decisions, these types of material will still be "waste" where they are superfluous, leftover or unwanted in the hands of the person or entity excavating, removing or producing them.

   As a result, the Proposed Amendments do not generally exclude the landfill levy from applying to these types of material, only in connection with clean fill premises.

   This also means that where specifications for works etc… exclude the use of "waste" materials for the works, the uncertainty regarding the use of uncontaminated fill, and even clean fill, which arises from the Eclipse Resources Pty Ltd decisions will remain. This aspect needs to be addressed and we do not support amendments that can result in clean fill or uncontaminated fill as being waste and subject to landfill levies.

7. The Proposed Amendments provide that premises will only be clean fill premises if they are "premises on which all of the waste that is, or has ever been, accepted for burial" is either uncontaminated fill or clean fill (my emphasis). Several points can be made about this.

   First, the exclusion from the levy will only apply to uncontaminated fill or clean fill at premises where these are the only types of waste that are received. Unless one of the other, existing exemptions is applicable, the levy will continue to apply to uncontaminated fill and clean fill at any premises where other types of waste are also received (if the premises are licensed or required to be licensed under the EP Act) – because both uncontaminated fill and clean fill are still considered to be "waste".

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Second, the criteria is whether any other type of waste is accepted for burial at the premises, not (for example) whether any other type of waste is either "received at" the premises or "disposed of to landfill" at the premises. There may not appear to be much difference between these various terms, but both the Court of Appeal and the Supreme Court in the Eclipse Resources Pty Ltd decisions found that there are differences. In short, "accepted for burial" requires more than simply being "received at", but is broader than "disposed of to landfill" (ie. material can be "accepted for burial" even though it is not ultimately "disposed of to landfill").

The Court of Appeal ([2017] WASCA 90) dealt with the proper meaning of the phrase "accepted for burial" at paragraphs [188]-[194], agreeing with and adopting the findings of the Supreme Court in the original decision ([2016] WASC 62). In summary, the Court of Appeal found that the determination is to be made at the time of receipt of the material at the premises, and that the phrase refers to material that is taken or received for the direct or immediate purpose of being put in the ground and covered with earth. This applies whether or not there may be a more remote or future objective, to be fulfilled after the premises have ceased to be used for landfill (such as a future use of the land), but is also used in contrast to phrases that appear in the definitions of other categories of licensed premises under the EP Regulations, such as "discharged onto land or into waters" (C19, C20, C22), "stored, reprocessed, treated or irrigated" (C61) or "stored pending processing" (C67A).

Third, and most important, the exclusion from the levy will only apply if uncontaminated fill or clean fill is the only type of waste that is, or has ever been accepted for burial at the premises. This raises serious practical difficulties and limitations for the exclusion of the levy. Presumably the owner/occupier of premises will be required to satisfy the DWER that the requirements to be clean fill premises are satisfied.

For "virgin" sites at which there has never been any burial of materials, this may not pose any difficulties – although, to take an extreme position, the criteria is not whether material has in fact been buried at the premises, but whether material other than uncontaminated fill or clean fill has ever been accepted for burial at the premises.

Where material is brought onto a site that is neither clean fill or has not been tested in accordance with the requirements outlined at Appendix B prior to being brought onsite which is later processed and tested so as to be made into uncontaminated fill to be used onsite or offsite will mean that any filling of the site will be subject to the landfill levy (ie. because material brought to site did not meet the definition of either cleanfill or uncontaminated fill at the time the material was brought to site on the basis that there was an intention to bury any part of the material even though the material was prior to being buried onsite made into uncontaminated fill). A site (development and landfill sites) that had intentions to bury any material that does not meet the

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definition of clean fill or uncontaminated fill at the time of being accepted, whether in the past or from that point on, will be required to pay the landfill levy on any fill used to develop the site whether it be clean fill or uncontaminated fill.

Further, for any site at which there has ever been some burial of materials in the past (including any site any at which any filling or change of levels has ever taken place), it will be necessary to satisfy the DWER that all of that material is either uncontaminated fill or clean fill.

Note that this aspect of the definition of clean fill premises is not limited to premises that were previously licensed under the EP Act to accept other types of waste, or at which other forms of waste have been received in the past in quantities that would have required licensing under the EP Act. Rather, if any waste has ever been accepted for burial at the premises, it appears to be necessary to demonstrate that all of that waste is either uncontaminated fill or clean fill. This means that premises will be excluded from being clean fill premises even if the amount of waste other than uncontaminated waste or clean fill that has in the past been accepted for burial is less than the threshold amount that would have required licensing under the EP Act.

Going back to the criteria to be satisfied for clean fill in the Waste Definitions (referred to above), it is clear that it will often be impossible to demonstrate that those criteria are satisfied in relation to historical filling, for which little or no source information may be available.

As to uncontaminated fill, assuming for the moment that it is possible to sample and test historical fill in the manner set out in Table 2 in order to determine whether the requirements of Table 1 are met, there is a question as to how practicable this might be for fill that is already in the ground. An example of this situation could be where a land developer constructs roads, drains, public open space etc… as part of a residential subdivision. If any part of the materials used to construct the subdivision do not meet the definition of clean fill or uncontaminated fill at the time of being brought onsite, then all the material buried onsite from that point on would be subject to the landfill levy. The kind of materials used to construct a subdivision will usually be made up of virgin materials, some of which are processed (road base, drainage aggregate, blended soils, mulch for public open space construction etc…) and some of which are generally not processed (virgin sands for fill). Lets assume that the developer has competed stage one of a significant multiple stage development using the material referred to in this paragraph. My reading of the consultation paper would mean that any fill used in constructing the remainder of the subdivision, would be subject to the landfill levy.

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Of even more difficulty, is the relevant time at which the requirements of Table 1 must be met for the purposes of the definition of clean fill premises.? It appears likely from the language of the definition and having regard to the purpose of the definition, that the relevant time is at the time the material is accepted for burial. But, how is this able to be demonstrated by sampling and testing that takes place some time (perhaps years) after the material was accepted for burial, in circumstances where some of the substances or attributes included in Table 1 change over time? This aspect, at least, requires further review – and consideration should be given to clarifying that, at least in relation to historical material, the relevant time is at the time of the sampling/testing that is carried out.

Another unusual and perhaps unsatisfactory outcome of the Proposed Amendments is that the same material – clean fill and uncontaminated fill – when used for the same purpose as fill for land, will either attract the levy or not attract the levy depending only on the historical use of the premises at which it is used.

The effect of this is a significant discrimination against existing fill and development sites that have ever excepted any material for burial that is neither clean fill of uncontaminated fill or any site the ever excepts any material for burial that is neither cleanfill or uncontaminated fill at the time of being excepted. As noted above, it may well be impracticable, if not impossible, to satisfy the criteria for a clean fill site in respect of an existing fill or a development site that has accepted material that hasn't met the definition of either clean fill or uncontaminated fill. The may result in these sites being abandoned for many years because they will only be able to be filled with material that attracts the landfill levy. This will result in an unacceptable environmental and commercial outcome (for landfill sites and development sites) and requires addressing.

8. The impact of the sampling costs detailed in Appendix B needs to be addressed. In order to encourage the production of recycled materials it will be necessary to subsidise sampling costs. The estimated laboratory costs for one sample are likely to be in the vicinity of $700 and this excludes onsite collection and sample delivery costs. Funds for laboratory sampling costs should be redirected from the collection of landfill levies to subsidise sampling costs in order to encourage recycling.

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9. The parameters required by Table 1 in Appendix B are unrealistic and not achievable. Further these paramters and specifications do not represent parameters that are necessary to ensure that recycled products (ie. uncontaminated fill) are fit for purpose, fit for the environment or fit to ensure that human health in not compromised. Most virgin materials extracted could not meet these same paramters and specifications. The parameters, maximum concentrations and leaching requirements must be addressed to ensure that recycled construction and demolition materials can meet a reasonable specification and that the specification is safe both in terms of human health and to the environment.

10. A further practical difficulty or risk arises from the fact that the definition of clean fill premises is applied as an exclusion or exception to the definition of various categories of licensed premises in the EP Regulations. It is up to the owner/occupier of premises to determine whether the premises require licensing under the EP Act, by reference to the definitions in the EP Regulations – but the Proposed Amendments do not involve the licensing of clean fill premises, which would require a positive determination by the DWER as to whether the criteria in the definition are satisfied. Nor do the Proposed Amendments provide for an application to be made to the DWER for a determination as to whether or not premises are clean fill premises, which would also require a positive determination by the DWER as to whether the criteria in the definition are satisfied. Rather, the Proposed Amendments provide that premises do not require licensing if the criteria in the definition of clean fill premises are satisfied, placing the onus on the owner/occupier to determine whether the criteria in the definition are met, in order to determine whether or not it is necessary to apply for one of the categories of licences.

    This risk arises in circumstances where the consequences of "getting it wrong" are significant – both in terms of the landfill levy unexpectedly being applicable to the material accepted for burial, and also a breach of the EP Act requirement for licensing of the premises.

Support to WRIWA suggestions

WRIWA believes the most effective way to improve resource recovery and recycling outcomes, and therefore minimise the landfilling of C&D waste, is to correctly value every component of the production process. The suggestions presented by WRIWA are aimed at improving the economic drivers to recover and recycle C&D waste. There are currently a number of factors working against achieving the outcomes being sought by government, regulators, industry and consumers. Some of these factors are;

- In Western Australia there is a lack of markets for recovered and recycled C&D materials. The WA Government needs to take a lead in specifying tender and other

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procurement requirements for inclusion of recycled materials. WRIWA believes the use of recycled C&D material in Victoria is far more mature, advanced and beneficial to environmental outcomes than what exists in WA. Valuing the use of 'clean fill' and 'uncontaminated fill' for legitimate road construction and daily cover activities within licensed landfill would assist market and value creation.

- A lack of DWER enforcement of compliance with existing landfill levy obligations. The WRIWA position is contained in its 16 November 2107 submission to the DWER 'Discussion paper – Waste levy and waste management: Proposed approaches for legislative reform'
- A market economy need to assess landfill levy obligations based on whether recovered and recycled materials are being used for productive and environmentally safe purposes rather than simply defining the levy obligation on a physical location.

Should you have any queries or wish to discuss any matter further please contact me.

Yours sincerely

Joe Gangemi
Director – G & G Corp Pty Ltd