

12 July 2005

Our Ref: D75138, EM31241, EM29213, EM30856

Mr Justin van der Zalm
Senior Environmental Engineer
GHD Pty Ltd
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180 Lonsdale Street
MELBOURNE VIC 3000

Dear Justin

LV POWER INDUSTRY – LANDFILL FINANCIAL ASSURANCE REQUIREMENTS

I refer to the ongoing debate about the development of Financial Assurances for the landfills under the control of the Latrobe Valley power industry. The purpose of this letter is to:

- outline the legal requirements for licence holders of landfills to maintain financial assurances;
- respond to your letter of 27 September 2002, that provides the industry position towards financial assurances; and
- provide a mechanism to move forward in developing an amicable outcome to the matter in such that financial assurances do not exist for the Latrobe Valley power industry sites.

At previous liaison meetings with the various power companies, information has been provided in order to clarify legal matters surrounding financial assurances. The following extracts from the legislation should help to further clarify the situation:

Environment Protection Act 1970 Section 4 - Definitions

"industrial waste" means –

- a) any waste arising from commercial, industrial or trade activities or from laboratories; or*
- b) ...*

Environment Protection (Scheduled Premises and Exemptions) Regulations 1996

5. Schedule Premises

- 1) *The premises listed in Table A are prescribed as schedule one, schedule two and schedule three for the purposes of the Act.*
- 2) *In addition to being prescribed as schedule one, schedule two and schedule three premises as provided by sub section (1) –*
 - a) *...*
 - b) *if a paragraph in Table A states that a premises is also a schedule five premises, the premises is prescribed as schedule five premises for the purposes of the Act*

6. How conflict to be resolved if premises falls into more than 1 category

If a premises falls into 2 or more of the categories listed in Table A and the premises is exempt in relation to one category but is not exempt in relation to one or more of the categories, the exemption in relation to the first category does not apply to the premises.

Table A – Scheduled Premises

1) Waste treatment, disposal and recycling

- a) *...*
- b) *...*
- c) *...*
- d) *...*
- e) **Landfills** *used for the discharge or deposit of solid wastes onto land being –*
 - i) *land disposal facilities for solid wastes (including solid industrial wastes) except premises, with solely land discharges or deposits, used only for the discharge or deposit of mining wastes and in accordance with the **Extractive Industries Development Act 1995** or the **Mineral Resources Development Act 1990**.*

All category 1(e) premises are also schedule five premises.

11 Utilities

- (a) **Power stations** *which generate electrical power from the consumption of a fuel at a rated capacity of at least 5 Megawatt electrical power.*

Environment Protection Act 1970 Section 21 - Special Conditions

(1) *In issuing a works approval or a licence or amending a licence the Authority may specify that the works approval or licence or the amendment of the licence is subject to the occupier of the premises in respect of which the works approval or licence relates complying with such of the following conditions as the Authority specifies—*

(a) ...

(b) ...

(ba) if the premises are -

(i) schedule four or schedule five premises; or

(ii) ...

the occupier must provide the Authority with a financial assurance satisfactory to the Authority in accordance with section 67B

Mineral Resources Development Act 1990

"tailings" means any waste mineral, stone or other material that was produced during the course of mining (whether before or after 6 November 1991), and includes any mineral, stone or material that is or was discarded from plant or machinery used for extracting minerals;

A Memorandum of Understanding (MOU) between EPA and DNRE (DSE) provides the basis for consistently administering the financial securities over the mining licenses by clearly distinguishing liabilities for rehabilitation and waste or pollution control. Enclosed is a copy for your information.

Section 67B of the Environment Protection Act 1970 sets out the criteria for which a financial assurance will be held by the Authority. This summary of the legal position on this matter, both identifies and clarifies a number of issues that have been of concern to the industry. In summary these issues were:

- Ash does not meet the definition of "tailings" for the purpose of a mining waste in accordance with the Mineral Resources Development Act 1990.
- Ash is waste from an industrial process beyond "material discarded from plant or machinery used for extracting minerals".
- The industrial process is a scheduled one, two, and three activity, with the land filling component of the activity identified as a schedule 5 activity.

- Schedule 5 activities require a financial assurance.
- The mining rehabilitation bonds do not suffice in addressing the liabilities associated with ash management and this is expressed in the MOU.

EPA notes other matters raised in your letter to support your argument that the power industry should not be required to provide a financial assurance. These relate to the asset value, expected life of the asset, the rehabilitation bonds, the level of risk posed by the waste, and the established environmental performance of the accredited licences. These are matters that may be taken into account when determining an appropriate financial assurance for the individual sites. You should note that the respective EPA waste discharge licences for the power industry premises require that financial assurances acceptable to the Authority must be in place. Currently the companies are exposed by not complying with this licence condition.

In order that the matter is progressed, I recommend that you encourage your clients to reconsider their position on this matter and take steps to develop proposals for financial assurances. Such proposals should be based on risk analysis of the ash management containment on the environment, taking into consideration issues raised in EPA publication 777, Determination of Financial Assurance for Landfills.

If you consider that a meeting of all parties will assist with the progression of this matter I would be pleased to arrange such a meeting.

If you wish to discuss this matter further, I invite you to contact David Guy on (03) 5176 1744. If you intend to respond to this letter by email please use the following address: EPA.Gippsland@epa.vic.gov.au

Yours sincerely

DAVID MACKENZIE
MANAGER GIPPSLAND REGION

Enc.

Cc Mr Russell Centre
Loy Yang Power