

**ADELAIDE HILLS COUNCIL  
SPECIAL COUNCIL MEETING  
Tuesday 11 September 2018  
CONFIDENTIAL AGENDA BUSINESS ITEM**

**RELEASED 22 OCTOBER 2019**

**Item:** 7.1

**Originating Officer:** John McArthur, Manager Waste and Emergency Management

**Responsible Director:** Peter Bice, Director Engineering and Assets

**Subject:** Ashton Landfill

**For:** Decision

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**1. Ashton Landfill – Exclusion of the Public**

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except:

- CEO, Andrew Aitken
- Director Infrastructure & Operations, Peter Bice
- Director Development & Regulatory Services, Marc Salver
- Director Corporate Services, Terry Crackett
- Director Community Capacity, David Waters
- Executive Manager Governance & Performance, Lachlan Miller
- Manager Waste and Emergency Management, John McArthur
- Governance and Risk Coordinator, Steven Watson
- Council’s Legal Advisor, Stephen Williams (Norman Water House)

be excluded from attendance at the meeting for Agenda Item 7.1 (Ashton Landfill) in confidence.

The Council is satisfied that it is necessary that the public, with the exception of Council staff in attendance as specified above, be excluded to enable Council to consider the report at the meeting on the following grounds:

Section 90(3)(i) of the *Local Government Act 1999*, the information to be received, discussed or considered in relation to this Agenda Item is information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council, the disclosure of which could reasonably be expected to prejudice the commercial position of person/agency/business involved with any litigation that may be undertaken.

Accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information and discussion confidential.

## **2. Ashton Landfill – Confidential Item**

### **SUMMARY**

The purpose of this report is to provide Council Members with information in relation to the alleged breach of contract by Tonkin Consulting when designing and overseeing landslip remediation works during 2013 and 2014 at the former Ashton Landfill. This work was undertaken to repair a large slip that occurred at the landfill in 2012.

It is alleged that this breach of contract led to a further significant slip at the site in 2015 which to this day remains in an unrepaired state given the significant costs involved to remediate the slip. This report also seeks a resolution to take reasonable action, including initiating legal proceedings against Tonkin Consulting for an alleged breach of contract in undertaking the remediation works.

### **RECOMMENDATION**

#### **Council resolves:**

- 1. That the report be received and noted**
- 2. That Council takes all reasonable actions, including initiating legal proceedings to recover losses associated with an alleged breach of contract by Tonkin Consulting when designing and overseeing slip remediation works they undertook during 2013 and 2014 at the former Ashton Landfill allegedly leading to a further landfill cap slip in 2015.**
- 3. That the Chief Executive Officer be delegated to undertake all necessary actions to effect this resolution.**

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## **1. GOVERNANCE**

### **➤ Strategic Management Plan/Council Policy**

Goal	Organisational Sustainability
Strategy	Risk and Responsibility – legal compliance & asset sustainability

Ensuring all options to minimise losses associated with Ashton Landfill are explored will assist to ensure risks posed by incurring significant financial losses are minimised.

### **➤ Legal Implications**

It is proposed that Council may initiate legal proceedings against Tonkin Consulting to avoid or minimise losses and costs incurred by Adelaide Hills Council in relation to alleged breach of contract when they designed and managed remediation works undertaken during 2013 and 2014 in response to a slip that occurred on the site in 2012. It is alleged the breach of contract led to a further significant slip on the site in 2015.

Any legal action undertaken will be through the appropriate Court.

Adelaide Hills Council, through the amalgamation of the District Councils of East Torrens, Stirling, Onkaparinga and Gumeracha in 1997, was responsible for the disposal of waste material at the Ashton Landfill. For this reason the Environment Protection Agency (EPA) will consider Council ultimately responsible for any environmental issues arising from

failure of the landfill cap. The EPA license for Ashton Landfill is still in the name of Adelaide Hills Council and therefore Council must comply with all relevant license requirements.

➤ **Risk Management Implications**

The recommendation in this report will assist in mitigating the risk of:

*Financial Loss incurred by Council as a result of alleged breach of contract by Tonkin Consulting when designing and undertaking landfill cap remediation repairs in 2013/2014 at Ashton Landfill.*

Inherent Risk	Residual Risk	Target Risk
High (2A)	High (2A)	Low

If, as part of implementing the proposed recommendation of this report, legal action is instigated it is important to control any proceedings so as to ensure that this action is effective and further risk of costs, out-weighing the benefit, is controlled. A mitigation action to review the current costs against likely outcomes at regular intervals is to be included as part of any approved action.

➤ **Financial and Resource Implications**

Budget estimates have been obtained from a suitability qualified engineering firm to undertake remediation works to the current slip area at Ashton Landfill range from \$441,500 to \$531,500. A cost range, rather than a single value, has been provided as there are a number of alternative remediation treatments that can be applied, with each treatment having differing costs.

Given the costs to repair the current slip are significant, and that there is a history of slips on the site, consideration needs to be given to claiming some or all of this amount from the consultants engaged to design and oversee the remediation works, in this case Tonkin Consulting. This view has been supported by independent engineering and legal advice provided to Council in relation to this matter.

Given the history of slips in the landfill cap, an additional budget estimate has been obtained to undertake works that are over and above those required to remediate the slip area from 2015. These additional works relate to other areas of the landfill cap that are steep and potentially prone to failure. The cost to undertake these additional works over a greater area of the landfill ranges from \$218,000 to \$303,000. This cost estimate is based on the additional area being remediated at the same time as the 2015 slip area.

In total, costs to undertake remediation of the 2015 slip area and the additional at risk area range between \$659,500 and \$834,500.

Noting the above, if Council were to commence legal proceedings, significant legal and court costs would be incurred. It is not possible at this point to provide accuracy in relation to potential legal and court expenses that may arise. As an indicative guide, Council's legal advisors have suggested costs to Council for a 10 day trial, that ran relatively efficiently and in an uncomplicated manner, would be in the order of \$370,000. For every extra day a trial ran over and above 10 days would incur additional costs of \$10,000 per day.

Council's legal advisors have however indicated that if proceedings were commenced it would be highly likely that the matter would be settled prior to trial through mediation most likely leading to a settlement.

Whilst a mediated outcome would be less expensive than a full trial process as outlined above, indicative preparatory costs of at least \$100,000 and costs in the order of \$20,000 for the mediation itself would be incurred by Council. The preparatory work would include matters such as engaging and briefing a barrister, preparation of a statement of claim, document discovery and obtaining expert advice and reports. Undertaking such preparatory actions prior to the mediation process provides a level of certainty to the parties as their respective positions are fully informed leading to greater potential for a successful outcome.

Mediation can be undertaken at an earlier stage without the same degree of preparatory activity for reduced costs, which as a minimum would be \$20,000 for the mediation process itself. However, in this scenario the potential for a successful outcome is reduced given the parties would not have the same level of certainty in relation to their respective positions as provided by undertaking more comprehensive preparatory activities.

Thus far \$20,000 has been spent on legal advice in relation to the alleged breach of contract. This expenditure has been costed to an existing budget allocation.

No provision has been made for initiating formal legal action against Tonkin Consulting or undertaking any of the aforementioned remedial works in the 2018-19 Adopted Budget, or in the Long Term Financial Plan future years. Council's 2018-19 Adopted Budget currently reflects an Operating Surplus of \$302k with an Operating Surplus Ratio of 0.7%. As such, expenditure of any or all of the amounts above are likely to result in a significant financial impact on Council's Operating Surplus for the 2018/19 financial year given that the legal and remediation costs are likely to be considered operating in nature (as Council does not own the asset).

Given that the legal and remediation expenditure is a one-off abnormal expenditure, the resultant impact on the operating surplus and ratio, as one of the measures of financial sustainability, can be viewed as short term and Council's operating financial position still remains quite sound.

Separately, Council will need to consider how any expenditure will be funded. While increasing borrowings by use of Council's short term drawdown facility could be considered, it would be preferable that if required, this expenditure be accommodated by undertaking an assessment and prioritisation of current projects including:

- New Capital and Asset renewal projects across all asset categories to identify individual capital asset timings that could be deferred without a significant impact on service provision or significant increase to the assets whole of life costs
- Other strategic initiatives to determine whether any project expenditure can be deferred without impacting on agreed Council Strategic Plan outcomes in the short term.

Given the uncertainty on the final outcome of this matter, appropriate budget adjustments will be presented to Council as and when needed through the budget review process.

### Suitability for Residential Premises

In addition to the costs outlined above relating to remedial and potential legal costs there are costs to be incurred in regard to the suitability of the site for residential purposes. The property owners have lodged a number of development applications for the construction of several dwellings on the site.

Ultimately, the property owners intend to build a residential dwelling on the site for habitable use. These applications are currently pending the results of a Site Contamination Audit. An audit of this nature is required to determine the suitability or otherwise for a residential dwelling on the site. Use of the site for residential purposes is a sensitive land use requiring a statement of suitability issued by an EPA accredited Site Contamination Auditor.

Currently, a procurement process is in progress to secure the services of an appropriate auditor. Once engaged, the first step for the auditor will be to review existing information and identify gaps, if any, in available data. This data is required to make an assessment as to the suitability of the site for residential purposes. Costs to engage the auditor will be known once the procurement process has been completed and an auditor engaged. As an approximate estimate, the services of the auditor could cost in the order of \$30,000 to \$40,000.

Subject to the outcome of the initial data review by the auditor there may be a requirement to engage appropriately qualified engineers to initiate and undertake further on site testing required to fill any gaps in the available data. Costs for these works, if any, will be known as and when they arise.

The costs to undertake these works will be in the first instance drawn from existing budgets and if required any budget adjustments will be made through the budget review process.

#### ➤ **Customer Service and Community/Cultural Implications**

Giving effect to the recommendation of this report does not directly impact customer service or the community.

#### ➤ **Environmental Implications**

There are no environmental implications arising from the current slip in the landfill cap as the underlying waste mass has not been exposed. However overtime, if the slip is not repaired, there is potential for the waste mass to be exposed and for the slip area to grow in size which has occurred to a small degree since it occurred in 2015.

#### ➤ **Engagement/Consultation conducted with Council Committee, Regional Subsidiary, Advisory Group, the Administration and Community**

*Council Committees:* Not Applicable

*Council Workshop:* Briefing to Council Members in June 2018

*Advisory Groups:* Not Applicable

*Administration:* Chief Executive Officer  
Director Infrastructure and Operations

Director Development and Regulatory Services  
Manager Financial Services

*Community:* Not Applicable

## 2. BACKGROUND

The Ashton Landfill was established in 1975 by the former District Council of East Torrens. The landfill ceased receiving waste in 2006 and formally closed on 31 March 2007. Following EPA approval of the *'Ashton Landfill Closure and Post Closure Management Plan & Capping Technical Specifications'* the waste mass was capped in 2009. The landfill capping was designed by Tonkin Consulting with physical works undertaken by the Adelaide Hills Region Waste Management Authority and Council.

The site was sold by Adelaide Hills Council to private owners in 2007. The sale process included a five year lease clause allowing Council to undertake remediation and management of the site. At the end of the lease period, Adelaide Hills Council was to quit the site and the new owner was to take over all responsibility for the landfill.

During 2012 the landfill suffered a major slip of the upper surface of the capping material. Remediation works to fix this slip were designed and overseen by Tonkin Consulting in 2013 (predominantly) and 2014. In 2015, the property owner reported another large slip had occurred which overlapped portions of the repaired slip that occurred in 2012.

Given the landfill has experienced two large slips and several smaller slips the 2015 slip has not been repaired at this point. As the landfill has experienced ongoing issues with slips the site has never been formally handed over to the property owners as intended by the sale agreement and lease in 2007.

Engineering and legal advice received thus far indicates alleged contractual breaches in relation to the repair work undertaken by Tonkin Consulting in 2013 and 2014 when remediating the 2012 slip that has allegedly led to all or part of the slip that occurred in 2015.

To date, communications with Tonkin Consulting has been undertaken with a view to reaching a settlement without this matter becoming litigious in nature. Council has sought explanation and settlement proposals from Tonkin. However, to date they have denied any responsibility or liability but in doing so, have not provided any sound engineering evidence to support their denials. Noting this outcome, and that Tonkin Consulting has commenced use of their legal advisors to correspond with Council, it may be necessary to instigate legal proceedings against them to recover some or all of the costs to be incurred by Council to remediate the slip.

## 3. ANALYSIS

The limitation period to pursue compensation in relation to the suitability of the original landfill capping design undertaken by Tonkin Consulting in 2007/08 is six years. Accordingly, this limitation period has passed and therefore Council cannot take any action in regard to the suitability of the original capping design.

The expiry of the limitation period for the design and remediation works undertaken by Tonkin Consulting in 2013 and 2014 (the focus of this report) is, in a worst case scenario,

towards the end of 2018. The actual expiry of the limitation period for this work is subject to final legal advice and confirmation therefore the end of 2018 timeline provided is only indicative at this stage.

In addition to the forthcoming expiration of the limitation period Council will enter caretaker mode from 18 September 2018 in response to the forthcoming Local Government Elections.

Noting the above, this report is seeking Council endorsement to do all reasonable things, including initiating legal proceedings, to recover losses associated with an alleged breach of contract by Tonkin Consulting in relation to the Ashton Landfill. Prior to commencing legal proceedings careful consideration will continue to be given to the likely cost of litigation and the prospects or otherwise for a successful outcome.

Further information via briefings (as previously provided) and formal reports will be provided to Council Members in relation to all matters regarding Ashton Landfill as and when material milestones and or decision points arise.

#### OPTIONS

Council has the following options:

- I. Resolve to take all reasonable actions, including legal proceedings, to recover losses associated with an alleged breach of contract by Tonkin Consulting and provide the Chief Executive Officer with the delegation to undertake all necessary actions to affect the resolution of this report. This option is recommended as it will provide capacity for the Administration to undertake the required actions towards recovering or minimising Council's losses (Recommended).
- II. Not adopt the recommendations of this report. This option is not recommended as it will potentially prevent actions being undertaken to recover or minimise Council's losses from the 2015 slip that has occurred at the Ashton Landfill (Not Recommended).

#### 4. APPENDIX

Nil

**3. Ashton Landfill – Period of Confidentiality**

**Subject to the CEO, or his delegate, disclosing information or any document (in whole or in part) for the purpose of implementing Council's decision(s) in this matter in the performance of the duties and responsibilities of office, Council, having considered Agenda Item 7.1 in confidence under sections 90(2) and 90(3) (i) of the *Local Government Act 1999*, resolves that an order be made under the provisions of sections 91(7) and (9) of the *Local Government Act 1999* that the report, related attachments and the minutes of Council and the discussion and considerations of the subject matter be retained in confidence until 10 September 2019.**

**Pursuant to section 91(9)(c) of the *Local Government Act 1999*, Council delegates the power to revoke the confidentiality order either partially or in full to the Chief Executive Officer.**