



Environmental Defender's Office

ACT Inc.

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Environment Protection Authority
GPO Box 158
CANBERRA ACT 2601

Dear Sir / Madam

SUBMISSION ON THE DRAFT WATER QUALITY ENVIRONMENT PROTECTION POLICY

The Environmental Defender's Office of the A.C.T wishes to put forward the following submissions to the Authority on the proposed draft Water Quality Environment Protection Policy (hereafter referred to as 'the Policy').

As a general comment the Office would like to express support for the adoption of policies which are designed to assist individuals and businesses better understand their obligations under the *Environment Protection Act 1997* (hereafter referred to as 'the EP Act') and the associated regulations as they relate to water. Such measures are important in achieving the overall legislative aim of maintaining and enhancing the ACT's water quality.

The Office would like to make a number of comments and suggestions that would, in our view, improve this understanding and better assist businesses and individuals

in complying with the legal framework. The comments can be broadly summarised as follows:

- i) broadening the focus of the objectives to refer not only to objectives of minimising harm but also to the objectives of preventing harm and restoring damage;
- ii) clarifying the effect of the Environment Protection Policies (EPPs);
- iii) providing examples of when a strict enforcement approach may be taken;
- iv) providing information about access to monitoring data;
- v) clarifying mandatory obligations; and
- vi) clarifying the meaning of an activity manager.

i) Broader focus of objects – to minimise and prevent harm and restore damage

One important objective of the EP Act and the legal framework regulating water in the ACT is not only to minimise certain environmental harm but also to prevent the harm and, where practicable, to reverse damage that has already happened (see in particular paragraphs 2(1)(a), 2(1)(h), 2(1)(l), 2(1)(o), 2(1)(p), 2(2)(b), 22(1) of the EP Act, and paragraph 6(1)(b) of the *Water Resources Act 2007*). Whilst recognising that the Policy is intended as a guide, not a comprehensive statement of the law, this Office is of the view that it is important that the Policy highlight not only the object of minimisation but also note the important objectives of prevention and taking measures to reverse harm which has occurred, where applicable.

The Office notes the following examples where it believes that this could be more clearly highlighted in the draft Policy:

Role of EPPs - paragraph 1.1

In paragraph 1.1 of the Policy, it is stated that ‘This EPP provides guidance on meeting these legislative requirements, including the need to adopt the **general environmental duty** as specified in the Act to minimise **environmental harm**.’ It is noted that the general environmental duty in subsection 22(1) of the EP Act is to ‘**prevent or** minimise environmental harm’ (my emphasis). This Office suggests that the background to the Policy should include a reference to the general environmental duty to **prevent** environmental harm as well as to minimise environmental harm. This would be consistent with the description of the general environmental duty in the Environment Protection Authority’s (hereafter referred to as the Authority’s) General EPP, which refers to both the duty to prevent and the duty to minimise environmental harm.

Policy objective – paragraph 2

In addition it is noted that the Policy Objective outlined in the draft Policy is to ‘to provide information to the community and to maintain, and where appropriate enhance, the ACTs water quality, ... by minimising water pollution.’ As noted above, an important objective of the EP Act is to not only reduce certain forms of pollution but also to eliminate them. Paragraph 2(1)(h) of the EP Act provides that one of the objects of the Act is to ‘regulate, reduce **or eliminate** the discharge of pollutants and hazardous substances into the ... water consistent with maintaining environmental quality’ (my emphasis). This Office is of the view that, consistent with the objects of the EP Act, the draft Policy should aim to provide information and guidance not only about matters to reduce and minimise certain forms of harm but also to eliminate these forms of harm. This is clearly an important aspect of the legislative intention, as evidenced by the stated objects of the Act.

Compliance with this EPP – paragraph 3

The general environmental duty is also referred to in paragraph 3 of the draft Policy. As discussed above, the Office recommends that this reference also be amended to reflect that the duty requires people to not only minimise environmental harm or nuisance, but also to **prevent** harm or nuisance.

Licensing of water use – paragraph 7.3

It is also suggested that paragraph 7.3 of the Policy should note that one of the objects of the *Water Resources Act 2007* is not only to protect waterways and groundwater aquifers from damage, but also to **reverse any damage** that has already happened, where practicable (my emphasis) (consistent with the objects of the Act set out in paragraph 6(b) of the *Water Resources Act 2007*).

ii) ***Effect of EPPs – must be taken into account by Authority in decision making (paragraph 3)***

In paragraph 3 of the draft Policy it is stated that ‘EPPs are not legally binding in themselves. They are statements of policy, guidelines and explanations of legal requirements.’

In this Office’s view it would be desirable if the draft policy explained that while the EPPs are not intended to place legally binding obligations on individuals and businesses (this is done in the Act and regulations), the Authority must take into account the Policy when administering the EP Act and making certain decisions under the Act.

It is noted that section 24 of the EP Act defines what an EPP is and notes three alternatives. Paragraph 24(a) of the Act states that ‘Environment protection policies are documents prepared by the Authority, ..., setting out – (a) guidelines to which the authority **must** have regard in administering the Act generally or in relation to specified functions of the authority...’ (my emphasis). Consequently where a Policy sets out guidelines which the authority must have regard to,

rather than ‘matters that the authority **may** take into account in relation to the making of a decision in the exercise of a discretion under the Act’ (paragraph 24(c) of the Act) (my emphasis), it is our view that the draft Policy should explain that the effect of the Policy is that the authority is legally required to have regard to the guidelines when administering the Act.

As this Office noted in its submission on the General EPP, paragraph 61(b) of the EP Act also requires the Authority to take into account any relevant environment protection policy when making certain decisions under the Act.

To ensure that the effect of the Policy is clear to individuals and businesses, this Office recommends that the Policy should more clearly explain that the matters set out in the Policy **must** be taken into account by the Authority when administering the Act and making certain decisions.

iii) ***Enforcement Policy – need for examples (paragraph 4)***

The Office notes that the Policy sets out the Authority’s general approach to enforcement, which reflects the General EPP. The Office strongly supports an effective enforcement regime to ensure appropriate protection is given to the environment. However, it is concerned that the Policy does not give appropriate weight to the possibility of tough enforcement action in cases of serious, flagrant and ongoing breaches and does not give guidance as to when a strict enforcement approach may be taken. Parliament’s concern for the harm created by the offences is reflected in the level of the penalties in the EP Act, which provides for maximum penalties of \$100, 000 for corporations (200 penalty units) for some offences.

The Office notes that the Policy does state that the approach is for guidance only and that serious cases may justify immediate application of a strict approach to enforcement.

However we think it would be useful for the Policy to give some examples of what cases might warrant a strict approach to enforcement. For example, if the Authority took into account matters such as whether it is a repeat offence, the magnitude of the environmental harm and the type of harm, it would be useful for this to be spelt out in the Policy. This would assist individuals and industry, by ensuring that they are more fully aware of the possible consequences of their actions.

iv) ***Access to monitoring data (paragraph 7.5)***

Accurate and regular monitoring of water usage, water supply, water flow and water quality are essential to ensure the effective operation of the Act. Accurate data relating to these matters will be integral to any consideration of the Authority as to whether a person or organisation has breached certain provisions in the EP Act.

This Office strongly supports a monitoring program for the ACT's water resources. In light of the importance of this monitoring role, this Office suggests that the draft Policy should outline where a person can access data relating to this monitoring, including who has undertaken the monitoring, when it has taken place, and the resulting data.

v) ***Clarification of mandatory obligations (paragraph 8.1)***

The Office is concerned that some of the language used in this draft Policy does not clearly highlight to businesses and individuals that certain actions are mandatory, or conversely, prohibited under the Act or Regulations and that failure to act, or not to act, will result in the person committing an offence.

In particular, paragraph 8.1 of the Policy states 'some examples of the control measures activity managers **should** put in place to protect water quality and the environment are

outlined below' (my emphasis). The Policy then provides a general list of actions that it may be appropriate for businesses to do to protect water quality, but the Policy does not equate them to particular activities undertaken by the business. Consequently certain actions may be appropriate for certain activities, but not others.

The Office notes that the previous Water Pollution EPP contained much greater details of the management of class A and B activities, which spelt out clearly the types of actions an activity manager should take when they are undertaking specific activities, for example storing petroleum, engaging in minor construction works, or conducting automotive repairs.

The Office strongly supports the listing of suggested environmental protection measures in the draft Policy to assist businesses and individuals in ensuring the protection of water quality. The Office notes that in some cases the suggested activities may be necessary to ensure that a business or individual does not commit an offence under Part 4 of the *Environment Protection Regulation 2005* (hereafter referred to as the 'Regulations'). Part 4 of the Regulations prescribe certain offences relating to the protection of waterways. For example, regulation 45 provides that it is an offence if a person places soil, sand, building material or waste from building work in the stormwater system or a waterway, or where it may enter the stormwater system or a waterway.

While the Office applauds the guidance provided in the draft Policy it is of the view that the draft Policy could more effectively highlight to an individual or business engaged in a specific form of activity, that failure to undertake certain environmental protection measures may result in the commission of an offence.

The 'Notes on reading this EPP' (at paragraph 1.5) state that where the EPP refers to a legal requirement, it will give the

source of this requirement for reference. It is suggested that paragraph 8 of the Policy should refer to Part 4 of the Regulations to highlight the legal requirements set out in that Part. It is also suggested that the Policy highlight that failure to comply with that Part will result in the commission of an offence. This will assist persons in complying with the regulatory framework.

vi) ***Clarifying meaning of an activity manager (paragraph 8)***

As discussed above, paragraph 8.1 of the draft Policy refers to ‘activity managers’, and discusses ways in which ‘activity managers’ should ensure that the activities they are involved in are conducted in such a way as to protect water quality. This term is also used in paragraph 8.2.1 of the Policy in relation to environmental authorisations. It is noted that, while the term ‘activity manager’ is used in the Explanatory Statement accompanying the EP Act, this term is not used in the Act or regulations and is not legally defined. Nor is the term defined in the draft Policy.

The Act and regulations place obligations relating to water management on ‘persons’, which includes an individual or a corporation (see section 160 of the *Legislation Act 2001*). Consequently the general environmental duties set out in the EP Act and the various offences relating to water management, apply to persons or corporations, involved in the relevant activities, not simply the ‘manager’ of these activities.

For example, it is possible that a business conducting activities that are subject to water-related regulations, could involve an employee carrying out work on direction from a manager, or a contractor carrying out work on behalf of another business. It is the view of this Office that it would be desirable for the draft Policy to clarify that the regulatory framework applies to all persons involved in activities which could potentially affect water quality. That is, that

obligations *may* be placed on persons conducting particular activities as well as persons who authorise a particular activity. This would assist individuals and businesses in complying with their legal obligations, and ensuring that persons do not contravene the legislation.

We thank you for the opportunity to make these submissions and would welcome further discussion on the matter should it be required.

Yours sincerely

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