Law Reform Submission - SA Environment Protection Act 1993

TO: DEPARTMENT FOR ENVIRONMENT AND HERITAGE

FROM: ENVIRONMENTAL DEFENDER'S OFFICE

RE: ENVIRONMENT PROTECTION (MISCELLANEOUS) AMENDMENT BILL 2003

DATE: 7 MARCH 2003

1. The EDO

The Environmental Defenders Office (SA) Inc. (EDO) is a non-profit community legal centre specialising in public-interest environmental law. In addition to providing legal advice to the community on matters involving environmental law, the EDO has a mandate from its members to pursue and comment on proposals to amend environmental legislation.

2. Introduction

The EDO commends the proposed changes to the Environment Protection Act 1993 as a significant advance in regulating environmentally harmful activities in South Australia. However, the EDO believes that the proposed changes contain significant scope for improvement. The following paper details the suggestions and concerns of the EDO in relation to the proposed changes.

3. Offences and Penalties

Jurisdiction of the Environment, Resources and Development Court (no specific clause)

The EDO commends the substantial increases in penalties for offences under the Environment Protection Act 1993 arising from the amendments made in late 2002 through the Statutes Amendment (Environment Protection) Act 2002. However, the Environment Resources and Development Court remains unable to impose penalties in excess of a fine of $120 000 or 2 years imprisonment by virtue of section 7 of the Environment Resources and Development Court Act 1993. It is crucial that the opportunity be taken in pursuing the proposed amendments relating to offences and penalties in this second round of amendments to the Environment Protection Act to address this jurisdictional limitation.

The EDO appreciates that the agreement of the Attorney-General, or the Minister responsible for the Environment Resources and Development Court Act, is needed to implement the proposed change. The EDO therefore urges a whole-of-government approach to this matter and strongly suggests that this particular issue be addressed through the Environment Protection (Miscellaneous) Amendment Bill 2003.

Civil Remedies (clause 47)

The EDO welcomes the proposed addition of sub-section 24 of section 104, enabling the Environment Resources and Development Court to consider the purpose of proceedings under this section when awarding costs. Whilst this may alleviate some of the concern which potential 'public interest' litigants have in relation to the financial risks associated with the use of section 104, there remain significant other impediments in section 104 which, in the experience of the EDO, account for the fact that this section has never been utilised by a single litigant in the manner envisaged. These include the provisions for security for costs and undertakings as to damages (sub-section 17) and the payment of the compensation for loss or damage suffered by a respondent (sub-section 18).

The EDO submits that the operation of the proposed sub-section 24 should be extended to cover applications by respondents under sub-sections 17 and 18 also. This would be consistent with the position adopted, for example, in the Land and Environment Court of NSW whereby the public interest nature of civil enforcement proceedings has been relied upon to refuse applications for security for costs and undertakings as to damages.

Civil Penalties (clause 48)

The EDO strongly supports the introduction of a civil penalties scheme under the Environment Protection Act and believes that, when combined with increases in maximum penalties, this will place the South Australian legislation well ahead of its interstate counterparts. However, the particular scheme which is proposed is of concern in several respects, as follows:

(a) Limited Scope

The proposals to limit the civil penalties scheme to offences which do not involve any mental element (strict liability offences), and to use civil penalties as an alternative to prosecution, are not supported by the EDO. The EPA Discussion Paper on Offences and Penalties (2000) thoroughly considered similar schemes elsewhere and indicates that it is common for civil penalties to be imposed in addition to criminal prosecution. It also notes the following consequence of this approach:

"If the [civil] penalty is in addition to prosecution, there is no need to restrict the scheme to particular offences. In these circumstances, the Authority would impose a penalty wherever it felt that this was appropriate and also refer the matter for prosecution…"

The EDO urges the adoption of this alternative model under which civil penalties may be imposed alongside a criminal prosecution. This is the position under USA Federal environmental law and in several other jurisdictions, as noted in the Discussion Paper. Whilst civil penalties serve to recoup unfair gains and to deter others, criminal prosecution achieves the additional goal of punishment in appropriate cases (which may include strict liability offences). Such an approach is more likely to ensure that civil penalties do not essentially replace criminal prosecution than the scheme currently proposed for South Australia.

(b) 'Third Party' Civil Penalty Proceedings (clause 48)

In section 4.3 of the Discussion Paper on Offences and Penalties, the option was considered of allowing environmental organisations or community groups to commence proceedings in the Environment Resources and Development Court for civil penalties, and for such penalties to be payable to the persons bringing the action.

The EDO strongly supports these options. In the United States, it is commonplace for environmental organisations to bring proceedings for the award of civil penalties in the Federal Courts under Federal environmental laws, often on the basis of breaches revealed in published monitoring data. As was also noted in the Discussion Paper, US courts have also been willing to award civil penalty payments to such organisations rather than direct payment to the general revenue (p59).

The EDO submits that additional provision should be made in the proposed section 104A for applications to the ERD Court for civil penalties to be able to be made pursuant to section 104(7) of the Environment Protection Act 1993, either separately or in conjunction with applications for any of the types of order that can be made by the Court under subsection 104(1). The court should also be empowered to order any civil penalty it imposes in such circumstances to be paid to the successful applicant, or alternatively, to a specified environmental project (cf., section 133(1)(b) in relation to criminal penalties).

(c) 'Negotiated' civil penalties (clause 48).

The EDO is not supportive of the proposed approach whereby civil penalties may be imposed by the EPA by 'negotiation'. There is no guarantee of transparency in such an approach, nor do the amendments indicate what guidelines or criteria will be applicable to such negotiations. The EDO is not aware of any equivalent system for the imposition of civil penalties in any other jurisdiction.

The amendments should spell out a clear procedure for the issue of civil penalties by the EPA by notice to the polluter, including criteria for the calculation of the relevant penalty amount. Rights of appeal to the Environment Resources and Development Court against a civil penalty notice should also be provided as a matter of natural justice.

4. Post Closure Issues and the Regulation of Activities Involving long-term Harm to Land (clause 4)

The EDO commends the proposal to provide the EPA with the power to impose requirements on authority holders after closure of environmentally significant activities and looks forward to the further proposed changes to the Act related to the regulation of contaminated sites (not yet in draft form).

Given such developments, however, the EDO questions the suitability of the defence available under subsection 84(c) of the Act, whereby it is a defence to a charge of causing serious or material environmental harm, causing an environmental nuisance or of failing to notify the EPA of incidents causing environmental harm to prove that the harm was confined to land owned by the polluter, or where pollution of land occurred with the landowners consent. Such a provision is inconsistent with the growing recognition that the contamination of any land has broad community and other implications and should be carefully regulated. Furthermore, no Australian State or Territory environmental legislation contains a similar provision.

The EDO therefore submits that the presently proposed amendments should include a provision repealing the defence available under section 84(c). Alternatively, and in the very least, amendments should ensure that the defence does not apply to the offence of failing to report an environmental incident. This would allow the EPA to develop a database of contaminated or potentially contaminated sites.

5. Changes to the Process of Making Environment Protection Policies (EPPs) (clauses 14-16)

The Process for Making EPPs

The EDO recognises the desire to reduce delays in developing EPPs but questions whether such delays are more a result of resource issues than public consultation requirements. We submit that the formal consultation process currently occupies only a fraction of the total time required to produce EPPs and that the greatest savings in time would be achieved by increasing resources and improving efficiency in the administrative processes of the EPA in preparing EPPs. The EDO suggests, however, that one time-saving measure that could be employed in the future would be to release any Discussion Paper in conjunction with the draft EPP, rather than up to 18 months in advance.

The EDO questions the proposition in the explanatory paper (at pp7-8) that the public hearing system "was found not to usefully contribute to the consultation process" and opposes the proposed removal of the public hearing requirement. Such a requirement remains in place under the Development Act in relation to amendments of Development Plans. The EDO submits that this fundamental mode of public consultation is too significant to be abandoned and should not be replaced by the proposed public information meeting.

It is also suggested that removing both the right to respond to submissions received in the first round of public consultation and the requirement for a second round of consultation represents too significant a decrease in public accountability and transparency. The EDO therefore suggests that the second round of consultation also be retained in order to give members of the public a right to comment on submissions received during the first round, and more particularly, on the changes to the draft EPP that have resulted from those submissions.

In relation to the proposed model for implementing National Environment Protection Measures (NEPMs) into South Australian law, the EDO submits that the amended Act should require that NEPMs be adopted within 6 months. In the event that this does not occur, the NEPM should be automatically adopted as an EPP, as is the case under the present system. Furthermore, the EDO submits that, in 'tailoring' NEPMs to fit South Australia's legislative requirements, there should be, in addition to the proposed constraints, a particular provision that, in adopting a NEPM as an EPP, there should be no substantive amendment of the NEPM.

6. Empowering Local Government as an Administering Agency (clause 11)

The Explanatory Paper accompanying the draft Bill argues a case for amendment of the Environment Protection Act whereby local councils will be empowered to "opt in" to the administration of the Act by being appointed an "administering agency" for that purpose. Appointment and assigning of powers would be by Regulation subject to certain limitations including a prohibition on councils exercising powers in relation to prescribed activities of environmental significance.

The EDO recognises the need for a State-wide acceptance of governmental responsibility for the administration of the Act and accepts that there are benefits to be obtained from administration of the Act at a local level. Nevertheless, the EDO has serious reservations as to the capacity or willingness of councils generally to effectively assume the proposed partial responsibility for

administration of the Act. The EDO's concerns may be divided into the two broad but related categories of Conflict of Interest and Resources..

Potential Conflict of Interest

Local governments have the primary responsibility for determining development applications under the Development Act. It is not uncommon for developments approved by Councils which do not require referral to the EPA for direction to subsequently create pollution problems that can be addressed effectively only by application of the provisions of the Environment Protection Act. Many councils, particularly those in poorer areas, are keen to attract industry and it is well recorded that Councils at times approve development with inappropriate or ineffective conditions. Councils in such circumstances are often reluctant to respond to subsequent complaints concerning environmental impacts of approved developments.

The EDO is aware of two instances of such difficulties that are presented by way of examples:

(i) Council X granted development consent to a drive-thru fast food and general retail outlet with no restrictions on the hours of operation even though it abutted a residential area. The facility became an all night focus for local young people with the creation of nuisance through the generation of prolonged, intrusive and excessive noise.

Despite repeated requests, Council has refused to assist and has rejected requests that it formally seek the assistance of the EPA.

(ii) Council M granted development consent to an intensive animal husbandry operation in a rural living area (below the Schedule 22 threshold) despite the strong objections of local residents who feared problems from noise and dust generated by trucks and from odour. The majority of councillors argued that the economic development was needed in the area. The odour from the facility is so intrusive that one resident has been forced on several occasions to leave his home at midnight to escape the effects. Other neighbours have experienced similar problems with odour and dust generation.

Despite breaches of conditions of the planning consent, Council has refused to assist the affected residents.

The above instances exemplify the problems that can be associated with empowering an organisation to regulate with respect to pollution the very development that it has previously approved. The EDO in no way suggests that this would happen in all or a majority of instances. However, such an administrative regime contrasts with the independence required for effective implementation of legislation which is often at odds with economic aspirations.

The problem would appear to be compounded by the fact that the new regime is to be implemented by the Minister for Environment and Heritage under Regulations. Consequently, this becomes essentially a political process. Depending on the nature of the Regulations, it renders more likely the continuation of an unsatisfactory arrangement in particular cases as it cannot always be guaranteed that Parliament will accept regulations which seek to repeal a transfer of functions to a particular council.

Resources

The EDO is also concerned that the effective transfer of functions to councils under the Act may be undermined by a lack of resources to perform those functions. The Draft Bill endeavours to provide cost-recovery machinery for councils as administering agencies to finance their responsibilities assumed under the Act through the recovery of technical costs and expenses incurred in investigating breaches of the Act. We note also the tentative proposals for additional mechanisms such as administrative, compliance and investigation fees.

It may be the case that such revenue-raising measures could be successful. However, a number of factors will affect the likelihood of success. For example, efficient recovery of such fees may be impracticable, bearing in mind that local councils will, in all likelihood be dealing with a majority of relatively small to medium industries that may be tardy in paying fees levied.

It may also be the case that the workload involved as an administering agency may be more related to general administration (salaries, telephones, etc.) than the specific task of issuing orders. It may not be possible to “capture” these broader administrative costs involved in assuming responsibilities as an administering agency through the recovery mechanisms under consideration. It may follow that even if a Council were prepared to accept responsibilities under the Act as proposed, financial limitations may severely limit the effectiveness of service delivery.

The EDO would like to see a more detailed economic evaluation of the issue of cost-recovery presented in the Explanatory Paper so that it may be satisfied that local councils are likely to have sufficient resources to effectively administer the Act.

Proposed Solutions

The Statutes Amendment (Environment Protection) Act 2002 was directed to providing greater and genuine autonomy to the Environment Protection Authority than had hitherto been the case.

The present proposals give the power of appointing local councils as administering agencies to the Minister with a council requirement to report to the Authority. The EDO believes that it would be more appropriate for regulations to be prepared that provide for the appointment of councils as administering agencies by the Minister only on the advice of the Authority based on specified criteria. The Regulations should also allow for withdrawal of appointments by the Minister on the advice of the Authority.

Criteria should include:

a) The history of the council in addressing pollution issues;

b) The resources likely to be available to assist the council in implementing its responsibilities;

c) Qualifications of relevant employees;

d) The number of authorised officers employed by the Council.

7. Authorised Officers (clause 33)

It is noted that the draft Bill, as a part of the move towards delegating responsibility for the administration of the Act to local councils, removes the requirement for councils to consult with the EPA prior to appointing authorised officers. The EDO does not support this amendment. Given the

potential problems associated with delegating administering authority to local councils (discussed above), it is imperative that a high standard of authorised officers is maintained.

The EDO therefore submits that the EPA should be responsible for appointing authorised officers, not local councils. Furthermore, it is submitted that the EPA should explicitly define, by way of Regulation, the qualifications and prior training required by authorised officers. This would not only improve enforcement of the Act, but would also ameliorate many of the problems associated with delegating administrative responsibility to local councils.

8. Consultation in Relation to Environmental Authorisations (clause 20)

The EDO supports the proposal to strengthen rights to public consultation through the requirement that adjacent landowners or occupiers are notified directly of applications for environmental authorisations. The EDO notes however, that the definition of “adjacent land” is unduly restrictive. A number of prescribed activities of environmental significance, particularly those involving odour, can have significant effects far beyond a range of 60 meters.

To impose such a limit in respect of all applications for environment authorisations is therefore somewhat arbitrary and will often prove to be inadequate. It is therefore suggested that the definition of “adjacent land” be amended so that it is more likely that all land owners and occupiers potentially affected by a prescribed activity of environmental significance receive direct notification. This may necessitate the prescription of different distances for activities involving different forms of pollution, for example, odour, noise, diminished visual amenity and so forth.

Beyond this, the EDO submits that a limited right of appeal should be given to adjacent landowners and occupiers pursuant to section 106 of the Act where such parties have received notification and made a submission in relation to an application for environmental authorisation. The EDO appreciates that, in practice, this right of appeal will be exercisable primarily with respect to licence conditions alone.

The EDO also continues to be concerned that members of the public are regularly denied comment and appeal rights in relation to environmental authorisations in the form of works approvals because these are generally dealt with under the provisions of the Development Act and its Regulations (which supersede the separate requirement for works approval under section 35 of the Environment Protection Act – see sub-s.(2)(b)).

Under the Development Act provisions, many prescribed activities do not fit within Category 3 and hence are not subject to full public consultation or third party appeal rights. The EDO recognises that this will require amendments to the Development Act, for example by amending section 37 to provide that any Schedule 22 activity must be classified as Category 3 development. Such an amendment should be pursued with the Minister responsible for the Development Act as a part of this current review process.

9. Public Register (no specific clause)

The EDO wishes to propose an amendment to section 109 of the Act, relating to the Public Register, to include a requirement that the results of monitoring or tests required to be undertaken as a condition of an environmental authorisation be recorded on the Register. Additionally, the EDO suggests that, in so far as it is practicable, the Register be placed on-line.

10. Human Health Considerations (clause 4)

The impacts of activities on human health is a primary concern of environment protection legislation, as is reflected to an extent in the objects of the Environment Protection Act, section 10(1)(a)(i). It is incongruous therefore that the definitions of “environment” and “environmental harm” in the Act do not explicitly incorporate the human health dimension. “Environment” as defined does not include humans (unless the term ‘organisms’ applies, which is unlikely) and accordingly the definition of “environmental harm” appears not to include harm to human health.

We assume that this is an accidental oversight rather than a deliberately adopted position, but consider that the matter is sufficiently open to doubt and debate that it deserves to be clarified. The EDO suggests that the definition of “environment” in section 4 be amended by including a new sub-section (c) to read “humans and other species”. This would suffice to ensure that activity which impacts solely on human health nevertheless falls within the definition of “environmental harm”.