ENVIRONMENTAL DEFENDERS OFFICE (SA) INC.

A Community Legal Centre specialising in public interest environmental law

1 July 2011

Statutory Authorities Review Committee
Parliament House
North Terrace
Adelaide
SA 5000

Attention: Mr Gareth Hickery
Secretary to the Committee

By email: SARC@parliament.sa.gov.au

INQUIRY: ENVIRONMENT PROTECTION AUTHORITY

The Environmental Defenders Office of South Australia (EDO) is a community legal centre with over 15 years' experience specialising in public interest environmental and planning law. Engaging in law reform processes, including reviewing and proposing changes to environmental bills and legislation forms an important part of our work. As a result, we welcome the opportunity to make a submission to this Inquiry.

Part 1 of this submission provides comment on the following matters specifically related to the Environment Protection Authority:

- Public Register;
- Casework including:
  - *Noise pollution;*
  - *Air pollution: jurisdictional issues;*
  - *Air pollution: smoke.*

Part 2 of this submission discusses the following matters connected to the enforcement and therefore overall efficacy of the Environment Protection Act (EP Act):

- Public notification and submission in respect of applications for environmental authorisations;
- Notice and submissions in respect of proposed variations of conditions;
- Appeals;
- Costs;
- General Environmental Duty.

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We would be delighted to meet with the Committee at its earliest convenience in order to discuss our submission in more detail.

Part 1

Public Register

Pursuant to section 109 of the EP Act, the Authority must keep a register recording details in relation to matters including environmental authorisations, environmental harm, site contamination, administrative orders, prosecutions and civil proceedings and penalties. The authority must ensure that information is recorded within three months of the relevant action.

However, given that the Authority is a public body with the fundamental aim of protecting the environment it is important that it operates in a transparent manner, which includes providing for prompt access to information in order to better enable public participation in decision-making and access to justice in environmental matters[1]. This is particularly important when the health of people and the environment is impacted so that individuals can make proactive choices about matters which impact their health and surrounds.

There is concern that in the recent site contamination incidents at Edwardstown and Port Pirie (Solomontown) those affected were not advised promptly. In any event, the notification period of three months is insufficient given the damage to health and the environment which may be caused in that time frame. Accordingly, we recommend that section 109 be amended to:

- Publish the information set out in section 109 and regulation 16 on-line in a downloadable form without fee;

- Information which the Authority can make available in its discretion should be made available electronically on request without fee. This would include the material included in public register by virtue of section 109(3)(a) (being information relating to environmental and development authorisations) and regulation 16(1)(b) (being information relating to tests, monitoring and evaluation under section 52 of the Act) and (c) (being information relating to a determination of the authority under section 58 of the Act dealing with voluntary environmental audits);

- Section 109(3) to be widened to enable the following to be published on the register, that is, the Authority's responses to:
    - Development Act referrals;
    - Development Plan Amendments;
    - The Planning Strategy;

[1] United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Danish city of Aarhus.

- Environmental Impact assessments under the Development Act;

- Enable this information to be included on the register within 14 days of the relevant action;

- Delete section 109(7) which indicates that the Governor may provide for the removal by the Authority of information recorded in the register.

Casework

As noted at the beginning of this submission, the EDO has been operating in South Australia for over 15 years. Our cumulative experience in the area of environmental law has allowed us to observe 'trends' resulting from legislative and administrative deficiencies.

Noise pollution

There appears to be a tendency for the EPA to limit their assessment of noise pollution to potential impacts on human beings. This approach is contrary to the EP Act, which obliges the Authority to take into account impacts and risks in relation to human activities and flora and fauna when making decisions. Specifically, section 47(1)(c) of the EP Act requires the EPA to "have regard to, and seek to further" the Act's objects when making a decision to grant or refuse an environmental authorisation.

As one would expect of an Act whose name unambiguously draws attention to its function, these objects include several expressly designed to protect the environment. Specifically, section 10 comprises (*inter alia*) objects promoting:

- *10(1)(a)(i) "use, development and protection of the **environment**……. while*

  *(B) safeguarding the life-supporting capacity of air, water, land and **eco-systems**; and*

  (C) *avoiding, remedying or mitigating any adverse effects of activities on the **environment**"* …

- *(b)(ii) [coordinating] activities, policies and programmes necessary to reduce, minimize or eliminate environmental harm and ensure effective **environmental protection**, restoration and enhancement;*

- *(b)(iv) [applying] a precautionary approach to the assessment of risk of **environmental harm** and ensure that all aspects of environmental quality affected by pollution and waste (including **ecosystem sustainability** and valued environmental attributes) are considered in decisions relating to the **environment**" (emphasis added).*

These sections evince a clear intention on the part of the legislature for the EPA to take into account the impacts of activities on the environment. Despite this, noise pollution appears in practice in certain circumstances to be considered only in relation to its

impact on human beings. We therefore propose amending the *Environment Protection (Noise) Policy 2007* to make it unambiguously clear to decision-makers that noise assessments must take into account potential impacts on the entire environment.

Air pollution: Jurisdictional confusion

There also appears to be a tendency for the EPA to refer complaints about dust and smoke pollution to the local Council which often then refers the individual complainant back to the Authority. The EPA's referral to the Council in the first instance is contrary to the EP Act given that:

- the Act specifically provides in section 3 that pollutant includes both smoke and dust and this term is linked to the duty and offences within the Act;
- the functions of the Authority include conducting investigations in order to assess compliance with the Act[2].

In these circumstances, we recommend that internal procedure be reviewed.

Air pollution: smoke

The EDO receives ongoing complaints regarding smoke pollution. Of particular concern in the Mount Gambier region is the smoke pollution caused by timber plantations which impact the health of the local community.

Under the Environment Protection (Burning) Policy 1994, agriculture (which apparently is interpreted in practice to include forestry) is exempt as Clause 4(2)(c) of the policy provides that the policy "*Does not apply to any fire in the open for - agriculture purposes."*

Such a clause is out-moded particularly given the Government's obligation under the Climate Change and Greenhouse Emissions Reduction Act (SA) 2007 to reduce greenhouse gas emissions. In this regard, we recommend that forestry plantations in particular and agriculture generally be responsible for on-site pollution and so be required to operate sustainably by using options such as on-site mulching and the on-selling of waste to companies specialising in organic recycling of harvest residue. This would require consequent amendments to the Burning Policy and the Air Quality Policy.

As indicated above, such changes would also have the added benefit of assisting this State to reach its targets under the Climate Change and Greenhouse Emissions Reduction Act (SA) 2007[3].

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[2] s13(1)(f)
[3] Section 5

Part 2

Public notification and submission in respect of applications for environmental authorisations

Section 39 of the EP Act comprises a number of subsections outlining the public notification requirements for applicants seeking to obtain an environmental authorisation. Pubic submissions in respect of proposed authorisations are also covered by this section.

While we applaud the inclusion of notification and submission provisions in the Act, it is in the public interest to make a number of amendments to improve community awareness of activities which will impact upon their local environment, and to broaden the scope for community participation in decision-making processes. Specifically, we propose amending:

- Section 39(2) so that it is **compulsory** for a public notice to be published:
    - in a local newspaper circulating in the area in which the activity would be undertaken if the environmental authorisation were granted. This is particularly important given that many people rely on their local newspaper (as opposed to a State or National paper) to inform them of events occurring within their local community. Given the ease with which an applicant could comply with such a requirement, we see no reason not to amend the Act accordingly;
    - on the Authority's website;
- Sections 37 and 39 (3)(a) so that it is not possible to apply for an exemption from the notification requirements outlined in section 39(1). Again, we submit that it is in the public interest for **all** applications for environmental authorisations to be made public in both State-circulating and local newspapers.
- Section 39(b) so that **any person** (rather than just the owner or occupier of land adjacent to the site of the proposed activity) may make a submission in respect of the proposed activity. Broadening the section in this manner would bring the Act into line with the widely held view that the environment belongs to the community at large, the corollary of which is that all South Australians should be entitled to comment on proposed activities.
- Section 39(1)(b) so that people wishing to make a submission are provided with **not less than 30 days** (as opposed to not less than 14 days) to do so. Given the generally complex nature of activities for which authorisation is required, members of the public need to be provided with adequate time to prepare submissions. 14 days is clearly inadequate for this purpose.
- Section 39 to include a subsection requiring the EPA to provide individuals who have made submissions with written notice of the final decision.

Notice and Submissions in respect of proposed variations of conditions

Section 46 outlines when and how notices and submissions may be made in respect of proposed variations to the conditions of an environmental authorisation. The public has a right to be fully informed of the exact (not approximate) nature of activities that impact upon the environment. To that extent, we propose:

- Deleting sections 46(4) and 46(4a)(a), which currently exempt applicants from complying with the public notice requirements under sections 46(1)(b) and (1a) where the proposed variation does not result in any relaxation of the relevant conditions.

- Amending section 46(2) so that it is **compulsory** for a public notice to be published:

    - in a local newspaper circulating in the area in which the activity would be undertaken if the environmental authorisation were granted;
    - on the Authority's website.

Further, we note that in this regard, the community in New South Wales has had the opportunity to contribute to a formal process of reviewing conditions contained in environment protection licences issued by the NSW Environment Protection Authority (EPA) since July 1999[4]. As a result, we also propose amending the following sections to mirror our suggestions above regarding submissions:

- Section 46(1)(b)(ii) so that **any person** (rather than just the owner or occupier of land adjacent to the site of the proposed activity) may make a submission in respect of the proposed activity.

- Section 46(1)(b)(ii) so that people wishing to make a submission are provided with **not less than 30 days** (as opposed to not less than 14 days) to do so;

- Section 46 to:

    - enable a right of any person to appear and make oral submissions to the EPA in support of their submission;
    - to include a subsection requiring the EPA to provide individuals who have made submissions with written notice of the final decision;
    - include a subsection requiring the EPA to have regard to submissions made by the public with respect to proposed variations to conditions;
    - allow a right of appeal to the Environment Resources and Development Court. More detail on this matter is provided below under the heading Appeal.

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[4] *Protection of the Environment Operations Act* (NSW) 1997

Appeals

Proper rights of appeal are fundamental to transparent and democratic decision-making processes. They can also lead to better overall results for the community and environment insofar as third parties may identify issues otherwise overlooked during the assessment process.[5] It has further been suggested that the mere presence of a general right of appeal may encourage decision-makers "not to take any 'short cuts' in decision-making, but to adopt a broad and analytical approach that informs the substance of the decision and supports the conclusion."[6]

While section 104 of the EP Act does allow third parties to seek civil remedies for breaches of the Act, its application is limited by subsection (7) to persons who have the leave of the Court or "whose interests are affected by the subject matter of the application." This can be contrasted with section 85 of the Development Act which allows "any person" to bring an appeal for a breach of the Act. Despite its broad application, section 85 has not opened the "floodgates" to excessive amounts of litigation, largely due it is suspected to the time, money and emotional stamina required to bring an action. In light of this fact and the potentially serious nature of breaches of the EP Act, we propose that section 106 be extended to enable "any person" to bring an appeal.

We further propose amending section 106 of the EP Act to allow third parties to bring merit-based appeals with respect to the granting, varying or renewing of licences. Given that approvals and licences essentially pertain to a broad range of activities which pollute the environment and possibly impact on human health, it is reasonable, and in the public interest, to provide South Australians with proportionally broad appeal rights.

Finally, these amendments would help to advance the objects of the EP Act, which are elaborated in section 10 of the Act and include:

- *(b)(iv) to apply a **precautionary approach** to the assessment of risk of environmental harm and ensure that all aspects of environmental quality affected by pollution and waste (including ecosystem sustainability and valued environmental attributes) are considered in decisions relating to the environment". (Emphasis added).*

Specifically and as noted above, a right to appeal tends to make decision-making processes more rigorous and minimise the risk of 'short-cuts'. In our experience thorough, rational decisions are more likely to take into account the precautionary principle, which in turn minimises the risk of environmental harm.

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[5] Morris S (President, Victorian Civil and Administration Tribunal), *Third Party Participation in the Planning Permit Process*, Victorian Civil and Administrative Tribunal, [online - accessed 29 June 2011]

[6] See generally Cabarrus, *Merits Review of Commonwealth Environmental Decision-making* (2009), 26 EPLJ 113. Taken from Bates, G, *Environmental Law in Australia*, 7th Edition, LexisNexis Butterworths, 2010. p 739.

Costs

Amending sections 104 and 106 without removing costs-related impediments to third party appeals would be, in a word, pointless. For example, the prospect of being ordered to pay the defendant's costs in the event of an unsuccessful claim deters many people from commencing proceedings, and in this sense is a significant barrier to justice.[7] We therefore propose amending the EP Act to make it materially possible for third parties to bring an appeal under these two sections.

To place our comments in context, we note that under section 104(23) of the EP Act, the Court "may have regard" to whether proceedings have been brought in the public interest when making a determination in respect of costs. However, to the extent that this section is worded so as to invest the Court with a broad discretionary power to make orders as they see fit, they are in no way compelled to limit costs in public-interest cases.

We therefore submit that it is in the interest of justice to amend section 104(23) of the EP Act to **require** the Court to make a protective costs order limiting the amount of damages recoverable in public-interest cases. This would provide prospective appellants with absolute certainty regarding the potential financial implications of the action in question. Precedent for protective costs orders in an environmental jurisdiction exists in NSW[8].

Further, we are also concerned that the possibility of being asked to provide security for costs and/or to make an undertaking to pay future damages (pursuant to section 104(17) and (18)) prohibits legitimate appeals from being brought in the ERD Court. Again, given the environmental and health issues associated with scheduled activities, it is in the interest of all South Australians for potentially hazardous works approvals and licences to be scrutinised by an independent authority, that is, the Court. It is therefore logical that section 104(17) and (18) be amended so that it does not apply to appellants bringing cases deemed to be in the public interest.

General Environmental Duty

Section 25 of the EP Act creates a general environmental duty. Specifically, section 25 (1) states that:

A person must not undertake an activity that pollutes, or might pollute, the environment unless the person takes all reasonable and practicable measures to prevent or minimise any resulting environmental harm".

This legislative duty is fundamental to the operation of the EP Act and is important as it confirms that priority is to be given to protecting the environment from pollution. The reach of the duty can be extended by utilising it as an incentive mechanism to

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[7] Cazalet, Gary (University of Melbourne Law School), *Protective Costs Orders in Public Interest Litigation*, Pilch Matters, 2009 , [online - accessed 29 June 2011]

[8] Rule 42.4 of the The Uniform Civil Procedure Rules, although reform is needed of this rule and in this regard see EDO NSW' "Submission to the NSW Law Reform Commission on Security for costs and associated costs orders" available at http://www.edo.org.au/edonsw See also *Blue Mountains Conservation Society v Delta Electricity [2009] NSWLEC 150*

encourage operators to reduce pollution thereby protecting the environment. This could be further encouraged by linking it with a reward scheme for those operators who improve their business beyond the standard provided for by the duty.

Please contact Ruth Beach of this office if you have any queries.

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