



# environmental defender's office new south wales

## Draft Pesticides Regulation 2009

17 April 2009

### The EDO Mission Statement

*To empower the community to protect the environment through law, recognising:*

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services around NSW*

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## Executive Summary

The EDO welcomes the opportunity to comment on the draft *NSW Pesticides Regulation 2009* ('the Regulation'). The EDO's Northern Rivers Office, which services the Northern Rivers Catchment Management Area, receives frequent calls from residents affected by spray drift<sup>1</sup> from the application of pesticides to timber, macadamia and sugar cane plantations in particular.

The EDO submits that minimising the impacts of spray drift is crucial in light of studies that have shown that some commonly used pesticides in Australian agriculture (such as dimethoate and other organophosphates, endosulfan and other organochlorines, and atrazine and other herbicides highly toxic to humans (particularly children) and other animals and plants. Indeed, the National Toxics Network Inc concluded in its 2009 report that "pesticide spray drift problems are getting worse with the increased use of pesticides and the intensification of high-pesticide using industries closer to residential areas and in water catchments."<sup>2</sup> In addition, the Australian Veterinary Practice Management Association (AVPMA)'s report entitled the *Operating Principles In Relation To Spray Drift Risks (2008)* acknowledged that spray drift is a significant problem.

The APVMA has announced it will carry out further risk assessment of some 2,800 agricultural chemical products (sprays and dusts) for spray drift risks. This extensive review process will take several years according to APVMA, and the subsequent level of control on relevant pesticides cannot be forecast at this stage. This means that many pesticides currently in use in NSW have not been properly assessed for spray drift risks and adequate controls may not be in place to ensure their safe use. Indeed, many pesticides that have been withdrawn from sale in numerous other countries are still available on sale in Australia.<sup>3</sup> Given the potential impacts, it will be important that the APVMA assessment occur in an efficient and timely manner. However, the current situation lends urgency to the need for the NSW Government to reduce risks through its regulation of pesticide use and the encouragement of a precautionary approach.

The EDO submits that problems with spray drift can be partly addressed by amendments to the Regulation which should result in fewer land-use conflicts, with benefits for farmers and others in the community. Our key recommendations are:

- Introduce a regime of mandatory prior notification for all immediate neighbours, as discussed below;
- All records of pesticide spraying should be available to any member of the public with a legitimate interest;

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<sup>1</sup> "Spray drift" here follows the APVMA's definition in its "Operating Principles in Relation to Spray Drift Risks", but also includes the post-application movement of pesticides hours or even days after application.

<sup>2</sup> National Toxics Network Inc, *The Threat of Pesticide Spray Drift*, 2009, p. 3.

<sup>3</sup> Personal communication from the National Toxics Network Inc.

- Records of pesticide spraying should be compiled by DECC on an annual basis and be freely available on the DECC website;
- The small use exemption should be limited; and
- The Regulation should increase fees to fund a research and monitoring program that can further reduce the risks of pesticides on community and environmental health.

We address the following issues in this submission:

1. Public notification
2. Record-keeping
3. Small use exemption
4. Research and monitoring

### **1. Notification**

The EDO considers that spray drift is problematic not only because of the toxicity of many of the chemicals involved, but because communities are disempowered if they do not know what is happening around them. Thus, there is a fundamental need for increased dissemination of relevant information in this context or, put another way, reform needs to take account of the concept of a right-to-know as well as risk assessment. The need for community awareness with respect to pesticide risks is acknowledged at an international level. Clause 9.2 of the *Food and Agriculture Organization of the United Nations (FAO) International Code of Conduct on the Distribution and Use of Pesticides*, states:

*governments are encouraged to develop:*

*9.2.1 legislation and regulations that permit the provision of information to the public about pesticide risks and the regulatory process;*  
*9.2.2 administrative procedures to provide transparency and facilitate the participation of the public in the regulatory process.”*

In this context, the EDO supports the introduction of a range of notification requirements into the *Pesticides Regulation 1995* in September 2007, and the impending introduction in September 2009 of further notification requirements in respect of technicians using pesticides adjacent to specified sensitive places.

However, there is currently no statutory requirement to notify residents of houses and other sensitive sites adjacent to agricultural land where pesticides are used. In our view this is a serious deficiency that, if allowed to continue, will result in increasing conflict between, and risk of harm to, neighbours. This may result in litigation where neighbours consider their common law right to the quiet enjoyment of their property has been violated, or where they believe that their neighbour has breached a duty of care or has trespassed on their land by repeatedly allowing pesticide spray to drift across the property boundary in spite of requests to desist.

There are two possible ways to remedy this deficiency which could be included in the Regulation. One is to expand the list of sensitive places to include all residential dwellings. The other is to require mandatory prior notification for all agricultural/commercial uses.

In either case, the EDO proposes that notification requirements should include:

- what application method/s will be used;
- when the application/s will take place (minimum 3 days notice);
- the exact area to be treated;
- which pesticide products and formulation types will be used ;
- a contact person and emergency phone number if damage ensues; and
- Where spraying is delayed due to weather or other reasons, notification should be repeated, giving a minimum of 24 hours notice.<sup>4</sup>

The EDO submits that in light of the potential impacts on other crops, potential health impacts and the safety of water supplies, the notification requirement should apply to all immediate neighbours, whether or not there are dwellings present. In the case of spraying by helicopter or fixed-wing plane it may be necessary to provide for a broader notification requirement from the boundaries of the subject property, as spray-drift is likely to be further-reaching. In determining the distances for notification in particular circumstances a precautionary approach should be adopted consistent with the principles of ecologically sustainable development.

This issue was discussed at a public meeting organised by the EDO Northern Rivers office in Byron Bay on Wednesday 8 April 2009. As noted above, spray drift has been a recurring problem in the densely settled but highly agriculturally productive Northern Rivers region.

## **2. Record-keeping**

The *Pesticides Regulation 1995* does not allow neighbours or other members of the public to inspect records of pesticide use. It is therefore practically difficult for any person who believes they may have been affected by spray drift to check the details of the technician's record of the incident/s involved.

The EDO therefore submits that all pesticides records should be available to any person with a legitimate interest in the information in order for the person to determine whether or not they are likely to be, or have been, at risk of adverse health impacts from pesticide exposure. This could involve on-farm access or access to a pest technician's records at their place of business. However, the EDO recognises that there may be some opposition to granting people the right to access private property. Consequently, a better option may be the imposition of a

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<sup>4</sup> At a meeting on 8 April 2009 in Byron Bay Jolyon Burnett, CEO of the Macadamia Society of Australia stated that the MSA would support mandatory prior notification obligations.

requirement that notices of pesticide use be forwarded to DECC and be available to the public by way of a register.

The use of a public register has advantages in that it provides a statutory right to view the relevant records that would not be subject to the inappropriate use of exemptions under the *Freedom of Information Act 1989* or the *Privacy and Personal Information Protection Act 1998*. However we note that this reform may not be so crucial if mandatory prior notification is introduced, as described above.

The public interest would also be advanced by records of use being compiled on an annual basis by DECC and made available on the DECC website. This could enable the total load of particular pesticides to be collated by property or catchment, which would in turn allow scientists and regulators to determine whether particular pesticides or classes of pesticides are being overused and therefore represent a significant risk to human and ecosystem health. It would also help to alleviate the inadequate resources for monitoring and compliance of pesticides by DECC, which prevents the Department from investigating all reports of spray drift incidents.

### **3. Small use exemption**

The EDO considers that there is no scientific basis for the current thresholds for record-keeping and training in the *Pesticides Regulation 1995*. Indeed, while there are wide variations between pesticides, many pesticides can be highly toxic in applications well under the current thresholds.<sup>5</sup> As a result some community groups have suggested it is appropriate for these thresholds to be reduced to the following levels:

- for outdoor use, 1 litre/1 kg of concentrated product or 5 litres/5 kgs of ready-to-use product; and
- for indoor use, 250 ml/250 mg of concentrated product or 1 litre/1 kg of ready-to-use product.<sup>6</sup>

### **4. Research and monitoring**

The EDO is not aware of any assessment of the long-term exposure on humans and animals from pesticides. Moreover, we are not aware of any regular monitoring program for the pesticide contamination of drinking water and rivers.

While research and monitoring are currently outside the ambit of the Regulation, the EDO suggests that fees under the legislation could be increased and the amounts applied to fund an independent research and monitoring program that would:

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<sup>5</sup> For example, atrazine and synthetic pyrethroids

<sup>6</sup> Eg National Toxics Network Inc.

- alert authorities and farmers/technicians to pesticide accidents and contamination incidents;
- be a valuable source of data for the APVMA in its review of spray drift risks; and
- give the public greater confidence that their health is not at risk.