



environmental defender's office new south wales

Submission on the Land Protection Proposal 2004

July 1 2004

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*
- ◆ *that the EDO has an obligation to provide representation in important matters in response to community needs as well as areas the EDO considers to be important for law reform*
- ◆ *the importance of indigenous involvement in protection of the environment.*

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1 July 2004

Dear Mr Gorta,

Submission on the Land Protection Proposal

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to comment on the joint Department of Environment and Conservation (DEC) and NSW Agriculture *Land Protection Proposal: Regulating the use of industrially sourced waste materials as fertilisers* (Land Protection Proposal).

The EDO supports the Land Protection Proposal, and welcomes action on this issue. The EDO has continued to act for the Total Environment Centre (TEC) campaigning for regulatory reform in this area since May 2002.

Although feedback is sought on the proposal generally, it is noted that comment is specifically sought on the following:

- the **materials that should or should not be prohibited**, with scientifically and technically valid information to support such action
- suggested criteria and arrangement for **assessing exemptions**
- **financial details** and any hardship or benefits arising from the proposal

This submission will also address additional issues including:

- **Precautionary Approach**
- **Public consultation**
- **Mutual Recognition and national approach**
- **Review of implementation of the Land Protection Proposal**

Prohibited Materials

The EDO welcomes the proposal to ban relevant materials from being used in fertiliser on agricultural lands.

While this submission does not include any additional materials for inclusion on the prohibited list at this stage, the EDO urges that the proposal include a clearer process for

nominating and listing new materials to be included on the prohibited list. This process should be transparent and accountable, with specific provision for consultation.

As it currently stands, the proposal suggests that determining materials for prohibition be achieved by the power for Ministerial Orders under ss18 and 22B of the *Fertilisers Act 1985*.

Section 18 states:

18 Soil improving agents to comply with composition standards

(1) The Minister may, by order published in the Gazette, declare that a soil improving agent, or a soil improving agent of a class specified in the order, must not contain more than a specified maximum concentration or proportion of any specified component (a ***composition standard***).

(2) A dealer must not sell a soil improving agent unless the soil improving agent complies with the composition standards (if any) that apply to it as a result of an order made under this section that is in force.

Maximum penalty: 50 penalty units.

(3) However, it is not an offence to sell a soil improving agent that does not comply with the composition standards applying to it if the soil improving agent is sold to a dealer.

(4) It is the duty of the Minister, before making an order under this section, to consult:

- (a) the Minister for the Environment, and
- (b) the Minister for Health, and
- (c) any other Minister whom the Minister considers would have responsibilities giving rise to an interest in being consulted,

but failure to consult those Ministers does not invalidate any order made.

(5) An order made by the Minister under this section must be published in at least one newspaper circulating generally throughout the State at the same time as, or as soon as practicable after, it is published in the Gazette.

(6) Section 40 (Notice of statutory rules to be tabled) and section 41 (Disallowance of statutory rules) of the [Interpretation Act 1987](#) apply to an order made under this section in the same way as they apply to a statutory rule within the meaning of that Act.

Section 22B mirrors this provision, but with regard to trace elements.

Under these sections, the Minister may consult with other Ministers, but this is not mandatory (22B(4) and 18(4)). The order is gazetted and published in a state newspaper under sections 18(5) and 22B(5).

While the Orders are disallowable (pursuant to section 41 *Interpretation Act 1987*), the opportunity for public input into the addition or removal of a material to the prohibited list is minimal. These provisions do not allow for adequate consultation.

<i>Recommendations:</i>

- *That the Fertilisers Act 1985 be amended to require broader consultation in the making of an order under section 18 and 22B.*
- *That prohibition be effective at the time of gazettal (see below)*
- *That the proposal be amended to provide that any person may nominate a material to be considered for prohibition.*

Assessing Exemptions

There are three main issues of concern in the exemption assessment process: the 6 month delay between gazettal and effective prohibition; criteria for assessing exemptions; and membership of the permanent working group.

The EDO has concerns at the 6 month delay on prohibition following gazettal. This could encourage dumping, and is contrary to adopting a precautionary approach.

Recommendations:

- *Prohibition should take effect at the time of gazettal*
- *Orders under the Fertilisers Act could be used to gazette exemptions subsequent to the initial prohibition.*

As well as the delay in prohibition, the EDO is concerned about the criteria used to assess an exemption. As noted by TEC:

“There may also be a tendency when assessing exemptions to rely on industry based criteria, including economic impact. We support no reliance on this and instead recommend use of potential environmental (including off-site) impact and a precautionary public health approach.”

Recommendations:

- *Criteria for consideration when assessing exemptions should focus on environmental and public health impact (on-site and off-site)*
- *Financial considerations are not a relevant criteria (see below)*
- *A precautionary approach should underpin all criteria.*
- *DEC and NSW Agriculture should publish detailed criteria by which exemptions will be assessed.*

The Proposal states that a “precautionary approach has been taken in defining the categories of materials that will be prohibited initially. However arrangements have been made to deal with requests for exemptions” (page 5). It is indicated that NSW Agriculture and DEC have established a permanent working group to examine requests for exemptions.

The EDO is concerned about the composition of the working group, and recommend the inclusion of representatives from community and environment groups, as well as independent scientists.

Recommendations:

- *Membership of the permanent working group be broadened to include independent scientific expertise and representation from environment and community groups*
- *Findings of the working group be made public.*

Financial Hardship.

The Proposal seeks comment on “financial details of any hardship or benefits arising from the proposal.”

As noted in the introduction to the proposal, financial considerations have contributed to the problem in that the “cost of properly treating or disposing of harmful waste can provide an unintended incentive to use waste as ‘fertilisers’, which rather than benefiting agricultural lands can actually degrade them” (page 2).

The EDO submits that private financial hardship is not a relevant factor to the implementation of the Land Protection Proposal. It is not relevant to consideration of exempt material. The issue of harmful material used as fertiliser for land application is a public health issue, where public health costs may of course be relevant. As such, the public health and safety must be the priority over personal financial implications for industry and individuals.

Recommendation:

- *Financial hardship is not a criteria for consideration when assessing exempt material.*

Additional Issues

The Precautionary Approach

The proposal notes that there is a regulatory gap between the *Fertiliser Act 1985* (administered by NSW Agriculture) and the *Protection of the Environment Operations Act 1997* (*POEO Act*) administered by DEC. Furthermore, the proposal notes that a national approach is still in the process of development. The Proposal also states “the science for specifying the safe levels for contaminants is still under development” (page 4). Combine these facts with the serious health risks of hazardous material in fertiliser, and there is strong cause to adopt a precautionary approach.

Current reviews and potential amendments to the *Fertilisers Act 1985*, the *POEO (Waste) Regulation 1996*, and the *POEO Act* are foreshadowed in the proposal. We support the Proposal providing interim regulation until these reviews and changes are complete.

As noted in our previous submission (14 May 2003),

“As with most environmental issues, the recycling of industrial waste as fertiliser is of national concern. ...Even in the best of all worlds, progress in these areas is obviously some way off. Consequently, these developments do not, and should not, preclude the need for an interim approach by the NSW Government. In particular, in light of the evident uncertainty, the NSW Government

should adopt a precautionary approach and, for example, introduce appropriately cautious limits for heavy metals as an interim measure (such as those apparently used in Canada and the European Union) pending these developments. The EPA is obviously in the best position to advise on these standards.”

We acknowledge progress in NSW to achieve this, but seek more robust protection for public health and the environment by better consultation and nomination provisions, prohibition effective upon gazettal, and further research being a priority.

Recommendations:

- *NSW Agriculture and DEC take a precautionary approach by making prohibitions effective upon gazettal, and consideration of exemptions subsequent to this.*
- *The permanent working group have expertise to conduct further research into offsite environmental and health impacts of relevant materials.*

Public consultation.

The EDO appreciates the opportunity to comment on this proposal and the efforts undertaken to consult stakeholders at this stage. We recommend continued community consultation and engagement for both the implementation of the NSW proposal and also for the development of a national approach. This could be aided by more comprehensive representation on the permanent working group (as noted above).

Recommendations:

- *There should be broader consultation on listing and exempting prohibited materials.*
- *There should be continued consultation on relevant legislative reviews and national policy development where possible.*

Mutual Recognition and a national approach

The EDO supports a national approach to this issue. We note the issue of freedom of interstate trade, but urge NSW to take a leadership role in promoting consistent regulation nationally in the interests of public health and the environment.

We note the involvement of DEC and NSW Agriculture in the EPHC national initiative to “develop a national framework for the reuse and recycling of industrial wastes, focussing primarily on their use in land management applications.” However, we support NSW taking the initiative, as an interim approach is necessary whilst awaiting national progress.

Review of implementation of the Land Protection Proposal

NSW Agriculture and DEC must undertake to review the implementation and operation of the Land Protection Proposal (for example, the Orders made to prohibit materials and the exemptions granted) in 1 year.

Independent auditing should augment internal reporting requirements.

Recommendations:

- *DEC (EPA) and NSW Agriculture complete internal reports detailing implementation, compliance and monitoring in 12 months from commencement of the proposal.*
- *An independent audit be conducted in 12 months.*
- *Information from the reporting and auditing be made publicly available.*

Thank you for the opportunity to comment on the Land Protection Proposal. If you require further information, please contact Rachel Walmsley at rachel.walmsley@edo.org.au or on 02 9262 6989.

Yours sincerely,
Environmental Defender's Office

Jeff Smith
Director