



A Community Legal Centre specialising
in public interest environmental law

3 May 2013

Environment Protection Authority
Via email

Re: Civil Penalty Calculations Policy – Proposed Amendments

The Environmental Defenders Office (SA) Inc. (EDO) is a community legal centre with twenty years experience specialising in public interest environmental and planning law. EDO functions include legal advice and representation, law reform and policy work and community legal education. We appreciate the opportunity to consider the proposed amendments to the *EPA Policy for Calculation of Civil Penalties under the Environment Protection Act 1993* (the Policy). We make the following comments in response to matters raised in the discussion paper.

Whether a \$1,000 floor penalty is reasonable:

We note that there have only been 7 negotiated civil penalties. Of these a category B offence of a breach of mandatory provision of an EPP attracted a 93% reduction of the maximum penalty which meant that the negotiated penalty amount was \$276.75 for each of the two offences¹. To provide more force to negotiated civil penalties and to increase the deterrent effect of these a floor penalty is reasonable. However a \$1000 floor penalty is insufficient in our view and we suggest \$2000 is more appropriate. We further suggest that consideration be given to having various floor penalties for different categories of offence.

Whether a proposed 20% increase to the foundation penalty accurately reflects the cost saved by avoiding prosecution and whether the penalty should be increased to reflect this saving:

We are of the view that there should be at least a 20% increase to Category 1, however we suggest that a higher increase could create a better deterrent effect in addition to reflecting the severity of the offence. The percentage attributed to Category 2 and 3 should be distinguished to reflect the severity of each offence. Category 3 relates to administrative offences and therefore should attract a lower percentage of the maximum penalty. We suggest the foundation penalty for the three Categories could be: 75% for Category 1 offences (increase of 25%), 50% for Category 2 offences (increase of 25%), and 45% for Category 3 offences (increase of 20%).

¹ Environment Protection Authority, *Civil Penalty Calculations Policy – Proposed Amendments Consultation Report*, p 8.

Whether various offences should be included in the Calculations Policy

The EDO is of the view that the offence of serious environmental harm² should not be included in the Calculations Policy. We are concerned that this could diminish the seriousness of this offence. We suggest that noise pollution caused by a concert or similar could come within the ambit of other offences currently dealt with under the Policy such as causing material environmental harm under s 80(2) or causing environmental nuisance under s 82(2).

The offence of failing to notify of serious or material environmental harm under s 83(1) could be included in the Policy. We agree further that the site contamination offences contained in Part 10A of the Act which do not require proof of intention or some other state of mind could be included in the Policy together with the offences in sections 4 and 5 of the *Plastic Shopping Bags (Waste Avoidance) Act 2008*.

Whether the proposed amendments to the adjusting factor item 7.4 should be made into separate factors and increase the maximum penalty reduction for the adjusting factor from 60% to 70%:

The EDO is of the view that item 7.4 should not be separated into two factors. If it is separated, each factor should not be given a maximum of 10%. A more reasonable weight should be a maximum of 5% to each factor. The objective of the Policy is to attain a balance between fairness and deterrence³. If the maximum attainable adjustment is 70% this would unreasonably diminish any desired deterrent effect.

Use of environmentally beneficial projects in negotiation

Whilst comment was not called for we regard this as an important issue for discussion. Whilst there is not a precedent in South Australia there are a number of interstate examples. The EDO is of the view that the EPA should strongly consider the use of environmentally beneficial projects in negotiation where appropriate.

Please do not hesitate to contact Melissa Ballantyne of this office should you have any queries in relation to this submission.

Environmental Defenders Office (SA) Inc.

² *Environment Protection Act 1993 (SA) s 79(2)*.

³ Environment Protection Agency, above n 1, p 5.