

**Report**

on the

**Review of the**  
***Protection of the Environment***  
***Operations Act 1997***

October 2003



Department of  
**Environment and Conservation (NSW)**

ISBN 1 74137 013 2  
EPA 2003/92  
October 2003

Published by:

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## **Minister's Foreword**

The New South Wales Government has comprehensive environmental legislation in place to protect public health and the environment from potential harm. One important component is the *Protection of the Environment Operations Act 1997* (POEO Act).

The POEO Act was a landmark piece of legislation that streamlined, consolidated and strengthened the State's environmental regulatory framework. This review of the Act has given us an opportunity to assess the Act's effectiveness and to determine whether its provisions are still appropriate.

There has been extensive consultation with the community and industry in the process of conducting this review, and I am pleased to report that the major stakeholders agree that the POEO Act is working well in achieving its objectives and there is no need for any major change in direction. However, this report identifies a number of possible areas in which change may be considered appropriate to enhance the Act. The Government will now be considering whether or not legislative reform is appropriate.

I am pleased to submit this report to Parliament.

**Bob Debus MP**

**Minister for the Environment**

**Report note:**  
**Formation of the Department of Environment and Conservation**

On 24 September 2003 the staff of the EPA became part of the Department of Environment and Conservation (DEC). However, certain statutory functions and powers, including those in the *Protection of the Environment Operations Act 1997*, continue to be exercised in the name of the EPA, a statutory body created by the *Protection of the Environment Administration Act 1991*. 'EPA' is used in this report when referring to those statutory functions and powers.

## Summary

The purpose of this review of the POEO Act was to determine whether the policy objectives were still valid and whether the terms of the Act were still appropriate for securing those objectives.

The Act principally deals with the regulation of activities that have the potential to pollute or otherwise harm the NSW environment. It represented a major overhaul of the previous legislation, which was complex and unwieldy and did not adequately delineate the responsibilities of regulatory authorities.

Although numerous changes have been made to the Act since 1997, the underlying principles of the legislation remain unchanged.

As part of this review, public submissions were called for, and consultations were undertaken with major stakeholders. None of the submissions to the review suggested that the Act was in any way fundamentally flawed. Overall, there was a high level of satisfaction with the framework and philosophy of the Act. However, comments on the waste regulatory provisions have highlighted concerns about their complexity and effectiveness and support for improvements in this area of the Act. Feedback from the review has also supported the need to simplify and streamline some aspects of environmental regulation and to clarify aspects of the Act in the following areas:

- the licensing regime
- the waste regulatory framework
- public participation
- compliance and enforcement
- economic measures and incentives
- environmental policies and objectives.

A number of non-legislative suggestions were raised during the review. These will be taken into account in developing appropriate changes to administrative practices and procedures. There were also suggestions raised relating to the Protection of the Environment Operations (Waste) Regulation 1996 and the Protection of the Environment Operations (General) Regulation 1998, and these will be addressed through upcoming reviews of these regulations. This report canvasses only those issues arising out of the review that could result in legislative changes to the POEO Act.

This review provided a valuable opportunity for analysis and comment by stakeholders. A number of possible areas for change have been identified. These build upon, rather than alter, the principles underlying the Act. The report concludes that the regulatory framework for environmental protection set out in the POEO Act has, on the whole, been successful.

## Methodology of the review

A multi-phased consultation process was adopted for the review to allow interested stakeholders adequate opportunity to contribute.

The Minister for the Environment issued the Terms of Reference (see Appendix A) for the review in December 2002. Public submissions on these closed in February 2003, and 49 submissions were received from a variety of organisations and individuals. The EPA also sent a questionnaire to local councils to seek information from them, given councils' important role in implementing the Act. This was completed by 98 of the 178 local councils of NSW.

The second phase of consultation involved the release of an Issues Paper in June 2003 and discussion of the paper at eight public consultation sessions held around the State in July and August 2003. Three hundred representatives from the community, industry and government took part in these sessions, providing valuable input to the review. In addition, 51 written submissions were received and separate meetings were also held with key stakeholder groups to explore specialised issues.

## Progress after five years of the POEO Act

The POEO Act aims to consolidate, streamline and strengthen the environmental regulatory regimes dealing with air and water pollution, noise control and waste management in NSW. The Act also delineates regulatory responsibilities (between EPA and local councils).

The POEO Act reinforces the EPA's role as a strong environmental regulator and sets out a streamlined environment protection licensing system. Key changes made by the POEO Act were to establish:

- single, integrated environment protection licences to replace multiple media-specific licences (air, noise, water and waste pollution)
- single environment protection licences as an approval mechanism to replace existing separate 'approvals to construct' and 'licences to operate'
- regular licence reviews at least once every 3 years to replace the administratively time-consuming annual licence renewals
- clearer definition of regulatory responsibility between EPA and local councils.

In announcing Parliament's approval of the Act, the Minister said that it was to achieve three main things:

- better integration of previous legislation
- streamlining of processes and responsibilities for the EPA, local government and industry
- enabling stronger laws to prevent and minimise pollution.

The new POEO Act was passed by Parliament in December 1997 and came into force in July 1999. The legislation has effectively been in operation for around four and a half years. The intervening year and a half was provided to allow the EPA to develop guidance and undertake training for industry and councils in the new provisions, and to set up new electronic systems and procedures for smooth introduction of the legislation.

In 2001 the Government undertook a review of the waste legislation, including the *Waste Minimisation and Management Act 1995* [repealed 8/10/01] and the regulatory provisions that had been incorporated into the POEO Act in 1997. That review led to the enactment of the *Waste Avoidance and Resource Recovery Act 2001* and *Waste Recycling and Processing Corporation Act 2001*.

Amendments have been made to the POEO Act at various times since its assent, to update it as required (see Appendix B).

## **Effectiveness of the POEO Act**

There are a number of objectives that the POEO Act seeks to deliver, and they broadly fall under one or more of the following four areas:

1. improving the state of the environment through a variety of tools
2. streamlining and simplifying legislation and regulatory processes
3. greater public access to information
4. stronger laws

### *Improving the state of the environment through a variety of tools*

The POEO Act established a wide range of environment protection tools. In particular, it introduced innovative licensing arrangements and the use of economic instruments such as Load Based Licensing (LBL), tradeable credits and financial assurances to complement the existing regulatory regime and help ensure more integrated and less expensive environment protection. The Act also seeks to promote the principles of ecologically sustainable development through values such as the precautionary principle and cleaner production.

Currently, about 270 activities fall within the LBL scheme, and from a comparison with pollutant load data from the National Pollutant Inventory (NPI) we know that these account for the majority of point-source emissions in NSW. The LBL scheme has for the first time enabled the EPA to track the emission of 29 critical air and water pollutants. At the end of the 2001–02 financial year the scheme had tracked over 460 million kilograms of air pollutants and 140 million kilograms of water pollutants. The air emissions of a small number of assessable pollutants fall outside the LBL scheme at some classes of premises. However, because the LBL scheme is implemented through the Protection of the Environment Operations (General) Regulation 1998, this issue will be addressed as part of the review of that Regulation.

Load Reduction Agreements (LRAs) allow licensees in the LBL scheme to immediately reduce their licence fees if they commit to achieving specific environmental outcomes in the longer term. The money they save in lower licence fees can be invested in achieving these outcomes. From the time of introduction of LBL up to the end of the last financial year, licensees had agreed to prevent a total of 3914 tonnes of pollution per year (1653 tonnes of air pollutants and 2261 tonnes of water pollutants). This has involved 23 licensees saving a combined total of over \$9.7 million in fees over the duration of the LRAs.

Financial assurance provisions under the Act mean that a bank guarantee or a bond can be used to secure or guarantee funding for carrying out works required by a licence should they not be carried out and/or should the licensee fold. Currently, 40 financial assurances are attached to licences ranging from \$8000 to \$1.5 million. To date, the EPA has not had reason to call upon these assurances.

Mandatory audits are a useful tool for requiring licensees to have independent audits undertaken at their premises in appropriate circumstances. They are imposed by licence conditions and can be used where licence conditions have been contravened, causing harm to the environment. The EPA uses this tool from time to time as appropriate.

Under the Act, pollution reduction programs (PRPs) can be imposed as conditions of a licence. Since the commencement of the Act, PRPs have been used quite frequently by the EPA to require licensees to carry out remediation works and upgrade plant and equipment. More than 150 PRPs are negotiated each year, with up 319 PRPs imposed in the 2000-01

financial year. The yearly value of the investment directed to reducing pollution under PRPs has ranged between \$24 million and \$417 million.

The EPA has powers under the POEO Act to develop and implement tradeable emission schemes, which can include determining aggregate limits on a form of pollution and creating credits that can be exchanged or traded. The Hunter River Salinity Trading Scheme, introduced in 1995, is one such scheme and is now set up under the Protection of the Environment Operations (Hunter River Salinity Trading Scheme) Regulation 2002. This scheme has been highly successful, with average in-river salinity halved and no exceedances of water quality goals occurring due to discharges under the scheme. Experience gained in developing this scheme has indicated that tradeable emissions schemes can be very effective complements to regulation and other approaches in appropriate circumstances.

The EPA is currently piloting a green offsets scheme, which is a form of emission trading involving small numbers of participants at one time. A green offset is an action taken outside a licensed premises (but near to it) that reduces pollution, resulting in cost-effective environmental protection. It is possible that the powers under the POEO Act may need to be refined to facilitate the introduction of such schemes: this is discussed later under 'Economic measures and incentives'.

Within the POEO Act framework, a range of opportunities is used by the EPA to encourage cleaner production. These include imposing cleaner production requirements through PRPs, education and training programs and encouraging cleaner production through industry partnership programs.

### *Streamlining and simplifying legislation and regulatory processes*

Under the POEO Act the EPA now issues one integrated licence that controls all aspects of air, noise, water and waste pollution from licensed activities. As a result, more than 1500 activities that were previously controlled by multiple licences now have one consolidated environment protection licence.

The Act also streamlined the old regulatory system by incorporating into the environment protection licence the previously separate pollution control approvals for the construction or alteration of works or equipment. This further reduced the regulatory burden on industry while still ensuring that potential impacts were addressed.

To better integrate land use planning approvals and EPA licences, the Schedule of EPA-licensed activities was largely aligned with the list of designated developments that require an EIS under Schedule 3 of the Environmental Planning and Assessment Regulation 2000. As a result, more than 80 new developments are referred to the EPA each year, ensuring that potential environmental impacts are considered at the early planning stages of development, and that proponents would achieve early certainty on regulatory requirements.

The Act clarified who was responsible for regulating particular activities. The Act gives local council additional powers to deal with activities not on the Schedule that may have local environmental impacts. Councils are also able to use environment protection notices, issue fines and charge fees for some notices.

The results of the local government survey showed that:

- 83 per cent of responding councils felt that the Act gave them effective tools to manage the environmental issues
- 78 per cent of councils agreed that the Act has clarified the regulatory roles of the EPA and local government
- 80 per cent of councils felt that the Act has set a regulatory framework that is flexible enough to accommodate changing circumstances

About half of the responding councils raised concerns about ongoing issues they had with regulating premises previously regulated by the EPA. The most frequently mentioned issues were a desire for more information on previous licences and inadequate resources, funding or staff for implementing the Act. The Act provides new sources of revenue, for example, compliance cost notices which many councils are using to cover costs associated with regulating premises. However funding remains an issue to many Councils. Greater metropolitan (Hunter, Illawarra, Central Coast) and regional councils were more likely to have ongoing issues than Sydney metropolitan and smaller rural councils. Responses to the review indicated the need for the DEC to play a greater advisory and education role for local councils. The DEC will continue to explore the most appropriate mechanisms of providing this support.

### *Greater public access to information*

The POEO Act includes a number of mechanisms to facilitate public participation in development proposals, licences and reviews of licence conditions. They include:

- establishment of public registers of regulatory action taken by the EPA and local government (to ensure transparency in the licensing and regulation of industry)
- inviting public comment and submissions on licence reviews and licence variations
- introducing a duty to notify pollution incidents
- establishment of an extensive public consultation process for the development of Protection of the Environment Policies.

The EPA has established a public register in both print and electronic form. It is accessible to the public at certain DEC offices and the DEC's library in Sydney and via the Internet. Information available on the DEC's website includes:

- licence details
- details of licensee's annual statements of compliance
- details of regulatory action (for example, notices issued)
- exemptions from the provisions of the POEO Act.

The web site also provides for community feedback. Since the public register has been on line, visits to the site have steadily increased from an average of 1700 per month in 2001 up to an average of 2500 per month in 2003. Overall, the public register has been one of the top 10 most requested areas of the EPA web site. The DEC is aware that users include researchers for socially responsible investment funds seeking information about the environmental performance of companies.

Feedback from the local councils that responded to the survey in early 2003 indicated that 61 per cent had established public registers under the POEO Act. Councils that had not yet established public registers cited lack of resources, time constraints and a misunderstanding of requirements. About half of the responding councils felt that the POEO Act had helped to ensure that the community has access to relevant and meaningful information about pollution and that the Act had given councils the means to increase opportunities for the local community to participate in environment protection. The remaining responding councils raised concerns about the limited resources available to ensure adequate community consultation.

The public also has an opportunity to provide input to the EPA's licence review process. By December 2003 the EPA will have completed one full cycle of licence reviews. This has involved seven advertisements calling for public input into the review of 2262 licences.

## *Stronger laws*

The POEO Act has maintained the three-tier offence and penalties system of the preceding legislation but has been amended to include new maximum court fines and simplified air and noise provisions.

The POEO Act provides for a number of different types of notices to be used in different circumstances. There are notices that can be used to direct immediate action – such as clean-up notices and noise abatement directions – and others for requiring certain works or studies to be carried out (prevention notices) or certain noise levels to be met (noise control notices). There are also those that recover the costs incurred by appropriate regulatory authorities in carrying out background work, checking compliance with clean-up and prevention notices, or voluntarily undertaking clean-up work.

Since the commencement of the Act, the EPA has issued 157 clean-up notices and 31 prevention notices to address a variety of environmental issues for both licensed and unlicensed facilities. Cost recovery notices have not been widely used by the EPA, with only three being issued so far.

Penalty notices can be issued for a variety of offences, including smoky vehicles, noisy vehicles, littering and more minor breaches of the legislation. The stronger enforcement powers under the Act have allowed the EPA to increase its enforcement presence. To date, the number of penalty notices issued by EPA officers has steadily increased from 3500 to 4500 a year, with fines totalling \$985,000 to \$1.5 million a year.

The EPA commences more than 100 prosecutions per year for pollution offences relating to motor vehicles, water pollution, waste and littering, breaches of licences, pesticides and other offences, with a 95 per cent success rate. In the 2002–03 financial year 156 prosecutions were commenced. Since the commencement of the Act, the total value of fines imposed per year for successful prosecutions ranged from \$660,000 for the 1999–2000 financial year up to \$1.1 million for the 2002–03 financial year.

The POEO Act also allows courts to impose other types of penalties other than fines. These include orders to prevent a recurrence of the offence, to carry out rehabilitation works, to clean up or to pay clean-up costs and to publicise the offence. Alternative penalties have been imposed in seven cases over the last 4 years. In July 2003, the EPA published a policy about when it would seek environmental court orders under Part 8.3 of the Act.

Ninety per cent of local councils that responded to the survey agreed that the POEO Act has strengthened the regulatory framework for local government environment protection work.

Forty-six per cent of councils regularly use cost recovery mechanisms for clean-up and prevention notices.

In financial year 2001–02 an average of 36 penalty notices, 13 clean-up notices and four prevention notices were issued per council under the POEO Act. Significantly more use is made of these notice powers by metropolitan councils.

## **Outcomes of the review**

### *The licensing regime and Schedule 1 of the Act*

The POEO Act currently sets up two levels of environmental regulation. The EPA regulates the higher environmental risk activities listed in Schedule 1 by licensing, as well as all activities carried on by public authorities. Local councils and other public authorities regulate the lower risk non-scheduled activities.

No major issues about the current licensing framework were raised in the review. Instead, input focused on changes that will simplify and strengthen the implementation of the Act.

The review considered whether the EPA should have the ability to regulate lower risk Schedule 1 activities by using tools other than licensing. There was general agreement that the EPA's licensing role should focus on activities with higher environmental risk and support for the use of alternative tools for lower risk activities that will streamline regulation and remove red tape where appropriate.

There was a widespread call for more incentives to encourage better environmental practices. Suggestions mainly included rewards of reduced licence fees and minimal licences for well-performing operators that have been formally certified (for example, in accordance with ISO 14000). However, the DEC is concerned that having formal certification does not necessarily translate to good performance outcomes. Also, there has been a relatively low uptake of similar schemes in other States. The DEC will continue to investigate appropriate incentives.

Responses indicated that there was a need to simplify and clarify the Schedule 1 category definitions. Also, suggestions were made to better align the categories with environmental risk where appropriate and to ensure a more level playing field.

The review also considered whether independent certification of annual returns should be introduced to improve confidence in the reliability of annual return data supplied by licensees. There was strong opposition from industry to such a tool being mandatory, on the basis of cost implications. However, there was some support for this tool being used in cases of poor environmental performance and/or as an option for well-performing licensees in return for benefits such as lower licensing fees. The DEC will investigate the use of such a tool in these circumstances.

Other suggestions and comments were centred on strengthening various aspects of the licensing system and duty-to-notify provisions.

Proposals for legislative changes being evaluated by the DEC include changes to facilitate the regulation of lower risk activities by alternative tools, improving Schedule 1 categories, and clarifying the duty-to-notify provisions. In focusing on higher environmental risk activities, the DEC is also considering whether it would be appropriate for the EPA to be able to direct a person to hold a licence in a sensitive environment where there may be a serious threat of water pollution. Pollutant discharges to waters from non-scheduled activities are not currently licensed.

## **Waste regulatory framework**

The POEO Act defines when a substance is a waste and therefore subject to regulation under the Act. The review considered whether it was necessary to clarify when a substance was no longer a waste. In particular, the review looked at whether further controls were necessary to prevent environmental harm from the reuse or recovery of wastes as fill material, fertiliser or fuel, and whether appropriate reuse and recovery of wastes could be further encouraged through the Act. Balancing these two potentially conflicting objectives is a major challenge for waste regulation.

A large number of stakeholders expressed the view that the definition of waste was too broad. However, this view was not unanimous. The concern with the broadness of the definition appeared to be centred on clarifying when a substance was no longer a waste, and the view was expressed that wastes being beneficially used as secondary resources should not be subjected to unnecessary regulation as 'wastes'. There was general support for further guidance to be provided by the DEC on the appropriate beneficial use of wastes. Various suggestions as to how this might be achieved included:

- recognition of beneficial reuse materials as secondary resources, rather than as 'wastes'
- the development of guidelines or specifications in consultation with industry and the community.

However, stakeholders also supported controls to prevent the inappropriate reuse or recovery of wastes. In particular, concern was expressed in relation to the recycling of some wastes for use as 'fertilisers' and in other land applications.

The DEC is considering additional mechanisms for facilitating the appropriate reuse or recovery of wastes as either fill material, fertilisers or fuels. One approach being considered is to ensure that the reuse or recovery of waste that conforms with endorsed guidelines, standards or specifications is not subject to unnecessary regulation under the Act.

As a matter of priority the DEC is working with NSW Agriculture to ensure that the application of waste or waste-derived fertilisers and soil additives does not pose a threat to human health or the environment. The EPA is also considering the use of a Protection of the Environment Policy to guide the recovery of waste or waste-derived fuels to generate energy.

Responses also indicated there was a need to simplify and clarify the NSW scheme for classification of wastes, so that it was easier to understand and use. At present some wastes are automatically classified on the basis of waste types set out in the Act, and others are classified according to chemical analysis and EPA classification guidelines. Some stakeholders also raised specific concerns with the definitions or classifications of particular waste types, for example, 'virgin excavated natural material', 'slightly contaminated soil', and 'putrescible waste'. There was general support for the DEC to review and rewrite its classification guidelines and for greater education of waste generators in relation to their responsibilities to properly classify their wastes.

There was widespread support from community, government and industry stakeholders to introduce an on-line waste-tracking system with simplified and streamlined waste-tracking requirements. Stakeholders also expressed concern that alternative arrangements should be available for those without Internet access. A number of other implementation issues were also raised, and these would need to be taken into account in the development of such a system. The DEC is considering the introduction of an on-line system. It is not anticipated that any amendment to the Act would be necessary to facilitate this. The DEC has also commenced a revision of the existing waste-tracking requirements. Any changes to the tracking requirements would need to be made through the POEO (Waste) Regulation 1996 and licensing conditions.

### *Public participation and access to information*

The POEO Act provides a number of mechanisms to facilitate effective public consultation on development proposals and licensing functions (including the issue, review and variation of a licence). This is through public registers of regulatory action, integrated development assessment, the licence review and variation processes and the duty-to-notify provisions of the Act.

The review considered whether these mechanisms were working well and whether there was a need for any additional provisions or refinements.

The POEO Act requires the EPA to review all environment protection licences at least once every three years and to give public notice of licences to be reviewed, within specified time frames. The EPA's evaluation of the first cycle of licence reviews indicated that there was scope for improvement; it highlighted the fact that these fixed time frames limited the overall environmental outcomes that could potentially be achieved through this process. Input to the review supported more flexible grouping of reviews that would allow licence reviews to be more effectively integrated with the EPA's other regulatory work.

The EPA's recent pilot comprehensive review of the Wood Preservation Industry, which included a sector audit, licence review, research on international trends and emerging technology and consultation with industry, demonstrates the effectiveness of such an

approach. The comprehensive approach also made possible the provision of more contextual information at the time of licence reviews to enable increased public participation.

The POEO Act review also considered whether the time frame for reviews should be extended, but there were strong opposing views between environment groups that wanted the 3-year time frame retained and industry groups that indicated a preference for extending the period to 10 years.

The DEC is considering whether the advertising provisions in the Act need to be more focused to enable reviews to be better integrated with other regulatory work and whether the time frame for review needs to be modified.

No major issues requiring legislative change to the POEO Act were raised regarding the public registers of regulatory action taken under the Act by the EPA and local government. Environment groups wanted additional information included on the register, such as reasons for licensing decisions, load based licensing data and licence review results. Also, industry groups wanted more contextual information included on non-compliances detailed in their Annual Returns. These will be considered shortly when the POEO (General) Regulation 1998 is reviewed.

The review also considered whether the EPA and other appropriate regulatory authorities should be afforded legal protection when making public statements or issuing warnings on matters of public importance or community interest. Currently, these types of comment can be unduly constrained by concerns about potential defamation action arising from such a statement or warning. This proposal was not generally supported. The DEC will monitor this issue to determine whether legislative change is needed in the future.

### *Compliance and enforcement*

The POEO Act has strong enforcement and compliance provisions to deal with environmental offenders, including:

- powerful offence provisions
- strong investigatory powers to collect evidence of offences
- substantial penalties for offences and a range of sentencing options the court may use to deal with offenders
- notice powers to require pollution problems to be fixed.

The review considered whether any improvements to these provisions are needed.

### **Notices**

Odour incidents can interfere with community amenity and can have health impacts. The Act currently allows the appropriate regulatory authority to issue prevention notices to manage odours, but these notices have a delayed effect because of appeal rights. Generally, input to the review supported the inclusion of odour within the scope of clean-up notices, so that immediate action can be required to clean up odorous materials.

The review also considered whether all notices should be able to require action within an appeal period to allow timely action to fix environmental problems. In other Australian jurisdictions notices can require action within an appeal period. This is balanced by the fact that the recipient can apply to postpone taking immediate action as part of the appeal and also by the fact that the requirements in the notice must be reasonable. There was general support for such an approach to be adopted in NSW.

Noise provisions in the POEO Act were transferred directly from the former Noise Control Act and did not include administrative fees and links with compliance cost notices. Responses

supported the provision of cost recovery for noise control notices to encourage council to use them more and to ensure consistency with other notice provisions.

The DEC is assessing whether legislative changes to implement these measures would be appropriate.

### **Liability provisions**

Currently the POEO Act provides a defence to directors and managers of a corporation if the court is satisfied that the corporation committed the offence without the knowledge of the person. The review considered whether this defence provision was overly broad and out of step with modern principles of corporate responsibility, which expect managers and directors to be aware of the environmental effects of their businesses. Responses to the review were both for and against removing this defence.

The DEC is assessing whether it is appropriate to place more onus on directors and managers, consistent with the approach taken in Occupational Health and Safety legislation and other environment protection legislation.

### **Powers**

The EPA can require licensees to undertake mandatory audits in certain circumstances. Some councils have requested the ability to require mandatory audits of non-scheduled activities. Some responses did not support such an extension of power, mainly because of concerns over the potential for misuse. It is noted that the current provisions in the Act specify strict requirements for when mandatory audits can be required.

The DEC is assessing the merits of extending mandatory audit powers to non-scheduled activities, subject to appropriate restrictions.

### **Offences**

Although there are general provisions in NSW legislation enabling local councils to undertake enforcement relating to abatement of air pollution or mitigation of nuisance, there are no provisions relating specifically to the operation of domestic solid fuel heaters. Feedback received from councils indicates that many would welcome a provision such as an on-the-spot fine for poor operation of a solid fuel heater that results in adverse impacts on air quality, as a means of deterring poor operational practice. Many community groups felt strongly about woodsmoke emissions and wanted better controls to address these.

Some submissions have called for new litter powers in relation to billposters, similar to those recently introduced in Victoria. These include an offence to put up bills without the consent of the owner, occupier or manager of the structure to which the bill is affixed. The provisions also make the person commissioning or erecting the bills, or the advertising organisation, responsible for ensuring that the bills do not become litter. The submissions argue that billposters are creating litter problems and that existing planning and environmental laws are not sufficiently targeted, or do not go far enough, to prevent the creation of billposter litter. The review considered whether the problem warranted the introduction of new offence provisions to prevent this kind of litter. Responses supported a new offence for billposters and the specification of responsible parties.

Some submissions also called for the newspaper exemption in the advertising material litter offence provisions to be removed. The DEC is assessing whether this would be appropriate.

The review considered whether additional controls were needed to address some perceived limitations in the current framework for dealing with illegal waste practices. Feedback from many stakeholders (government, industry and community) confirmed a widespread desire for

greater enforcement action to prevent illegal practices from causing environmental harm and to ensure a 'level playing field' for industry. There was confirmation from a number of councils that difficulties in using the existing waste offence provisions needed to be addressed. There was also support for a new land pollution offence similar to an equivalent provision in Victoria. There was some support for the creation of an offence for misclassifying wastes.

The DEC is considering whether additional offences are required in the Act to address these issues.

### **Fines and penalties**

The review considered whether the current POEO Act fines and penalties should be increased to provide a greater deterrent and to bring them into line with penalties for equivalent offences in other jurisdictions. Responses from the review were divided on this issue. However, there is no doubt the community expects the EPA to be a strong, independent regulator. Although a range of approaches (including education, incentives and partnerships) is used, prosecutions and on-the-spot fines remain a very important part of EPA's regulatory approach. The DEC is assessing the potential value of increasing maximum fines and penalties in NSW.

A number of other types of penalties may also be imposed by a court under the POEO Act. For example, a variety of sentencing options are available, such as investigation cost orders, monetary benefits penalty orders, publication orders, environmental service orders and environmental audit orders. The review considered whether the scope of sentencing options should be expanded. Examples include payment of money to a third party to carry out works or projects, financial assurances as court orders, and ordering a defendant to attend a relevant training course. Overall, there was strong support for using and expanding the range of sentencing orders.

Currently, the POEO Act does not allow the EPA to accept undertakings to remedy or restrain breaches of the Act without first commencing court proceedings. Court-enforceable undertakings have proven effective in providing an enhanced enforcement capability for other regulators such as the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC). Where an authority believes that a party has not complied with the terms of an undertaking, it may apply to the court for appropriate orders. The review considered whether the EPA should be allowed to accept court-enforceable undertakings. No major opposition to this concept was raised during the review. Such a provision could help achieve the desired environmental outcomes and provide an alternative to criminal court proceedings.

The DEC is assessing the benefits of extending the scope of sentencing orders so that the EPA could accept court-enforceable undertakings.

### ***Economic measures and incentives***

The Act introduced a number of innovative financial and economic instruments to complement traditional regulatory approaches and to assist in further achieving cost-effective environmental protection. The types of new instruments include financial assurances, tradeable emission schemes and load based licensing. An additional instrument (green offsets) is being developed by the EPA. These are a form of emission trading involving small numbers of participants at one time. A green offset is an action taken outside a licensed premises (but near to it) that reduces pollution, resulting in cost-effective environmental protection.

The DEC is assessing whether some minor legislative amendments are required to facilitate offsets: for example, allowing offset measures to be implemented off-site from a licensed premises as a condition of an environment protection licence.

### **Waste levy**

A number of issues were raised through the review in relation to the effectiveness of the waste levy, which applies to waste disposal at licensed facilities in certain parts of the State. There were a number of conflicting views as to how effective the levy was, including:

- the levy is not high enough to sufficiently influence waste avoidance and the diversion of wastes to recycling and recovery
- the levy is too high and hence an incentive for waste dumping
- the levy encourages significant recycling, particularly of construction and demolition waste.

There was widespread support for the levy collected to be directly spent on waste initiatives to encourage waste avoidance and resource recovery, as well as on enforcement and other environment protection programs. There were also some suggestions to introduce further levies on the manufacturing stage of some products (for example, tyres) to ensure their proper disposal or recovery.

Specific issues in relation to the application of the levy and exemptions and rebates were also raised in the review. The majority of responses supported extending the application of the levy to all landfills to ensure a more level playing field. Smaller unlicensed or illegal landfills are able to offer cheaper rates as a result of not passing on the levy charge to their customers. There were also opposing views on whether the levy should apply to all types of waste facilities (for example, recyclers, transfer stations) as well as to landfills. The DEC is considering whether the current approach to application of the levy is still appropriate. Feedback obtained in relation to exemptions and rebates from the levy will be considered by the DEC in the remake of the POEO (Waste) Regulation 1996, which is currently underway.

### *Environmental policies and objectives*

#### **Protection of the environment policies**

The previous legislation did not have any formal avenues for establishing plans, policies and strategies to secure positive environmental outcomes. The POEO Act sought to create such an opportunity with the provision under Part 2 for the EPA to develop Protection of the Environment Policies (PEPs). These PEPs can specify:

- environment protection goals
- environment protection standards
- guidance to help achieve goals set by PEPs
- protocols for assessing whether standards and goals have been achieved
- attainment programs for achieving goals and standards.

PEPs may apply to the whole of NSW or specific areas. They may deal with any aspect of the environment, or with any activity that may have a detrimental impact on the environment.

Although the DEC has considered the development of a number of PEPs, to date none has been introduced. As part of the review, the DEC has considered the possible reasons for this, such as whether the process for developing a PEP is too complex. However, the process for developing a PEP in NSW is similar to that used in other jurisdictions.

The conclusion is that generally PEPs have not progressed past the conceptual stage because the particular issues they may have addressed were more readily dealt with through other policy, planning or catchment management instruments or documents. For example, a PEP for Sydney Harbour as originally proposed by the then Minister was not progressed as other models for managing the relevant issues were advanced and environmental goals and actions for Sydney Harbour are now included in a draft catchment blueprint. The DEC continues to explore the use of PEPs in addressing emerging issues that do not clearly lend themselves to management with other existing tools.

There were many calls for PEPs to be made enforceable, although there is no experience upon which to consider making such a change before these tools have been used.

In 1998, Government adopted interim water quality objectives following community consultation. The DEC is considering whether the Classified Waters Scheme, created through the Clean Waters Regulation 1972, should be replaced by a PEP, regulation, plan or planning instrument that provides water quality standards or objectives. A number of submissions suggested possible subjects for PEPs, and the DEC will explore the potential for these to be developed for projects.

### **POEO Act objectives**

The POEO Act replaced pollution control legislation that focused on limiting the amounts of pollutants emitted to various media. The pollution control emphasis was focused more on 'end of pipe' control of pollution. The POEO Act objectives are much broader and call for a variety of tools to protect, restore and enhance the environment and reduce pollution. These include pollution prevention measures, cleaner production and measures to reduce pollution at source. The POEO Act objectives relate to the operation of the environment protection regime for NSW. The POEO Act is about environment protection operations and regulation, which are subsets of the statutory responsibilities of the EPA and local councils.

The POEO Act is one of numerous State laws relating to environment protection and natural resource management. It is important not to duplicate objectives in these other laws.

Most submissions support the DEC view that there is no need to amend the objectives at this time.

### **Conclusion**

In light of the achievements to date and the outcomes of the recent review, we can conclude that the POEO Act is working well in meeting its objectives. Major stakeholders agree with the environmental framework set up by the Act and its general philosophy. However, a number of suggestions (both legislative and non-legislative) have been identified to further enhance the operation of the Act. The major issues that could result in legislative changes have been discussed in this report. The non-legislative changes suggested by stakeholders will be taken into account in the development of changes to the relevant DEC administrative practices and procedures.

## **Appendix A – Minister’s Terms of Reference (issued December 2002)**

In accordance with section 327 of the Protection of the Environment Operations Act 1997 and the Terms of Reference below, the Minister for the Environment seeks comment on the provisions of the POEO Act in providing a clear, comprehensive and strong regulatory regime for protecting the environment in NSW.

Section 327 of the POEO Act states that:

- The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- The review is to be undertaken as soon as possible after the period of five years from the date of assent to this Act.
- A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of five years.

In undertaking these statutory requirements, the Minister shall consider the appropriateness or otherwise of the provisions dealing with:

- the licensing regime and Schedule 1 of the Act
- appropriate regulatory authorities (ARAs)
- community consultation and access to information
- compliance and enforcement
- economic incentives
- Protection of the Environment Policies
- other policy issues

The Minister shall also consider whether:

- the Act focuses on the highest environmental priorities and provides practical and effective mechanisms for addressing them?
- the powers available to local government and other ARAs are adequate?
- the Act creates barriers to alternative regulatory approaches?
- the Act promotes a range of approaches from education/cleaner production through to enforcement?
- compliance and administrative costs of the legislation are reasonable and justified compared to benefits achieved?
- the regulatory framework is flexible enough to accommodate changing circumstances?
- opportunities exist to adopt best practice from other jurisdictions?

Information on the POEO Act can be accessed on the Environment Protection Authority (EPA) Internet website under [www.epa.nsw.gov.au/legal/envacts.htm#acts](http://www.epa.nsw.gov.au/legal/envacts.htm#acts), or by phoning the EPA’s Pollution Line on 131 555.

## **Appendix B – Summary of amendments made to the *Protection of the Environment Operations Act 1997***

The Act has been amended by the following legislation:

### *EPA-administered legislation*

- *Pesticides Act 1999* No. 80
- *Road Transport Legislation Amendment Act 1999* No. 19
- *Protection of the Environment Operations Amendment (Littering) Act 2000* No. 20
- *Protection of the Environment Operations Amendment (Balloons) Act 2000* No. 28
- *Protection of the Environment Operations Amendment (Tradeable Emission Schemes) Act 2000* No. 91
- *Waste Avoidance and Resource Recovery Act 2001* No.58
- *Environment Protection Legislation Amendment Act 2002* No. 14
- *Protection of the Environment Operations Amendment (Tradeable Emission Scheme Fund) Act 2002* No. 61

### *Other Acts*

- *Justices Legislation Amendment (Appeals) Act 1998* No. 137
- *Crimes Legislation Amendment Act 1999* No. 54

### *Statute Law revision*

- *Statute Law (Miscellaneous Provisions) Act 1998* No. 54
- *Statute Law (Miscellaneous Provisions) Act (No. 2) 1998* No. 20
- *Statute Law (Miscellaneous Provisions) Act 1999* No. 31
- *Statute Law (Miscellaneous Provisions) Act (No. 2) 1999* No. 85
- *Statute Law (Miscellaneous Provisions) Act 2000* No. 53
- *Statute Law (Miscellaneous Provisions) Act (No. 2) 2000* No. 93
- *Statute Law (Miscellaneous Provisions) Act 2001* No. 56
- *Statute Law (Miscellaneous Provisions) Act (No. 2) 2001* No 112
- *Statute Law (Miscellaneous Provisions) Act 2002* No. 53