

CORRS IN BRIEF

NOVEMBER 2008

CHANGES TO QLD ENVIRONMENTAL REGULATION

The *Environmental Protection Regulation 1998* (Qld) (**current Regulation**) is due to expire in August 2009. It will be replaced by the *Environmental Protection Regulation 2008* (Qld) (**new Regulation**) which was passed by the Queensland Parliament in November 2008 and will commence in January 2009.

The *Environmental Protection and Other Legislation Amendment Act (No. 2) 2008* (Qld) (**EPOLA**) was also passed by the Queensland Parliament in October 2008 but has not yet been proclaimed into force. EPOLA amends the *Environmental Protection Act 1994* (Qld) (**EP Act**) to make a number of changes which are associated with the review and replacement of the current Regulation.

LEVELS OF ENVIRONMENTALLY RELEVANT ACTIVITIES

The current Regulation lists a number of environmentally relevant activities (**ERAs**) which may result in the release of a contaminant or which have the potential to cause harm to the environment. Prior to commencing an ERA, a fee must be paid and a development approval or code of compliance must be obtained. The current Regulation distinguishes between level one and level two ERAs on the basis on higher or lower environmental impact. Level one ERAs incur an annual fee as they present a higher risk to the environment whereas level two ERAs present a lower risk and therefore incur no ongoing fee.

As a result of the new Regulation and EPOLA amendments, the distinction between level one and level two ERAs will not be maintained except through the fees schedule. However, mining and petroleum activities will continue to maintain the level one and level two ERA classification system. These activities are not included in the Integrated Development Assessment System under the *Integrated Planning Act 1997* (Qld) (**IPA**) and therefore the level system will continue to have relevance in determining whether an activity operates under a code of compliance or requires an environmental impact statement.

FEES AND AGGREGATE ENVIRONMENT SCORES

The current Regulation calculates the annual fees for ERAs based on the type of industry being regulated and the outputs which are produced. The new Regulation and EPOLA amendments introduce a new fee structure which incorporates the extent of point source pollution for each ERA. An Environmental Emission Profile (**EPP**) is used to determine annual fees by profiling the an average operations' relative risk of causing environmental harm. The EEP produces an aggregate environmental score for an ERA by adding together:

- (a) a site attribute score calculated by looking at the environmental factors existing at an average ERA site; and
- (b) an emission score calculated from National Pollution Inventory Data.

Annual fees are then determined by multiplying the aggregate environmental score for an ERA by the applicable fee unit. Aquaculture, intensive animal feed lotting, pig keeping and poultry farming will attract a higher fee unit than the other ERAs prescribed for in the new Regulation.

The new fee structure means that some ERAs which were previously listed as level two will now attract a fee while other ERAs may attract an increased fee.

MULTIPLE SITE DISCOUNTS AND FEE WAIVERS

The new Regulation and EPOLA amendments also alter the existing arrangements for multiple site discounts and fee waivers and introduce eligibility criteria for fee discounts. Currently, a multiple site discount is available whereby operators with more than one site on a Registration Certificate are only required to pay the single highest fee of all sites. Under the new Regulation, all commercial operations will now have to comply with the criteria for a single integrated operation in order to be eligible for the discount. The non-commercial activities of local government which do not fall

within the criteria for a single integrated operation may now also be eligible for the discount.

Operators will no longer be able to apply for a waiver of annual fees where the fee would cause financial hardship or the likelihood of environmental harm is insignificant. Under the new Regulation, administering authorities, Aboriginal Community Councils and sewage treatment plants run by charitable organisations will be exempt from the payment of fees in relation to development applications and registration certificates.

Fee discounts may also be available where the operator has been operating at a higher level than mere compliance and is implementing an approved environmental management system or is an approved partner of the Environmental Protection Agency's (EPA's) ecoBiz program. In addition, some operations may be eligible for a low emissions score discount.

REGULATED ACTIVITIES

Some ERAs which are not regulated under the current Regulation will be regulated under the new Regulation. These include ventilation stacks of tunnels and sheep feed lotting. In addition, the threshold for waste transfer stations will be decreased so that operators who previously fell below the threshold for regulation will now be caught. The operators of these newly regulated ERAs will need to apply for a registration certificate within twelve months of becoming a regulated ERA. The changes will also result in several ERAs having higher regulatory effort and fees because of the reassessment of environmental risk.

A number of ERAs which are regulated under the current Regulation will no longer be regulated under the new Regulation. Some of the ERAs affected by de-regulation include aquaculture, community infrastructure and services, extractive activities, food processing, metal product activities, animal housing, plastic manufacturing asbestos product manufacturing, motor racing, sawmilling and wood chipping, and transport and maritime services. The thresholds for a number of ERAs will also increase including gas production, paint manufacturing and boiler making and engineering.

RELOCATION OF OFFENCE PROVISIONS AND NEW POLICIES

The EPOLA amendments relocate the environmental nuisance, water and air pollution and fuel quality standards offence provisions in the following legislation into the EP Act:

(a) current Regulation;

(b) *Environmental Protection (Air) Policy 1997* (Qld) (**EP Air Policy**);

(c) *Environmental Protection (Noise) Policy 1997* (Qld) (**EP Noise Policy**); and

(d) *Environmental Protection (Water) Policy 1997* (Qld) (**EP Water Policy**).

The EP Air, Noise and Water Policies are due to expire in August 2009. As a consequence, the EPA is currently in the process of drafting new EP Air, Noise and Water Policies which will commence prior to the expiry deadline. Several State Planning Policies (**SPPs**) on Air, Noise and Water are also being drafted. The SPPs will include the important aspects of the EP Air, Noise and Water Policies as well as specific planning measures to achieve the aims of the EP Policies. Local governments will be required to have regard to the new SPPs when assessing development.

DEVOLUTION OF OFFENCES TO LOCAL GOVERNMENT

Responsibility for environmental nuisance is shared between the EPA and local governments under the current Regulation depending on various circumstances. The new Regulation clarifies the responsibilities of both state and local governments by recognising that local governments are best placed to regulate minor environmental matters whereas state governments should take responsibility for major environmental matters. The new Regulation gives local governments responsibility for all environmental nuisance except where the unlawful emission is generated from a state or local government activity or regulated under another law. Local governments will be given flexibility to vary and regulate environmental nuisance through their local laws to reflect the community's preferences for emission standards. The standards in a local law will override those in the new Regulation.

Local governments will have access to the full range of enforcement tools in the EP Act and the new Regulation in order to allow them to effectively manage nuisance. In particular, local governments will now be able to require an operator to undertake a transitional environmental program or issue an environmental protection order. The ability to issue abatement notices and on the spot fines for minor offences will also remain.

The responsibility for enforcement of minor water pollution matters, including the offences for the release of certain things or build up of sediment in a roadside gutter, stormwater drain or water, will also be devolved to local government under the new Regulation.

AMENDED OFFENCE PROVISIONS

The new Regulation makes a number of changes to environmental nuisance offences. The definition of environmental nuisance will be replaced with an expanded definition which includes aerosols, fumes, particles and smoke. The definition in the current Regulation only covers noise, dust, odour and light. The expanded definition will allow local government to have devolved responsibility for all emissions.

The current Regulation provides that individuals and corporations who commit a nuisance offence will receive the same penalty. The new Regulation will increase the penalty for unlawfully causing environmental nuisance and will require that corporations pay more than individuals.

The exclusions to unlawful environmental nuisance for non-domestic animal noise, audible traffic signal noise and cooking odours will be retained. However the exclusions for blasting noise and outdoor shooting ranges will become the specific noise standards in the EP Act which, when breached, will be an offence. A number of other exclusions to unlawful environmental nuisance will be introduced including transport and safety noise, government activities, public infrastructure and nuisance which is already regulated by other laws.

Several amendments will also be made to offences relating to noise standards, water contamination, releases from boats into non-coastal waters, air contamination and fuel standards. The changes will allow an administering authority to require an applicant to carry out a noise assessment or record and provide emissions data in order to inform an environmental management decision. There will also be increased penalties for water offences and a more extensive list of water contaminants under the new Regulation.

A NEW ENFORCEMENT TOOL – DIRECTION NOTICES

The new Regulation introduces direction notices as an enforcement tool to replace nuisance abatement notices, which are only available for unlawful environmental nuisance. The new direction notices will be available for:

- (a) unlawful environmental nuisance;
- (b) the default specific noise standards;
- (c) a local law that provides a variation from the default specific noise standards; and
- (d) minor water pollution matters.

Where the unlawful environmental nuisance involves an emission the following must be considered before issuing a direction notice:

- (a) the general emission criteria must be considered to determine whether there is a reasonable belief that the emission is causing a nuisance. Several of the criteria in the current Regulation have been clarified by the EPOLA amendments and new Regulation. In addition, a new criterion has been included which obliges the authorised person to consider the mitigation measures which have been or could reasonably be taken in the circumstances;
- (b) if the emission is noise, the additional noise criteria and any noise measurements which have been taken must also be considered.

A direction notice may direct actions such as stopping or preventing a continuation of the release or offence, containing or controlling the release or cleaning up the pollution. It is an offence not to comply with a direction notice.

CLEAN UP NOTICES FOR CONTAMINATION INCIDENTS

The amended EP Act will allow an administering authority to issue a clean up notice where they reasonably believe that a contamination incident has occurred or is occurring. A contamination incident is an incident that causes or is likely to cause serious or material environmental harm and does not include an incident involving only environmental nuisance. The state government has responsibility for issuing the notices, even where the contamination incident is caused by an activity which has been devolved to local government.

An administering authority may issue a clean up notice in order to:

- (a) prevent or minimise contamination;
- (b) rehabilitate or restore the environment because of the incident;
- (c) assess the nature and extent of the environmental harm or the risk of further environmental harm from the incident; and
- (d) keep the administering authority informed about the incident or the actions taken under the notice.

It is an offence to fail to comply with a clean up notice or to obstruct an action being undertaken in compliance with a clean up notice. However, it is a defence to non-compliance with a clean up notice if the relevant contamination incident

was caused by a natural disaster or a terrorist act and reasonable security or preventative measures had been undertaken at the site given the inherent nature of the risk. If a clean up notice has not been complied with within the specified timeframe, an authorised person may undertake the work specified in the notice.

COST RECOVERY MEASURES FOR THE CONTAMINATION OF LAND

The new Regulation and EPOLA amendments also introduce cost recovery notices. These may be issued where a person has failed to comply with a clean up notice or written emergency direction and require that person to pay all reasonable expenses that the administering authority incurred in relation to the contamination incident. Costs may be claimed against any recipient of a cost recovery notice and all of the recipients can take action against each other to ensure that the polluter pays.

The above defences for clean up notices also apply to cost recovery notices however further exceptions apply in so far as the director of a company who receives a cost recovery notice may be exempt from compliance where they took all reasonable steps to ensure that the company paid the costs. In addition, a parent company of a company who receives cost recovery notice may be exempt from compliance where they can establish that all reasonable steps were taken to ensure that the original recipient company paid the costs.

IMPLICATIONS

The EPOLA amendments and new Regulation will result in significant changes to environmental regulation in Queensland:

- (a) the new fee structure for ERAs means that some operators of ERAs with high environmental scores may experience an increase in annual fees while other operators with low environmental scores may no longer be regulated;
- (b) some commercial operators of ERAs will no longer be eligible for multiple site discounts and fee waivers;
- (c) operators of newly regulated activities will need to apply for a registration certificate within twelve months of becoming a regulated ERA;
- (d) local governments will bear the responsibility for the enforcement of environmental nuisance and water pollution offences. This will mean that local governments will have the ability to issue environmental protection orders, require environmental management programs and make local laws in relation to the offences;
- (e) local governments may also experience an increase in fee revenue with fewer resources being dedicated to activities with lower emissions;
- (f) enforcement mechanisms will be strengthened with new tools such as direction, clean up and cost recovery notices available to administering authorities to enforce breaches of the EP Act or new Regulation.

For further information, please contact:

Luke McDonald
Partner
Tel 07 3228 9744
luke.mcdonald@corrs.com.au

SYDNEY

Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000
Tel +61 2 9210 6500
Fax +61 2 9210 6611

MELBOURNE

Bourke Place
600 Bourke Street
Melbourne VIC 3000
Tel +61 3 9672 3000
Fax +61 3 9672 3010

BRISBANE

Waterfront Place
1 Eagle Street
Brisbane QLD 4000
Tel +61 7 3228 9333
Fax +61 7 3228 9444

PERTH

Woodside Plaza
240 St George's Terrace
Perth WA 6000
Tel +61 8 9460 1666
Fax +61 8 9460 1667

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