

31 March 2021

NSW Environment Protection Authority
Regulatory Practice
Locked Bag 5022
PARRAMATTA NSW 2124

RE: ASBG's Submission on NSW EPA's Draft Regulatory Strategy 2021

The Australian Sustainable Business Group (ASBG) welcomes the opportunity to comment on the NSW EPA's draft [Regulatory Strategy \(RS\)](#).

ASBG is a leading environment and energy business representative body that specialises in providing the latest information, including changes to environmental legislation, regulations and policy that may impact industry, business and other organisations. We operate in NSW and Queensland and have over 100 members comprising of Australia's largest manufacturing companies and other related businesses.

ASBG welcomes the review as it comes at a time of considerable administrative changes within the Environment Protection Authority (EPA), where it is more of an enforcement agency and much of its policy work has shifted to other areas under the umbrella Department of Planning, Industry and Environment (DPIE).

Overall the general thrust of the RS is welcomed as it becomes a core policy document in which the EPA will enforce the legislation it is responsible for. However, there are few improvements and clarifications required:

- Clarification on the extent of the EPA's regulation of health issues and minimisation of overlap with Safework NSW.
- Improved reference to the EPA's Principles, especially Ecologically Sustainable Development and the Precautionary Principle.
- Application of the risk-based approach and use of a science-based approach

Protecting Human Health

ASBG strongly supports the EPA's role in the protection of human health, where it has clear responsibilities in this area. The environmental aspects of these health issues deal with ambient air pollution issues, such as air quality and noise etc. with land and water pollution included as health issues.

There is an issue when it comes to EPA's inclusion of worker's health issues from air pollution, inside operating sites, generally covered by Environment Protection Licenses (EPL). In the past a rule of thumb could be applied to the jurisdictional border between EPA and Safework NSW, which was the site boundary. Using this approach, any air pollution issue within a 'bubble' over the site was considered Safework NSW's jurisdiction as it affected the workplace. Outside this bubble it becomes EPA's jurisdiction.

When looking at the human health objectives, under both agencies main legislation there is support for this approach:

Work, Health and Safety Act 2011, s3 Object:

(1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by--

- (a) protecting workers and other persons against **harm to their health**, safety and welfare through the **elimination or minimisation of risks arising from work or from specified types of substances** or plant, and...

Protection of the Environment Administration Act 1997 s3 Objects of Act:

The objects of this Act are as follows:

- (a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain **ecologically sustainable development**, ...
- (d) to reduce **risks to human health** and prevent the degradation of the environment by the use of mechanisms that promote the following:
 - (i) pollution prevention and cleaner production,
 - (ii) the reduction to harmless levels of the discharge of substances likely to cause harm to the environment,
 - (iia) the elimination of harmful wastes,
 - (iii) the reduction in the use of materials and the re-use, recovery or recycling of materials,
 - (iv) the making of progressive environmental improvements, including the reduction of pollution at source,
 - (v) the monitoring and reporting of environmental quality on a regular basis,...

From the above it would seem clear that Safework NSW has jurisdiction over harm to workers' health arising from work or specified types of substances at the workplace. Consequently, workers exposed to substances, which would include air pollutants, within a workplace, are clearly covered under the jurisdiction of Safework NSW. Whereas the EPA's objectives under the POEA Act, is to reduce risks to human health in a broad sense. Under the [Ambient Air Quality NEPM](#) it is even more limiting; covering only *ambient air* which does not include the air environment inside buildings or structures. Coverage by this bubble on air pollution incidents is further supported by the Protection of the Environment Operations Act 1997 [s127 Proof of causing pollution](#):

To prove that air pollution was caused from premises, within the meaning of sections 124–126 [Operate and maintain plant and equipment in a proper and efficient manner etc.], it is sufficient to prove that air pollution was caused on the premises, unless the defendant satisfies the court that the air pollution **did not cause air pollution outside the premises**.

So s127, means that air pollution that is caused within a site's boundaries, made by poorly operated and maintained plant and equipment is not an EPA pollution issue. Consequently, it clearly fits under Safework NSW's jurisdiction. Again this supports the site 'bubble' rule of thumb approach.

However, interpretation of the extent of where the EPA stops and Safework NSW takes over on health grounds in practice is quite murky. There are many examples of the EPA prosecuting sites with EPLs on air pollution incidents where, clearly the air pollution emissions could not cause air pollution outside the premises. Here both the EPA and Safework NSW have overlapping jurisdiction. Why does this occur? The issue is that almost all [perhaps all subject to exhaustive examination] EPLs do not include the s127 POEO Act defense. As a consequence, internal incidents where on-site only air emissions occur due to plant and equipment failures have been targeted as worker's health or human health issues by the EPA. Sometimes both Safework NSW and the EPA are involved, others only the EPA or Safework NSW are involved. This jurisdictional overlap was not intended by the drafting of the legislation and further deters investment in NSW by businesses and organisations where they are captured under an EPL.

R1 ASBG recommends the roles of the EPA and Safework NSW dealing with health enforcement be clarified, especially on air pollution affecting workers' health in workplaces.

Ecological Sustainable Development

Under the POEA Act *Ecological Sustainable Development* (ESD) is defined in [s6\(2\)](#):

(2) For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of social, **economic** and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs: ...

[includes the Precautionary Principle, intergenerational equity, conservation of biological diversity and improved valuation, pricing and incentive mechanisms.]

With this in mind the reference to ESD as an object of the Act should also include a reference to the definition of ESD in 6(2) of the POEO Act. The full definitions of ESD under the POEA Act should be reflected in the RS or at least referenced. Without consideration of the full definition and objections of the POEA Act, and other Acts under EPA's enforcement the strategy is incomplete. Ignoring certain parts of the objectives and definitions is not acceptable and this important strategy should be clear on this.

Also the [Inter-Government Agreement on the Environment](#) (IGAE) which mirrors s6 POEA Act, and which NSW Government is a signatory to also includes the following:

RECOGNISE that the concept of ecologically sustainable development including proper resource accounting provides potential for the integration of environmental and **economic considerations** in decision making and for balancing the interests of current and future generations;...

Economic considerations, including but not limited to cost-benefit assessment, are an essential part of ESD and it is concerning this is omitted from the RS¹. There is a single mention of use of economic mechanisms for enforcement, but this is not the sole intent of *economic considerations* as should also be included in policy and in regulatory decision making.

Economic measures are also incorporated into the POEO Act, especially in the ability to negotiate Environment Protection License conditions. Consequently, as a result of its legislation the EPA must take into account economic considerations in balance with other environmental controls into account. This can be addressed for example by:

- The use of effective cost-benefit studies where the full costs on businesses and other organisations are properly considered and taken into account with new or when changing legislation and policy.
- Considering costs in the Implementation of punitive actions, such as Clean Up and or Prevention Notices, which carry material economic impact to the site in question. For example, requiring removal of thousands of tonnes of material as waste with likely costs exceeding \$400/t.
- Other actions which carry considerable cost implications for individual and businesses as a whole.

This is not saying that such actions should not proceed or that heavy penalties should apply due to the culpability of the offender. Where the offender is a victim of criminal activity, or was attempting to comply and failed due to *bona fide* differing legal interpretations, or other reasonable mitigating factors and there

¹ The only reference to "economic actions is to economic mechanisms – e.g. the Waste Levy, Licence fees, tradeable emissions etc.

are material costs involved, then consideration of more flexible arrangements should be encouraged and appropriately reviewed in light of the circumstances of the regulatory change or action.

R2 ASBG recommends the Regulatory Strategy include economic considerations in its Principles, and it being identified as an important balance with environmental protection and punitive measures.

Precautionary Principle and Risk-Based Approach

The Precautionary Principle is again well defined under the POEA Act as:

S6(2)(a) **the precautionary principle** —namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
- (ii) an assessment of the risk-weighted consequences of various options,

To further better define the legal meaning of ESD and the Precautionary Principle, Chief Justice Brian Preston prepared *The Principles of Ecologically Sustainable Development*². Key elements extracted from this paper include:

Principle of integration:

The principle of integration ensures mutual respect and reciprocity between economic and environmental considerations:

- Environmental considerations are to be integrated into economic and other development plans, programs and projects and
- Development needs are to be taken into account in applying environmental objectives.

Precautionary principle: first condition precedent

If there is no threat of serious or irreversible environmental damage (the first condition precedent is not satisfied), there is no basis on which the precautionary principle can operate.

Precautionary principle: second condition precedent

For the formulation of “serious or irreversible environmental damage”, the correlative degree of certainty about the threat is “highly uncertain of threat” or “considerable scientific uncertainty”.

Precautionary principle: second condition precedent

If there is not considerable scientific uncertainty (the second condition is not satisfied) but there is a threat of serious or irreversible environmental damage (the first condition precedent is satisfied), the precautionary principle will not apply.

Reference to this paper would also enhance and clarify the RS in this respect.

ASBG welcomes the reference to the Risk-based approach in the RS’s Principles page. However, no reference to the economic considerations, is discussed in the document.

R3 ASBG recommends the full definition of ESD under s6 of the Protection of the Environment Administration Act 1997 be used and referenced in the Regulation Strategy.

² The Principles of Ecologically Sustainable Development, Chief Justice Brian Preston, NSW LEC, https://lec.nsw.gov.au/documents/speeches-and-papers/preston_principles%20of%20ecologically%20sustainable%20development.pdf

Include a Science-Based Approach

The RS refers to using an *evidence-based approach*, which is linked to the legal processes requiring evidence, which is welcomed and supported. In addition, ASBG considers the RS should also include the *science-based approach*, especially when setting limits and policy under environmental regulation and EPA policy. J Preston's clarification of ESD brings in the science-based approach as it is a key intrinsic part of ESD and the Precautionary Principle. As a consequence, use of the *Precautionary Principle* would only apply where there is considerable scientific uncertainty and of serious or irreversible environmental damage is occurring or is a threat.

Unfortunately, this is not always used, perhaps more generated more from a political and legislative perspective than an EPA one. An example, is the introduction of the *presence-based approach* which currently applies to asbestos waste, which is notably contrary to a *risk, science and evidence-based approach*. This approach appears contrary to the objectives of the POEA Act, but have been inserted into the POEO Act³. While the EPA must enforce NSW legislation the legislators provide, it should be applied by the regulator in a risk and science-based manner where possible taking into account the range of polices and other risks involved.

For example, on a stockpile there is evidence of some asbestos on its surface in a small area. A *risk-based approach* would require the extent of the asbestos contamination to be determined using a *science-based* method of screening specific volumes, rather than condemn the entire stockpile to landfill as asbestos waste, such as under a *presence-based approach*. Here a science-based approach would be taking effective action, by screening, not only considering the risk of asbestos in parts of the stockpile, it is also reducing the amount going to landfill. As asbestos waste cannot be recycled or reused, the cleared materials can, supporting the DPIE policy position of minimising waste to landfill.

R4 ASBG recommends the Regulatory Strategy include the use of a science-based approach and avoid a presence-based approach, where practicable.

Should you require further information, clarification or details on the submission please contact me on 02 9453 3348.

Yours Sincerely



Andrew Doig
CEO

Australian Sustainable Business Group (ASBG)
T. +61 2 9453 3348
F: +61 2 9383 8916
(31 Lady Penrhyn Dr, Beacon Hill NSW 2100)

Email address:

andrew@asbg.net.au, www.asbg.net.au

³ [S241\(1\)\(f\) POEO Act Matters to be Considered in Imposing Penalty Schedule 1\(50\) POEO Act](#) "asbestos waste" means any waste that contains asbestos