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4 March 2022

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Dear David

RE: Submission on the Draft Recovered Soils and Recovered Fines Orders and Exemptions

The Australian Sustainable Business Group (ASBG) welcomes the opportunity to comment on the draft *Recovered Soil and Fines Order and Exemption* (RROE).

The Australian Sustainable Business Group (ASBG) is a leading environment and energy business representative body that specializes 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.

1 BACKGROUND

ASBG received a copy of the letter and drafts the Environment Protection Authority (EPA) sent to some of our members which requested consultation on the: new Resource Recovery Orders and Exemptions (RROE) for recovered soils and fines.

ASBG provided a submission last year on the proposed changes including the revoking of the Recovered Fines RROEs both batch and continuous. This submission also focuses on the text of the draft RROEs:

- Recovered Fines (batch)
- Recovered Soil

These are referred to as the draft RROEs. Key issues discussed include:

- The impact on waste quantities to landfill following the revoking of the Recovered Fined RROEs and replacement RROEs on the remaining life of landfills in the Sydney area.
- Dealing with third parties which can, via negligence or wilfulness contaminate RRO materials
- Asbestos issues and measurement

2 REVOCATION TRANSITIONS & IMPACT ASSESSMENT

ASBG welcomes the transitional assistance offered largely to sites which operate based on the Recovered Fined (Continuous) RRO, which are flagged for revocation. Batch recovered fines operators are better placed, but will time to adjust to the replacement RRO. However, the assistance in terms of waste levy discounts at landfill, may not be enough in terms of time and resources to alter existing plant and equipment to comply with the Recovered Fined (Batch) RROE. Some sites simply do not have the room to manage stockpiles and will have to cease operations, resulting in recyclable C&D waste diverted to landfill. Others are constrained by their Environment Protection Licence and planning consent conditions, which can take over a year to gain consent and then alter their sites to meet the batch conditions.

Further transitional arrangements should be undertaken with the goal of minimising diverting more waste to landfill. To undertake a smooth transition, the Government should assess each processor individually identifying their issues and requirements, timeframe and ability to achieve the replacement Recovered Fines RROE. In fact, the waste levy discount shows that large volumes of waste directed to landfill is going to occur. A poor transition must be avoided as it would result in a lowering of confidence to invest in future NSW waste infrastructure, which is badly needed and increase waste to landfill, of which space is fast running out in the Greater Sydney area.

Sydney area is fast running out of landfill capacity, NSW Government's the *NSW Waste and Sustainable Materials Strategy – A guide to future infrastructure needs* states:

> At our current rate of waste generation and recycling, putrescible landfills servicing Greater Sydney are likely to reach capacity by 2036 and non-putrescible landfills by 2028.

Consequently, the transitional processes must aim to minimise the amount of C&D waste going to landfill which is being processed under the to be revoked Recovered Fines RROEs. However, the revocation of these RROEs are likely to result in significantly more waste going to landfill. In our last submission, ASBG said the revocation could affect 2.1 Mt p.a. of C&D materials that currently rely on these RROEs. If the revocation process is done poorly including the published transitional arrangements, ASBG guesstimates, the revocation may result in between 0.5 to 1 Mt being diverted to landfill in the first year. Overtime Installation of new equipment, planning approvals and other changes should result in this volume dropping. Nevertheless, a poor adjustment could result in a guesstimated 2 Mt to 3 Mt of additional waste going to landfill.

The Department of Planning Industry and Environment put in a lot of work in developing the *NSW Waste and Sustainable Materials Strategy – A guide to future infrastructure needs.* ASBG would expect the likely additional volumes of waste, generated by the revocation actions, would alter this document's findings and its conclusions. Consequently, the additional waste to landfill forecast should be rerun in the modelling for waste in in the Sydney region. If this has a significant impact on the remaining life of inert landfill in the Sydney area, then significant changes to NSW's infrastructure needs would be required. Given that less than 6 years of landfill life remains at current rates, such considerations should be done as a matter of urgency. Perhaps the increased waste load from the recent floods should also be included?

R1 ASBG recommends the:

- ***More time and improved transitional arrangements be made for sites affected by the revocation actions***
- ***Impact of the additional waste to landfill generated from the revocation and modifications of the Recovered Fines RROEs be included in a publicly released reassessment of NSW's, remaining***

landfill capacities, especially for the Sydney area, and appropriate changes made to the waste infrastructure forecasts.

3 IMPLICATIONS OF THE ORDERS AND EXEMPTIONS

The text of the draft RROEs uses far more robust legal language compared to current RROEs, to clearly assign liability onto the processor or consumer of the Orders and Exemptions respectively. While this is not unexpected, it makes the void of responsibility of third parties even more clear, especially the transport component in the chain of responsibility in dealing with RROE materials. These changes are best summarised by the following text from the draft RROs:

> *Users and **suppliers** of **recovered fines** and **blended recovered fines** use, and deal with, the waste at their own risk.*

The text, sampling and analysis, especially for asbestos, sets a new template to be incorporated into other RROEs the EPA has issued. As a consequence, the overall changes to the Recovered Fines and Recovered Soils RROEs must be viewed as being applied, over time, to all generic RROEs and many Specific RROEs.

A key concern with the increased emphasis of liability on producers and consumers, is it leaves out third parties, tying responsibility largely on either the producer or consumer of the material. All the draft RROEs state the offence for not complying with them, but does not take into account third parties who can negligently or wilfully contaminate loads or breach RROE conditions. There are a number of cases where an RROE transporter, for commercial or other reasons, has, for example, hidden asbestos under legitimate loads or spiked a competitor to remove competition.

ASBG, in its 2021 submission raised the issue of producer and consumer quality control. It was discussed the consumer can be more liable than the producer as it is simply easier for the EPA to launch a prosecution against the consumer for receiving, using or stockpiling non-conforming RRO material. Such a process reverses consumer law, where the provider of the material is liable for supplying a faulty (illegal) product. This issue could be considered partly addressed by the new section 3.3. However, ASBG is concerned over the broadness of this new section:

> *3.3 A supplier must not supply recovered fines or blended recovered fines that contains asbestos, regardless of whether:*
>
> *3.3.1 the test results from any samples collected and tested from any batch of waste show no asbestos found; or*
>
> *3.3.2 suspected asbestos is observed in any batch of waste and is confirmed not to be asbestos.*

There are number of issues here:

- That finding asbestos in a stockpile is a function of sampling frequency (see section 4 below)
- If contamination by asbestos (or even another contaminant) occurs regardless of who did it, the processor is liable.

Liability is generally restricted to the producer where non-conformance of the RRO occurs. Also prosecution under s144AAA POEO Act would be difficult due to the legal test of proof, though this can apply to suppliers of the processors as well as the processor. However, due to the lower test of *reasonably suspects*, s91(1)(b) POEO Act Clean Up Notices (CUN) can be applied to the processor, where asbestos is found regardless where the RRO material rests. In most cases the volume of non-conforming waste tends to be >>250 m^3 or about

550 tonnes (soil has a density of about 2.2 kg/L), so a CUN for asbestos waste of this size can cost $275,000 ($500/t) or more. This is as large a financial cost, similar to defending against a prosecution, but it is also represents a small stockpile, with many CUNs resulting much higher costs.

In practice, the majority consumers do not contract the producer for the supply, but use a third party under contract. Contract suppliers can offer a more consistent volume and speed of supply, often in a mix of recovered fines and other RROE materials, such as under the ENM RROE. Some can offer to manage the paper work for the consumer, suggesting erroneously this shields them from their liabilities under RREs and NSW waste laws. Nevertheless, use of a third party between the processor and consumer is a common action, but the clear linking of asbestos liability back to the process or the consumer simply does not consider this type of commercial arrangement under the draft RROEs.

A consumer who uses contractor for supply can still face criminal charges and or CUNs if asbestos is found in their stockpiles, from negligent or wilful actions of the contractor, transporter or other parties. Their only method of recovery is to sue the transporter or the processor for providing a faulty (illegal) product. With little evidence of where the (asbestos) contamination originated from this can be challenging and comes with high legal risk. Often the contractor has such limited assets pursuit in court is unviable. The design of the RROE framework makes it difficult to include these third parties. Innovative ideas are worth pursuing to ensure the most culpable party is held liable as the current system still makes the consumer easiest to prosecute.

A better solution is to recommend consumers deal directly with the processors and or have robust contracts, insurance and knowledge about the third party used to supply fill. The processors can then use a reputable transport companies. Other methods can be used such as using transporters with real time tracking systems on their vehicles. ASBG does not wish to stop the practice of using third party contracts, but consumers and even processors of RRO material need to be better prepared. Also the recommendation regarding issuing of CUN below is covered under the EPA's Regulatory Policy and Prosecution Guidelines, the purpose is to emphasise that each cases' should be considered on its individual circumstances, which includes third parties as described above.

In other submissions ASBG has raised the double liability of victims of illegal dumping. This occurs where criminals after breaking in and illegally dumping asbestos waste escape prosecution. Often the victim property owner / occupier is issue with a CUN, bears the cost of the crime. Hence, a victim of the breaking and damage caused, then a victim obligated to clean up the criminal's mess. It is not uncommon that illegal activity is captured by hard evidence obtained by a processor, consumer or landowner, such as video, false certificates or other actions of being criminally involved in wilfully breaching waste laws. However, our members have claimed the EPA when provided with such evidence takes no action and provides no explanation or feedback why no action was undertaken. Provision of at least feedback, where such evidence has been provided will promote better views about the EPA as the police for environmental crimes. It is appreciated that much evidence is not legally effective, so EPA guidance on the types of evidence how to collect it and ensure it is legally admissible would assist.

R2 ASBG recommends the EPA:

- ***In issuing Clean Up Notices and other regulatory actions regarding fill material, also consider the role of third parties' in breaches of NSW waste laws including Resource Recovery Orders and Exemptions (RROE)***

- ***Provide guidance for consumers, where they contract third parties to source and supply fill materials.***
    - ***Awareness of the waste laws and how they work***
    - ***Provide a template contract***
    - ***Recommend insurance against non-conformance of NSW waste laws including RROEs***
- ***Produce guidance on collecting evidence on breaches under NSW waste laws especially for illegal dumping and non-conformance of RRO materials and its presentation to the EPA for action.***

4 ASBESTOS ISSUES

A main focus of this submission is on the treatment of asbestos. In managing asbestos there are higher issues beyond the scope of just RROEs. In particular, asbestos is the only contaminant where a *presence based* approach is used, essentially meaning only a zero level is acceptable. However, has published documents stating:

> *World Health Organisation: Urban areas: - general levels may vary from below 100 to 1000 F/m^3*
> *Safework Australia See the table of typical background – avg. outdoor air is 0.0005 fibres/ml and 0.0002 fibres/ml in indoor air*
> *Asbestos, Victoria: We are all exposed to low levels of asbestos in the air we breathe every day. Ambient or background air usually contains between 10 and 200 fibres for every 1,000 litres (or cubic metre) of air.*

Achieving a zero asbestos level in any stockpile of waste exposed to urban air is simply not possible as asbestos fibres are ubiquitous, contaminating stockpiles making them all potentially asbestos waste. A rigorous testing regime will, therefore find asbestos fibres; it simply depends on how hard it is looked for. Legally, scientifically and practically this causes perverse outcomes resulting in significant difficulties and high uncertainties. All other states and jurisdictions use AS 4964 as is and accept its 0.01% level.

This issue and resulting knock-on issues associated with a presence based approach to asbestos were discussed in ASBG's 2021 submission.

4.1.1 Asbestos Analysis

ASBG welcomed the changes made to correct the asbestos analysis process, but EPA has essentially rewritten AS 4964 with many issues remaining. ASBG members include occupational hygienists, which have reviewed the methods for asbestos measurement and still consider it poor. Issues with the asbestos analysis are presented in Table 1.

Table 1: Comments on Asbestos Key Test Method	
Asbestos Key Test Method line	**Comment**
Table 3: 22 c The weight of the sample must be recorded prior to analysis.	This is already a requirement of AS4964, which is redundant and should be removed.
Table 3: 22 c A minimum of 1 kilogram of recovered soil must be analysed.	Issues include: • Where has the sample size requirement of 1 kg come from and what does it mean? What is the benefit of the increased sample size? • AS4964 allows for the subsampling of the <2mm fraction (if the 2mm is >30-60 grams); Therefore, only 30-60 grams is analysed using the microscope. • Does the whole I kg require to be spilt into 60 gram samples and all sampled? Or is the 1 kg mixed then one sample taken? EPA needs to clarify and explain how this *ad hoc* requirement to AS4964 will work and to what statistical end.
Table 3: 22 Analysis must comply with the Australian Standard AS4964-2004, Method for the qualitative identification of asbestos in bulk samples, Standards Australia, with the exception of sieve size, that NATA has accredited that laboratory under ISO/IEC17025 – Testing and calibration to use to test for that chemical or attribute in recovered fines.	It appears the EPA requires sieving in the lab with a 7 mm sieve? If the EPA instructs labs to swap a 10 mm sieve for a 7 mm sieve as part of the lab analysis as it renders AS4964 statistically meaningless. Also requiring NATA accreditation method, then varying it technically voids this accredited method. Such a change would require considerable scientific justification or use of such an altered method could have difficulty in court.
Table 3: 22 Analysis must gravimetrically determine the mass of bonded ACM retained on a 7mm sieve and assumes 15% of ACM as asbestos.	Assumes ACM is 15% asbestos containing. This makes an assumption which can return erroneously readings. If EPA wishes to rewrite AS4964, it should be undertaken by first seeking expert advice then scientifically and statistically justifying the changes and then subjecting these to public consultation. Specific test methods are prepared by environmental agencies, (see US EPA method validation page) are generally subject to draft development full scientific peer review, development of discussion papers detailing changes or new methods and public consultation.
Table 3: 22 Analysis must gravimetrically determine the mass of asbestos fines ('AF') and fibrous asbestos ('FA') retained on and passing a 2mm sieve post 7mm sieving. Assumes AF and FA are 100% **asbestos** containing. **Asbestos** retained must be calculated as a percentage of the total sample weight	Assumes AF and FA are 100% asbestos containing. This makes an assumption which can return erroneously high readings. Further refinement of this *ad hoc* additional requirement is required or remove this scientifically erroneous clause.

Table 1: Comments on Asbestos Key Test Method cont.	
Asbestos Key Test Method line	**Comment**
Table 3: 22 Column 3, d. Where an accredited laboratory has observed or measured asbestos below the limit of reporting, the laboratory must still report that asbestos was observed.	Reporting errors can give false positives at below the limit of detection of 0.1g/kg. Limits of detection are there for a reason, below which the errors can result in false results. While there is a presence based approach used, the effect of citing false positives may prove problematic in court.

If EPA wishes to rewrite asbestos analysis in soils analysis method, then it should prepare its own laboratory analytical method, like the US EPA does. However, this will require laboratory testing and statistical experts to properly develop. Not doing so would potentially render the asbestos sampling and analysis method invalid in court, and easily challengeable, or at least lead to questions about its accuracy and validity.

In general comment the EPA appears to have continued with this draft, without proper reference and advice from laboratories and measurement professionals. Laboratories would also not be able to be NATA accredited against these *ad hoc* changes to AS4964, simply as these *ad hoc* changes are not covered under their NATA accreditation. As a consequence, without a clear process the EPA's requirement for NATA accredited methods cannot apply to asbestos assessment under draft RS RROE. The issues raised with the *ad hoc* changes to AS4964 and other standards needs to be addressed in a professional manner with reference to appropriate professionals, subject to peer review and public consultation.

R3 ASBG recommends the EPA:

- ***Develop its own asbestos analytical method, which replaces AS 4964, using appropriate expertise in statistics, sampling and laboratory analysis and scientific peer review and subject these changes to public consultation.***
- ***Obtain NATA certification of the new test method or variations to AS 4964***

This submission has been prepared with the input and assistance of members of ASBG's Policy Reference Group (PRG).

Should you require further details and clarification of the contents of this submission please contact me.

Yours Sincerely

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