



8 May 2001

Jane Nash
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Environment Protection Authority
PO Box A290
Sydney South NSW 1232

RE: EPA Draft Policy “Assessment and Management of Odour from Stationary Sources in NSW”

Dear Jane

The Australian Environment Business Network (AEBN) welcomes the opportunity to comment on the EPA’s *Draft Policy: Assessment and Management of Odour from Stationary Sources in NSW* (the Odour Policy).

AEBN now represents over 100 companies nationally and includes the following industry sectors: food and beverage, automotive, electricity, water, waste, chemical, mining and mineral processing, pharmaceutical, and metal fabrication.

Our NSW Policy Reference Group (PRG), was instrumental in the preparation of this submission. The EPA attended a PRG meeting earlier in the year to provide an overview of the Odour Policy. This submission is the crystallisation of the PRG’s views and comments, which was assisted by the EPA.

Odour is essentially a subjective matter largely triggered by complaints in the anthropogenic environment. Such subjectivity and difficulty in measurement of many odours make odour a difficult issue to regulate. Nevertheless, the EPA has to properly balance the rights of odour generators with their impact on their neighbours. Unfortunately, the subjectivity of odour offensiveness can make realistic complaints difficult to separate from incorrect or vexatious complaints, particularly when non-environmental issues are also in conflict. Prior to the Protection of the Environment Operations Act 1997 being in force, the benefit of doubt usually fell in favour of the complainant rather than the assumed generator.

Issues covered in this submission include:

- Removal of Trigger for Confirmed Complaints
- Use of the Policy
- Odour criteria for new sites
- Abutment, Encroachment and Mitigation issues
- Specific Issues
- Conclusion

1. REMOVAL OF TRIGGER FOR CONFIRMED COMPLAINTS

A major omission from the 2001 Draft Policy is the means to differentiate from real and vexatious complaints. In averting this, the 1999 Discussion Paper states, “*The trigger of 5 or more complaints in a 90 day period, from 5 separate persons not living in the same dwelling*”. This has been watered down to *confirmed complaints* in the Odour Policy.

Industry is concerned how the EPA intends to identify *confirmed complaints*. A number of members receive most of their complaints from one or two residents. For some these types of complainants are vexatious, for others they are extremely sensitive to certain odours. AEBN is concerned that *POEO Act section 129* (below) must be interpreted that any offensive odour emitted from a licenced site is guilty of an offence.

POEO Act s129 Emission of odours from premises licensed for scheduled activities

- (1) The occupier of any premises at which scheduled activities are carried on under the authority conferred by a licence must not cause or permit the emission of any offensive odour from the premises to which the licence applies.
- (2) It is a defence in proceedings against a person for an offence against this section if the person establishes that:
 - (a) the emission is identified in the relevant environment protection licence as a potentially offensive odour and the odour was emitted in accordance with the conditions of the licence directed at minimising the odour, or
 - (b) the only persons affected by the odour were persons engaged in the management or operation of the premises.
- (3) A person who contravenes this section is guilty of an offence.

Hence the sensitivity by the EPA to complaints on odour must match the Act’s requirements. AEBN is concerns include:

- How the EPA will process confirmed complaints
- When enough complaints will trigger an EPA officer to inspect and verify the odour
- Identification of vexatious complainants from *confirmed complaints*

In addition the broadness of section 129 also permits complainants to go directly to the Land and Environment Court under section 252 and 253. While there has been little activity in the use of s252 and s253, it remains an area of the POEO Act in which vexatious complainants can cause considerable hardship to a licensed company and remains as an ongoing liability on industry. If the use of this section is abused or the use of odour as a vexatious vehicle to achieve outcomes not related to the environment, then a review of the wording of the POEO Act may be required.

R1 AEBN recommends the EPA:

- ***Reinstall the “trigger of 5 or more complaints in a 90 day period, from 5 separate persons not living in the same dwelling”***
- ***Insert a comment that vexatious complaints or complainants will be ignored***

R2 AEBN recommends “confirmed complaints” be defined as complaints that are supported by:

- ***At least one other unrelated separate individual***
- ***Meteorological activity***
- ***Type of odour (is it characteristic of the site’s odours?)***
- ***Operating conditions at the source (was the plant running, was odour equipment operating?)***

AEBN is concerned when the complaints trigger is reached this will automatically deem that the odour is offensive. As typical action is prosecutorial, this may be inappropriate, target the wrong source or may avoid dealing with the issue due to lengthy legal proceedings. The Policy should list a step process with increasing levels of action to deal with the odour source. Use of pollution control measures should be the first level of corrective action to be undertaken. The last course of action will be prosecution. Obviously the severity of the incident and the past history of the site may lead to jumping to a tougher level of action.

R3 *AEBN recommends once the complaints triggers are exceeded, the policy list increasing levels of odour control actions and the appropriate course an inspector should follow in choosing the appropriate level of action.*

Under the POEO Act, offensive odours from residential areas are exempt. This is a curious position as it obviates any action from industry on offensive odours from its neighbouring residents. As a company is responsible for the occupational health and safety of its workforce, this precludes any company the ability to control residential emissions. It appears the only cause of action open to a company is to declare a public nuisance. In such circumstances other local residents are more likely to blame the industrial development than a neighbour. In contrast residential noise issues are not exempt, yet are a similar public annoyance issue.

2. USE OF THE ODOUR POLICY

AEBN is concerned the EPA may avoid using the Odour Policy for anything but EPA Scheduled sites. Such concern arises from the proposed application of the Stationary Noise Source Policy, where the EPA has indicated the policy only applies to scheduled sites. AEBN is of the view the EPA is the lead agency on environmental issues and needs to lead the NSW Government, particularly local government, on this issue. Consequently, the Odour Policy should provide guidance to other agencies on how to assess, assist and select the appropriate actions to deliver fair outcomes.

Care must be taken to ensure that misinterpretation of the final policy is not easily achieved. AEBN has significant experience of misinterpretation of the EPA's policy, particularly by local government. Within this context AEBN welcomes the use of flow charts to better describe the workings of the Odour Policy.

AEBN is currently working with EPA's Noise Branch to develop supplementary information to assisting the interpretation of the Industrial Noise Policy (INP). Such clarification of the interpretation of the INP was considered necessary due to the complex nature of noise control and the evidence of misunderstanding and its misinterpretation, especially by other government agencies. Odour has many similarities to noise and similar care must be used in drafting the final document. In addition a revisit after one year to see how the Odour Policy is being used and misused in its general use. Supplementary information may be an appropriate manner to improve interpretation, but it is always best to strive for the easiest to understand document in the first place.

3. ODOUR CRITERIA FOR NEW SITES

Assessing the odour impacts from a planned development can be difficult, particularly if the process is new. The EPA's Odour Policy paper suggests three tiers of assessment using ground-level concentration (glc) as the criteria for determining appropriate stack-emission concentrations. AEBN considers that the detailed assessment of the glc even at tier 3-level assessment contains large errors.

AEBN has reports from two sites that have undertaken tier 3-level assessments on their existing facilities. The results were so conservative in both cases that odour from the sites were estimated to be detectable (ie over 2 Odour Units) over 90% of the time. In reality odour from both sites is rarely

detected and few complaints received despite both sites suffering from residential encroachment and having urban developments virtually across the road.

Errors in excess of 100% are common in odour determination. The outcome is similar to simplified risk assessments on health effects, in which safety margins, favouring the conservative side accumulate to build into errors of many orders of magnitudes. Risk assessments have been only recently able to better reflect reality by use of more complex and rigorous methods; even then they err on the side of caution. AEBN considers modelling for odours is still under development and is excessively conservative to be applied to most industrial applications.

Such large error rates may lead the consent authority or the EPA to place conservative limits on the development, some times many times greater than warranted. AEBN considers that such conservatism needs to be balanced with the cost of mitigation measures. While post-mitigation measures are usually far more expensive and difficult to deal with than doing so within the planning stage, this may not be the case in every circumstance.

Another example of excessive conservatism comes from the Technical Notes, which accompany the Odour Policy. AEBN is concerned that examples 10.8 and 10.9 are, in part, based on odour detection being present for as low as 1 second intervals. Analytical measurement of odours present for 1 second is an extremely difficult sampling effort. In addition AEBN questions the need to go down to a one-second odour? As humans breathe about 12 times per minute at rest, at least half of the people would not generally detect a one-second odour. A more sensible time threshold should be 10 seconds. This is partly supported in the Odour Policy by reference to the use of the Noise Response Time (NRT). AEBN doubts that the NRT, which is undefined, is as low as 1 second.

R4 AEBN recommends the EPA only use modelling of odours only as a design tool for new developments and not have the model used for setting licence conditions or development consent.

Such examples, perhaps in a case study form, could be included on the EPA's website, thus providing valuable public information.

Section 3.3 *Odour Performance Criteria* requires that new developments ensure that no individual be exposed to ambient odour levels of greater than 7 Odour Units (OU). Table 3.1 provides a decreasing level of permissible odour exposures to increasing exposed populations. Unfortunately no reference is made to the area or density in which to measure the exposed population. AEBN is concerned of the use of setting a 2 OU limit when large variations exist between odours and their offensiveness and cost of establishing accurate measures of Odour Units for complex mixtures.

Special consideration for short-term odour generating activities needs to be included in this policy or as a separate policy. Construction activity has been accepted by the EPA as a short-term generator of noise and as a consequence a separate Construction Noise Policy has been developed. AEBN considers that the same type of allowance needs to be provided to the construction industry and other special industry types, such as waste facilities for odour.

Construction odour can occur when digging odorous sediments, such as old landfills, marine and river sediments. Significant costs have arisen in keeping within the ambient odour limits that currently exist.

A waste facilities' odorous waste loads cannot be readily checked, with most odour being emitted during the tipping operation. Controls can only be applied after the event, by notifying the generator. Nevertheless, operators at waste facilities have the problem of little control over one-off odorous loads. Exacerbating this is that complaints from persons who *are present on the affected area of the*

site, which is normally open to members of the public¹ can also be considered confirmed complaints by the EPA.

R5 *AEBN recommends that short-term odour generating activities, such as those generated by construction activities, remediation of contaminated land be permitted to emit at least twice the odour limits applied to permanent sites.*

4. ABUTMENT, ENCROACHMENT AND MITIGATION ISSUES

A major problem has emerged where residential sites have been permitted to encroach and finally abut industrial sites. It appears local government and residential developers have no legal responsibility for actions that produce unnecessary community conflict.

This issue is more easily addressed for new developments than existing abutments between residential and industrial developments. Responsibility for preventing potential conflict must be attached to the new development. This should apply if the development were either industrial or residential. AEBN provides the following example to illustrate how such an approach may operate:

A residential developer is proposing to develop a complex of villas next door to a small goods factory. Odour from the factory is measured at 7 OU at the site of the proposed development where this is currently vacant land. The 149 certificates of the villas will contain a clause that does not permit them to issue formal complaints of odours relating to odours from the small goods factory. Consequently, residents of the villas will be relying on complaints from other neighbours to trigger Government intervention. The developer chose this path over the other option of building a suitable barrier wall (to also mitigate noise).

R6 *AEBN recommends the onus of odour measurement and control be placed on the proponent of the new site abutting another area.*

While the Department of Urban Affairs and Planning is developing solutions to abutment and encroachment issues, AEBN considers this process will take a few years to develop into effective planning policy. The Odour Policy does briefly address land use planning issues, but tends to concentrate on the siting of new industrial developments and pays scant attention to new residential developments encroaching on existing industrial developments. Consequently, AEBN considers that that new developments should take responsibility for encroachment issues and this be made clear in the Odour Policy.

Thought should be given to assigning higher odour thresholds according to land use. For example, existing industrial site be given + 3 OU on the odour criteria where residential encroachment is to occur. Therefore, an odour limit of 5 OU could apply where encroachment occurs at urban densities.

This is consistent with the Industrial Noise Policy (INP) where land uses dictate the permissible ambient noise levels. Under the INP where residential development is to abut an existing industrial site, a 5 dB increase in noise levels is permitted.

AEBN considers there may be difficulty in obtaining a legally binding settlement condition in trade-offs as discussed in Step 5 “Negotiation Process” in the Odour Policy. Residents will be unlikely to accept negative variations to 149 certificates without substantial compensation.

It is essential that local government be made responsible for creating abutment conflict situations through poor re-zoning by requiring the Council to manage the land use conflicts they create.

While negotiation with residents may be considered difficult, the negotiation process should remain

¹ See The Odour Policy section 6.1 Using Confirmed Complaints as a Trigger

within the Odour Policy. Odour complaints by industry over its industrial neighbours are reasonably frequent. In industry-vs-industry odour issues, the use of negotiation is likely to be a favoured compromise.

R7 *AEBN recommends that an urban/industrial interface special zone be permitted to receive +30U above the odour criteria where development affects existing industrial sites.*

5. SPECIFIC ISSUES

Notification of Odour Complaint

Our members reported that notification of odour complaints to the company by the EPA or council to take weeks if not months after the incident. Industry needs to know quickly about odour issues so they can act on any odour problems as they occur. Intermittent odour releases are notorious to track down and identification of when the incident occurs would be valuable in creating a more harmonious environment between industry and residential areas. Withholding of complaints information for legal reasons appears to be inconsistent with the objectives of the POEO Act, especially:

3 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; and
- (c) to ensure that the community has access to relevant and meaningful information about pollution.

Industry and business are considered to be part of the community.

Industry-to-Industry Complaints

The means by which the EPA counts complaints from industrial sites is an issue. An industrial site may have hundreds of sufferers due to a neighbouring odour source, but may only count as one complaint to the EPA. Guidance on this issue would be appreciated; should every employee affected by the odour lodge a complaint or is one from a representative all that is required. This issue is also related as to what the EPA considers as a confirmed complaint.

Negotiated Outcomes vs General Public Complaints

Negotiated outcomes may be obviated by complaints from the general public entering that area. On this basis, complaints by the general public where negotiated outcomes are present should be taken in context with other complaints from those who are covered by the negotiated solution. Where complaints come only from the general public passing through the area they should be only taken into consideration by the EPA if supported by residents and industries in the area that accept the negotiated outcome.

Use of Negotiated Outcomes

AEBN is concerned that the use of negotiated outcomes may not be achievable with some communities. Where such negotiations cannot proceed this outcome needs to be better addressed in the document than by merely stating strong measures such as prosecutions or licence revocation as stated in the flow chart on page 36. Other problems also occur on page 36 including:

- The flow chart on Page 36 of the Draft Odour Policy seems to miss out the step of undertaking mediation and negotiation with odour-affected neighbours. While industry-to-residential negotiated outcomes may be rare, industry-to-industry negotiated outcomes are considered to be far more likely to proceed.

- The comments under the flowchart on Page 36 provide an example of long and short exposure times, as more or less than one hour. AEBN is concerned that such ‘examples’ will be taken as the law and interpreted literally by other government agencies.

6. CONCLUSION

Improving the clarification of what is a *confirmed complaint*, and how and when the EPA acts on confirmed complaints will provide increased certainty for industry. Notification of odour complaint/s by the EPA to alleged emission sites should permit quick action to rectify the cause.

A staged approach to dealing with complaints with a flow-chart approach in choosing the appropriate level of regulatory action will provide government agencies and industry alike with a clearer path to what will be required and prevent large variations in inspectional actions across NSW. Central to this action is the need for a clearly defined trigger of confirmed complaints.

Clarifying the coverage of the Odour Policy to ensure it is the common guiding document across NSW for all government agencies will enable consistent odour control. Importantly the EPA must ensure that the Odour Policy is not open to misinterpretation. Changes to the clarity of setting odour limits and conditions particularly when encroachment issues arise will ensure fairer application of the policy.

Modelling of odour emissions will be used as a guide for the design of odour mitigation strategies. In using modelling the EPA will acknowledge the conservative nature of the process and apply its use in a flexible manner, and not use it to set licence conditions.

For further clarification of the above points and recommendations please contact me on 9925 7515.

Yours sincerely

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