

15 October 2010

EPA Victoria Compliance & Enforcement Review Team
GPO Box 4395
MELBOURNE VIC 3001

ATTN: Mr Stan Krpan

Dear Stan

The Australian Environment Business Network (AEBN) welcomes the opportunity to comment on **EPA's Compliance and Enforcement Review**.

The Australian Environment Business Network (AEBN) is Australia's peak industry representative body on environmental issues. The AEBN Members consist of manufacturing and service industries, and local government. The AEBN has well over 300 member organisations, mainly within Victoria.

On 17 September 2010, the AEBN, in conjunction with Norton Rose law firm, conducted an *AEBN Environment Obligations Briefing* which included a session on EPA's Compliance and Enforcement Review.

This session was facilitated by Stan Krpan of EPA and chaired by Tina Khoury, Chief Executive Officer, Australian Environment Business Network (AEBN). Notes taken by EPA at the Briefing are attached to this submission and should be read as part of this submission (see Attachment 1).

As well as this session, AEBN has spoken with numerous members and received direct feedback on a number of the questions detailed in EPA's Compliance and Enforcement Discussion Paper.

Accordingly, AEBN wishes to provide the following additional points to those raised at our Briefing.

General Comments

The AEBN supports the EPA philosophy that there needs to be improvement in the application of the EPA enforcement activity. At present there is significant uncertainty and inconsistency in how the EPA undertakes its enforcement duty.

The Environment Protection Act lists the Principles by which the EPA will be guided in its decision making processes. One of these principles relates to enforcement:

1K Principle of enforcement

Enforcement of environmental requirements should be undertaken for the purpose of—

- (a) better protecting the environment and its economic and social uses;*
- (b) ensuring that no commercial advantage is obtained by any person who fails to comply with environmental requirements;*
- (c) influencing the attitude and behaviour of persons whose actions may have adverse environmental impacts or who develop, invest in, purchase or use goods and services which may have adverse environmental impacts.*

Without a consistent approach to enforcement, the objectives of this Principle cannot be met.

The EPA states its current approach to enforcement is depicted in the following diagram.



This diagram unfortunately is not seen by many as an accurate reflection of where EPA enforcement activities are undertaken.

Member feedback suggests that EPA compliance effort is most often encountered by those companies who are trying to comply, rather than as the diagram suggests, the greatest compliance effort being used on those who choose not to comply.

Even within this, there appears to be little consistency when enforcement action will be taken.

There appears to be little evidence of EPA focussing its compliance effort to those companies or individuals who do not want to comply. Obviously these companies and individuals will be more difficult to identify to deal with.

Recommendation 1: The EPA should establish a proactive program to seek out those companies and individuals who are actively seeking to not comply with their legal obligations.

Recommendation 2: A reporting metric should be developed to determine the success of the program developed in Recommendation 1. Details of this should be reported publicly on an annual basis.

Future Enforcement

The EPA provided the following chart as an explanation of a risk based approach to enforcement. This chart is shown below:



This chart details the enforcement level or tool which will be applied in designated circumstances.

AEBN supports the general thrust of the chart as displayed and believes that this chart is consistent with the economic principle detailed in the Environment Protection Act 1970:

1B Principle of integration of economic, social and environmental considerations

- (1) *Sound environmental practices and procedures should be adopted as a basis for ecologically sustainable development for the benefit of all human beings and the environment.*
- (2) *This requires the effective integration of economic, social and environmental considerations in decision making processes with the need to improve community well-being and the benefit of future generations.*
- (3) *The measures adopted should be cost-effective and in proportion to the significance of the environmental problems being addressed.*

The AEBN believes the key consideration relating to enforcement is in section (3) of this Principle - *The measures adopted should be cost effective and in proportion to the significance of the environmental problem being addressed.*

AEBN believes the diagram of “EPA’s Approach to Enforcement” is a fair and reasoned interpretation of this Principle.

This approach, if applied consistently, would provide certainty to all the community on how the provisions of the Environment Protection Act will be administered.

To ensure that the Policy is being consistently applied, the EPA should provide an appeal process.

This process should allow for parties who do not believe the policy has been fairly applied, to seek some arbitration in a timely manner.

Recommendation 3: EPA should adopt the Diagram “EPAs Approach to Enforcement” as an organisational policy and apply this approach to all decision making processes relating to regulatory enforcement.

Recommendation 4: EPA should publish the findings of an independent auditor on how this policy has been applied to all enforcement related decisions.

Recommendation 5: EPA establishes an appeals mechanism so EPA enforcement decisions can be assessed by an independent arbiter to ensure compliance with Policy.

Role of the Regulator

The EPA, over recent years, has made significant achievement in relation to how it has partnered with industry and other organisations. While some may see this as becoming too close to industry, AEBN believes that this approach is a sign of maturity as a Regulator.

It is the responsibility of the Regulator, in this case, the EPA, to ensure that the requirements on industry are concise and understandable.

While ignorance may not be seen as a defence, confusion on how requirements will be administered and interpreted may be.

Accordingly, the EPA should ensure that there are sufficient educational and assistance tools available for those trying to interpret their obligations.

Recommendation 6: EPA establish easy to follow guides to assist organisations to understand their legal obligations.

Recommendation 7: EPA provide assistance to external organisations such as AEBN the tools and necessary support for them to provide industry assistance and representation.

Recommendation 8: EPA establish a Communications Charter which details the obligation for EPA to clearly and concisely communicate to the community their obligations and responsibility and to explain the reason for this obligation and how it satisfies the Principles detailed in the Environment Protection Act.

Conclusion

The AEBN welcomes this review and applauds EPA's intention to become consistent in its approach to enforcement.

AEBN believes the balance EPA strikes between enforcement and support is critical for the ongoing success of EPA and the ongoing improvement of the environmental quality within Victoria.

More important to where this balance may be is the obligation on EPA to implement its regulatory function consistently.

A failure of the balance between enforcement and support mechanisms while significant is not as significant as an inconsistent approach to regulation which will undermine the integrity of EPA and will damage its standing within the community.

Should you require further detail or explanation regarding this submission, I can be contacted at the Australian Environment Business Network (AEBN) National Head Office on (03) 9397 2511 or at tina@aebn.com.au

Yours sincerely

Tina Khoury
Chief Executive Officer
Australian Environment Business Network (AEBN)

AUSTRALIAN ENVIRONMENT BUSINESS NETWORK (AEBN)**Presentation by Stan Krpan****on****EPA Victoria's Compliance and Enforcement Review****CONFERENCE NOTES**

Date: Friday, 17 September 2010
Time: 3.00pm – 4.00pm
Venue: Norton Rose law offices, Level 15, 485 Bourke Street, Melbourne
Notes taken by: EPA Victoria

**Chair: Tina Khoury, Chief Executive Officer
Australian Environment Business Network (AEBN)**

1. Welcome

Philippa Challis of the Australian Environment Business Network (AEBN) welcomed Stan Krpan, Consultant heading EPA Victoria's Compliance and Enforcement Review.

2. Introduction of the Review

Stan Krpan provided a contextual background to the Compliance and Enforcement Review.

3. Discussion**How effective has the EPA been in enforcing the law at the moment?**

Comments received:

- There is a lack of consistency in enforcement – one industry may get away with something while another may not, depending partly on what region of Victoria they are in, and different approaches of inspectors.
- There is not enough standardisation – need a new methodology to help with this.
- The lack of consistency in EPA's approach is not just in relation to enforcement but in general dealings with the EPA. There is often a different officer on the phone every time they ring the relevant EPA unit, which means that they need to brief the new officer each time. EPA needs to maintain and promote their staff talent so that there's not a new officer handling the case each time.

- The overlaps and gaps between the councils and the EPA are not yet widely recognised by the general community. Some local government officers feel EPA has not been effective in regulating the landfill industry. They are now dealing with 10-15 years of neglect on the issue. It is a joint responsibility between EPA and local government.
- One attendee commented they had noticed that EPA has stepped up its enforcement in last 6 months, and believed there is a risk of undermining the relationship with industry through over-reaction with good companies rather than targeting the bad or worst performing companies.
- From an industry perspective, they lack the trust that the regulator won't suddenly come down harder when an industry takes a more proactive approach.
- There has been real variance in the level of EPA officers' understanding of technical issues recently, since Cheryl Batagol was appointed as Chair. Some technical matters have strict legal impacts attached to them, and this is where the real issue is at, not at the relationship level. There is a mismatch between offering support/guidance, and getting to the pointy end or trickier resolutions. He is not sure that EPA has the powers to do this. Some of the better operators are now feeling they have to retreat because of their own transparency, and feel they are getting targeted because of this. Many industries that don't provide the same information to EPA get ignored.
- Another issue is that some Client Relationship Managers (CRMs) don't have expertise in their area. The EPA complaint response time seems very slow – sometimes it has been as long as 4 to 5 months. There are other instances when they have reported a problem to EPA and no-one has got back to them.
- The EPA telephone voicemail message hasn't changed in many years. EREP issues should be put through straight to that area. Also sometimes regional office telephones are diverted to central switch in Melbourne.
- EPA seems to have reduced the size of its resources over the years. It seems that EPA staff have reduced their commitment because they don't have the resources to deal with all the issues, and have little experience.

Is the risk-approach model helpful?

- As a model it's great, but the application of the model is not how it is currently being followed. Sometimes businesses that are trying to do the right thing are being targeted – there has been an over-reaction since the start of 2010.

What is everyone's experience of a risk-based model?

- A risk-based approach is appropriate. It is critical that EPA demonstrates courage and publish/make public its risk criteria – it needs to be open and transparent.
- Stan Krpan commented that the UK model is a good example - they publish their criteria on risk so everyone knows where they stand.
- One issue is the amount of time taken on the 'show cause' letters on technical conditions for minor technical breaches. This is disproportionate to the actual breach and costs business a lot of time and money. The new licensing system will hopefully improve this. Licences and notices need to have

conditions that are less prescriptive. There is a disproportionate focus on administrative breaches, and this has got in the way of targeting more strategic breaches.

- There is concern that EPA can be too close to business and does not enjoy a good relationship with communities. In addition, concern that those companies who enjoy a good relationship with EPA are dealt with more favourably on non-compliance issues but there is also a concern that the EPA has been harsh on these companies because it knows them well. However when EPA staff don't have a close relationship with a company, they don't understand their business. They don't want that sort of relationship either.
- Stan Krpan commented that EPA is not necessarily delivering on the business side of things either, and that the approach needs to be balanced and predictable.
- Amenity issues take up over 50% of resources which was felt to be a disproportionate amount of activity. However some long-standing amenity issues become more complex issues.

EPA's Principles of Enforcement – are they relevant?

- They are all good! They need to be applied.
- It was commented that this has to be very clear or EPA risks being seen as inconsistent again.
- Stan Krpan explained that EPA can't investigate all offences. It has to explain which they will target.
- He added that the internal review process will allow businesses to challenge the decisions made by EPA.

What is the role of Community in enforcement?

- "Speaking as a member of the community", one attendee commented that getting access to the EPA is a real issue – it seems like "Fortress EPA" at the moment – it is insular and not transparent.
- Another attendee stressed that in terms of the larger companies, when there is a community advisory panel or network, it needs to be made clear how they are formed. There needs to be a consistent model - that can be a very powerful tool to help determine/prioritise local issues.
- One attendee commented they were very happy with their relationship with their Client Relationship Manager (CRM). Previously they had a really bad experience with one and this had led to the shutting down of communication between the EPA and their business.
- CRMs need to have/be given a more technical background, or if not to ensure they refer to technical staff in a timely way.
- The split between enforcement and CRMs is problematic, especially when industries are significantly investing in compliance and the relationship person.
- It was questioned what would be done about businesses that don't have licences?

- Stan Krpan responded that while it was mostly a function of resources, it was also about approach. Cumulative risk comes from multiple sources. The question is how can EPA use its resources to target areas of harm, whether or not there is a licence.
- Stan summed up that the public comment period finishes on 25 October. Some issues will form part of a reform agenda that will take 2-3 years.

Notes taken by EPA Victoria

Session concluded at 4.00pm, 17 September 2010