

Environmental Protection Legislation Amendment Regulation (No. 1) 2016

Explanatory notes for Subordinate Legislation (No. 116) 2016

made under the

Environmental Protection Act 1994

General Outline

Short title

This regulation may be cited as the *Environmental Protection Legislation Amendment Regulation (No. 1) 2016* (the Amendment Regulation).

Authorising law

Section 580 of the *Environmental Protection Act 1994*.

Policy objectives and the reasons for them

The objectives of the Amendment Regulation are to amend the *Environmental Protection Regulation 2008* and the *Environmental Protection (Air) Policy 2008* to:

- ensure the level of regulation for the (ERA) for chemically treating timber is proportionate to environmental risks;
- update references to prescribed standards for the sale of solid fuel burning equipment;
- ensure that the power to issue the new environmental protection order introduced in the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* is not devolved to local government; and
- correct some miscellaneous errors.

Achievement of policy objectives

The policy objectives are to be achieved by:

- amending the definition for Schedule 2, Item 46—chemical treatment of timber—to ensure that the aggregate environmental score (AES), and annual fee charged, is proportionate to the environmental risk of modern operators and consistent with the regulatory approach taken for other prescribed ERAs;
- amending section 78 to replace the reference to an out of date Australian Standard with reference to the two most recent emission and efficiency Australian Standards;

- amending section 103 to ensure that local governments do not have the delegation to issue the new environmental protection order introduced in the *Environmental Protection (Chain of Responsibility) Amendment Act 2016*;
- amending the heading of section 106 to ensure its correct interpretation;
- reinstating the definition of 'year' for activities in schedules 2 and 2A to ensure that the interpretation of the definition of activities limited by an amount of throughput, production or quantity of use in a year (in either its definition or threshold) are consistent with the policy intent;
- correcting a typographical error in schedule 1 of the *Environmental Protection (Air) Policy 2008*; and
- correcting other minor drafting errors identified by the Office of the Queensland Parliamentary Counsel.

Consistency with policy objectives of authorising law

The Amendment Regulation is consistent with the object of the *Environmental Protection Act 1994*, which is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (ecologically sustainable development).

Inconsistency with policy objectives of other legislation

The Amendment Regulation only impacts upon subordinate legislation to the *Environmental Protection Act 1994* and does not impact upon policy objectives of any other legislation.

Benefits and costs of implementation

The amendments are not expected to add to the administrative cost of the Queensland Government.

The amendment to the definition for Schedule 2, Item 46—chemical treatment of timber—will enable government resources to be focussed on activities which pose a higher risk to the environment which will benefit the community as a whole.

These amendments ensure a consistent and proportionate regulatory approach by reducing fees for businesses using low risk chemicals treating more than 1,500 cubic metres of timber and reducing regulation for small businesses that are using low risk chemicals below the 1,500 cubic metre threshold. Other businesses using small amounts of chemicals, such as motor vehicle workshops, are not regulated as an ERA.

The benefits to government are:

- reduced compliance costs associated with de-regulated licences or operators for lower risk activities;
- maintaining a consistent and proportionate regulatory approach to that with other prescribed ERAs; and

- encouraging good environmental practices by providing an incentive to the use of less hazardous chemicals.

Indirect administrative costs to government will be kept to a minimum through transitional arrangements to see the changes implemented on the anniversary date of each licence.

Industry: There are no associated costs to industry.

There are 36 environmental authorities for timber treatment activity. Based on data collected from operators for this activity it is estimated that:

- three will be de-regulated;
- 14 will receive a fee reduction;
- 17 will retain the status quo; and
- two should apply to surrender their environmental authority as they are no longer operating.

All other amendments are administrative or machinery in nature. They will not impact stakeholders, other than to provide greater clarity and consistency in interpretation and ensure that that the regulation references contemporary standards.

Consistency with fundamental legislative principles

Section 24(1)(i) of the *Legislative Standards Act 1992* was considered during the drafting of this regulation and the amendments are consistent with fundamental legislative principles.

Consultation

Consultation has been undertaken with the Office of Best Practice Regulation.

To develop the amendment proposal for chemical treatment of timber, the Department of Environment and Heritage Protection (EHP) attempted contact with all 36 holders of an environmental authority for timber treatment activities and was able to make contact with approximately 85% of holders and collected information on the chemicals used and volume of timber treated per year. It is expected that industry will be supportive of the amendments.

Notes on Provisions

Clause 1 Short title

This clause states that the short title of this regulation is the *Environmental Protection Legislation Amendment Regulation (No. 1) 2016*.

Clause 2 Regulation amended

This clause states that this regulation amends the *Environmental Protection Regulation 2008*.

Clause 3 Insertion of new S 16A

This clause inserts a definition of ‘year’ for the carrying out of ERAs regulated under Schedules 2 and 2A.

Some ERA listed in Schedules 2 and 2A are limited by an amount of throughput, production or quantity of use in a year (in either its definition, or threshold). For these activities, the use of the term ‘year’ is intended to be defined as the 12 month period commencing on the day environmental authority takes effect, in the first year of operation, and from the anniversary day each year thereafter.

The *Environmental Protection and Other Legislation Amendment Regulation (No. 1) 2013* inadvertently removed section 16 of the EP Regulation which included a definition of ‘year’ for prescribed ERAs in line with the above policy intent.

Without the definition for ‘year’ the definition in the *Acts Interpretation Act 1954* is used which is a calendar year (i.e. the 12 months from 1 January). The consequences of applying this default meaning is that where an activity is regulated on the basis of throughput, production or quantity of use in a year, an operator could increase the amount of throughput, production or quantity of material in the first year of the environmentally authority taking effect.

To ensure that the intended definition of year is consistently applied to all ERAs that are regulated on the basis of particular parameters around throughput, production or quantity of use in a year, it is necessary to be explicit about the definition of year.

The expansion to cover Schedule 2A resource activities will simply formalise the policy intent across all environmental relevant activities.

Clause 4 Replacement of s 78 (Prescribed standard for particular offences relating to air contamination)

This clause replaces the existing prescribed standard for air contamination with contemporary emission and efficiency standards in order to ascertain whether an offence has been committed under section 440ZL of the *Environmental Protection Act 1994*.

In 2014, Standards Australia updated the existing 1999 edition of the flue gas emission standard (*AS/NZS 4013:1999—Domestic solid fuel burning appliances—Method for determination of flue gas emission*). It also developed a set of efficiency standards entitled *AS/NZS4012:2014 Domestic Solid Fuel Burning Appliances – Method for determination of power output and efficiency*. Both the updated emission standard and the new efficiency standard were developed in conjunction with industry and are suitable for use as prescribed standards in this section.

Nominating the edition of the emission and efficiency standards has deliberately been withheld so that the latest edition, in place at the time of the alleged offence, is to be used to ascertain whether an offence has been committed under section 440ZL of the *Environmental Protection Act 1994*. The intent is that the edition of prescribed standards in place at the time of the alleged offence is to be used to determine if an offence has occurred.

Clause 5 Amendment of s 88 (Minister may name occupier in report to council)

This clause corrects a drafting error by inserting a reference to section 480A (Incomplete documents) instead of 480 (False or misleading documents) of the *Environmental Protection Act 1994*.

Clause 6 Amendment of s 97 (Information not to be used as evidence)

This clause corrects a drafting error by inserting a reference to section 480A (Incomplete documents) instead of 480 (False or misleading documents) of the *Environmental Protection Act 1994*.

Clause 7 Amendment of s 103 (issuing particular notices and orders)

This clause ensures that the power to issue the new type of Environmental Protection Order introduced as part of the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* is not devolved to local government.

The intent of section 103 is to clarify the type of enforcement tools that cannot be devolved to local government. As the power to issue the Environmental Protection Order to a related person is disproportionate to the environmental risk associated with activities administered by local government, it is necessary to ensure that this clause makes it clear that the power to issue an environmental protection order under Chapter 7, Part 5, Division 2 of the *Environmental Protection Act 1994* is part of the suite of enforcement tools that are not devolved to local government.

As a consequence of this amendment, the section heading has also been broadened to ensure that it does not constrain interpretation of the section content.

Clause 8 Amendment of s 106 Other particular acts, omissions or activities

This clause amends the heading of section 106 to correct a drafting error and to clarify the intent of this provision. Pursuant to sections 98-100 of the *Environmental Protection Regulation 2008* the offences of environmental nuisance, noise nuisance and water contamination are devolved to local government.

Section 106 sets out specific matters which are not devolved to local government despite sections 98-100. Subsection (2)(a) deals with particular acts, omissions or activities by State or local government entities. Subsection (2)(b) deals with ERAs not devolved to local government.

The policy intent of subsection (2)(b) is that the devolution of offences set out in sections 98-100 of are not devolved to local government where those offences relate to an ERA that is not devolved to local government.

However, the heading of section 106 creates ambiguity as to the intention of subsection (2)(b) in that it indicates that the content of the section is far narrower in scope than it actually is (i.e. the heading indicates that the section deals with act, omission or activities as a result of actions by State or local government). As an ERA is not necessarily carried out by a State or local government, there is a possibility that subsection (2)(b) could be interpreted to mean that section 98-100 offences would remain devolved to local government.

Subsection (2)(b) was added to the *Environmental Protection Regulation 2008* in 2009, but the heading was not amended to reflect this addition.

Therefore, to ensure that the heading of section 106 does not constrain the interpretation of the content, the heading of section 106 needs to be broadened to be reflective of the content in both subsections 2(a) and 2(b).

Clause 9 Insertion of new Ch 9, Pt11

This clause is consequential to relevant amendments (clauses 3 and 10) made in this Amendment Regulation.

Section 179 ensures that the reinstatement of the definition for 'year' in Section 16A for the carrying out of Schedule 2 and 2A activities is applied to all environmental authorities issued prior to the amendment as well as all environmental authorities that will be issued after the amendment.

Section 180 sets out how the effect of the amended definition and threshold for timber treatment activities in Schedule 2, Part 10, Item 46, is to be applied to environmental authorities already in place at the time of the amendment. It ensures that the holder of an environmental authority for a timber treatment activity that was issued before this Amendment Regulation commenced is taken to be the holder of an environmental authority for an activity that aligns with the amended definition and threshold. The transition to being a holder of an environmental authority for an activity that aligns with the amended definition and threshold will take effect at the next anniversary day for the environmental authority. No pro-rata of annual fees will be required.

If the activity being carried out no longer meets the amended definition and threshold for Schedule 2, Part 10, Item 46, then the environmental authority will lapse on its next anniversary day. There will be no requirement for the holder of the environmental authority to lodge a surrender application.

Section 181 sets out how the effect of the amended definition and threshold for timber treatment activities in Schedule 2, part 10, Item 46 is to be applied to applications for an environmental authority that have been lodged but not decided at the time of the change.

The application for an environmental authority will automatically be taken to be an application for an activity that meets the amended definition and threshold for timber treatment activities. There will be no requirement for the applicant to amend the application. The application fee paid for the original application will not be refunded and will be taken to be the application fee for the timber treatment activity under the amended definition and threshold.

EHP will be contacting all environmental authority holders that carry out timber treatment to ensure the transitional arrangements are implemented.

Clause 10 Amendment of Sch 2 (Chemically treating timber)

This clause amends Schedule 2 of the *Environmental Protection Regulation 2008* which describes prescribed ERAs for the purposes of regulating those activities under

an environmental authority. Specifically, Item 46 (chemically treating timber) is amended as a result of a review undertaken by EHP in relation to the environmental risk posed by some lower risk timber treatment activities.

The review identified that the singular definition and threshold for timber treatment activities with a corresponding aggregate environmental score of 42 was based on the 2008 timber treatment industry practice of using chemicals that have carcinogenic or potential carcinogenic components. Only one threshold which captured all timber treatment activities was applied due to the nature and toxicity of chemicals historically used by the industry, even in small volumes.

Based on contemporary information from current timber treatment operators in Queensland, some of the industry is using chemicals that do not have carcinogenic properties. In response to these business practices, and in line with the policy intent that an aggregate environmental score is assigned according to the environmental risk posed by the activity, the review has determined that activities that do not use carcinogenic or potentially carcinogenic chemicals present a reduced risk of harm, to both the environment and human health. For operators not using carcinogenic or potentially carcinogenic materials and also only treating small volumes of timber per year, the risk posed to the environment is smaller again.

This clause also amends the definition of timber treatment activities and ensures that the aggregate environmental scores for the two thresholds are proportional to the environmental risk. The amendments result in:

- the existing aggregate environmental score (and hence fees) is retained for activities using high risk (carcinogenic or potentially carcinogenic) chemicals;
- a reduced aggregate environmental score (and hence fees) for activities using lower risk chemicals to treat more than 1,500 cubic metres of timber per year; and
- deregulation of activities treating less than 1,500 cubic metres of timber per year using the lower risk chemicals.

The chemical composition of timber treatment preservatives used to determine 'high risk' chemicals (i.e. have carcinogenic or potentially carcinogenic properties) is based on a list in the Australian Standard (AS1604.1: 2012 'Specification for preservative treatment; Part 1: sawn and round timber').

The threshold of 1,500 cubic metres of timber using lower risk chemicals has been based on the lower environmental risk posed by operations treating this amount of timber and the ability of EHP to use other tools in the legislation to address any environmental harm (e.g. compliance with the general environmental duty and prescribed water contamination provisions). Cubic metre is an appropriate measure of volume as it is commonly used by the timber industry and will be easier to measure and quantify from a regulatory perspective.

This amendment is consistent with the existing ERA framework, and the deregulation of low risk ERAs in 2013. It is appropriate to deregulate particular activities where only small volumes of timber are treated per year with non-carcinogenic chemicals.

Clause 11 Amendment of Sch 12 (Dictionary)

The clause is a consequential amendment that cross references the reinstatement of a definition of year in section 16A.

Clause 12 Policy amended

This clause states that this regulation amends the *Environmental Protection (Air) Policy 2008*.

Clause 13 Amendment of Sch 1 (Air quality objectives)

This clause amends a typographical error where the entry for 'hyrdocrabons' is corrected to 'hydrocarbons'.