

Regulatory Impact Statement

Proposed Environmentally Hazardous Chemicals Regulation 2008

Department of **Environment & Climate Change** NSW



Submissions

DECC welcomes written comments on the draft Environmentally Hazardous Chemicals Regulation and Regulatory Impact Statement. Send your written submission to:

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This Regulatory Impact Statement is available on the DECC website at www.environment.nsw.gov.au/consult or from Environment Line, telephone 131 555.

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Summary

The Environmentally Hazardous Chemicals Regulation 1999 (the EHC Regulation) contains administrative provisions relating to the operation of the *Environmentally Hazardous Chemicals Act 1985*. It therefore provides an administrative underpinning to the management of certain hazardous chemicals and chemical wastes in NSW.

The Department of Environment and Climate Change NSW (DECC) proposes to remake the EHC Regulation which would otherwise expire on 1 September 2008. The remake will be undertaken in accordance with best practice principles and will seek to improve the quality of the EHC Regulation, thereby upholding a priority of the NSW State Plan. DECC will ensure the continued efficiency and effectiveness of the EHC Regulation.

To this end DECC proposes to retain the current EHC Regulation with the only changes being to adjust fees to align them with the cost of administering the EHC Regulation. Maximum fees for technology assessments would be progressively adjusted upwards over the next five years to address changes in the scale and complexity of assessments since the fee was introduced.

1 Introduction

The Environmentally Hazardous Chemicals Regulation 1999 (EHC Regulation) is due to lapse on 1 September 2008. As required by the *Subordinate Legislation Act 1989*, a review of the existing EHC Regulation has been carried out to ensure that the most appropriate legislative approach is applied to the management of chemical contamination.

This report is a Regulatory Impact Statement (RIS) for the remaking of the EHC Regulation.

1.1 Purpose and content of the Regulatory Impact Statement

The *Subordinate Legislation Act 1989* provides for the staged repeal of statutory rules, including Regulations, every five years. Under the program of staged repeal, Regulations which are due for repeal may:

- be remade with major or minor amendments
- be allowed to lapse
- have their repeal postponed by one year if exceptional circumstances exist.

The repeal of a statutory rule may be postponed up to five times.

Permission was granted on previous occasions to postpone the repeal of the existing EHC Regulation until 1 September 2008. The postponements were sought to provide time in which to await the outcome of developments at the national level. In particular, the Environment Protection and Heritage Council has been developing, and has recently endorsed, a framework for the environmental management of chemicals in Australia – National Chemicals Environmental Management (NChEM). Regulatory proposals under NChEM are being considered by the Productivity Commission and the Council of Australian Governments (COAG). It is expected that the outcomes of this process may require future changes to the *Environmentally Hazardous Chemicals Act 1985* (the EHC Act) and the EHC Regulation in NSW.

COAG has also established a ministerial taskforce ‘to develop measures to achieve a streamlined and harmonised system of national chemicals and plastics regulation’.¹ This taskforce will be informed by a Productivity Commission study into chemicals and plastics regulation, with the final report due on 27 July 2008.

Given that COAG timeframes will extend beyond September 2008, the Department of Environment and Climate Change NSW (DECC) proposes to remake the EHC Regulation now to ensure its continued operation and to provide the necessary regulatory certainty for those industries operating in accordance with current regulatory requirements.

Before the EHC Regulation can be remade, DECC is required to prepare a RIS to assess the economic, social and environmental costs and benefits of the proposed EHC Regulation and its alternatives. The purpose of the RIS is to ensure that the new EHC Regulation provides the best approach for achieving the desired objective.

¹ COAG (2006)

The RIS must provide justification for the proposed EHC Regulation by showing that it provides the greatest net benefit or least cost to the community compared with its alternatives.

1.2 Consultation

This RIS represents the formal consultation phase on the proposed EHC Regulation. The RIS and the draft EHC Regulation are being made available for public comment for a period of 28 days. The following parties have been formally invited to comment on the proposed regulation:

- the Hazardous Chemicals Advisory Committee
- current licence holders.

Written submissions from the public will be considered before finalising the EHC Regulation. A notice calling for submissions from the public was published in the NSW Government Gazette and in major metropolitan newspapers.

2 Roles and responsibilities for chemicals regulation and management

2.1 Roles and responsibilities

Commonwealth, states, territories and local government authorities all have responsibilities in relation to chemicals regulation and management.

At the Commonwealth level, chemicals are assessed and registered or listed under separate regulatory schemes according to their end use – industrial, agricultural and veterinary, therapeutic (pharmaceuticals and medicines) or food related. The following assessment agencies have been established to administer the separate national regulatory schemes:

- National Industrial Chemicals Notification and Assessment Scheme (NICNAS) – industrial chemicals
- Australian Pesticides and Veterinary Medicines Authority (APVMA) – agricultural and veterinary ('agvet') chemicals
- Therapeutic Goods Administration (TGA) – therapeutic goods
- Food Standards Australia and New Zealand (FSANZ) – food additives.

These agencies are responsible for the assessment of chemicals prior to their manufacture, importation or use in Australia.

There are also national frameworks for managing chemical risks in transport and workplaces, setting residue standards in food produce, limiting access to certain poisons, and managing aspects of environmental quality and monitoring.

The states and territories enforce conditions of use set by assessment agencies. Such conditions generally cover the transport, storage, use, reuse and ultimate disposal of a chemical.

Local government has a role in implementing some state and territory Regulations relating to chemicals – in particular, those concerned with small to medium firms and aspects of waste disposal.

2.2 NSW chemicals management legislation

In NSW the following legislative instruments are used to control activities associated with the use and disposal of chemicals:

- EHC Act – used to regulate chemicals of particular concern throughout their entire life cycle, thereby minimising potential environmental impacts from hazardous chemicals and chemical waste in NSW (more detail follows).
- *Protection of the Environment Operations Act 1997* (POEO Act) – provides key mechanisms for protecting the environment and improving environmental outcomes in NSW. The POEO Act deals with chemical emissions to air, discharges to water and land. It provides a regulatory regime for chemical pollution and waste management, and specifies licensing requirements for activities including hazardous waste generation, storage and transport. The POEO Act contains a range of offence provisions and enforcement powers.
- *Pesticides Act 1999* – regulates the use of pesticides in NSW after the point of sale and promotes the protection of human health, the environment, property and trade by minimising risks from pesticide use. It does this by requiring all pesticide users to follow product label directions strictly and to do no harm through their use of chemicals. Under the Pesticides Act enforcement powers include the ability to issue penalty notices and to prosecute offences.
- *Contaminated Land Management Act 1997* – establishes a legal framework which enables the regulation of sites that are contaminated with chemical wastes that pose, or are likely to pose, a significant risk of harm to human health and/or the environment.
- Protection of the Environment Operations (Clean Air) Regulation 2002 – for regulating chemical air emissions from industry, wood heaters and motor vehicles.
- Protection of the Environment Operations (Waste) Regulation 2005 – used to manage waste storage and transportation as well as set reporting and record keeping requirements for waste facilities. This regulation has special requirements for asbestos and clinical waste and makes it an offence to apply residue waste to land that is used for the purpose of growing vegetation.
- *Radiation Control Act 1990* and the Radiation Control Regulation 2003 – for regulating and controlling radioactive substances, radioactive sources and radiation apparatus. The Act does not apply to radioactive ore while it is being mined or treated.
- *Road and Rail Transport (Dangerous Goods) Act 1997* – allows both DECC and WorkCover NSW to regulate the transport of dangerous goods (other than explosives) by road and rail as part of a national scheme for road transport. The transport of dangerous goods involves the importing, loading, consigning, marking and placarding of goods, and driving of vehicles.
- *Waste Avoidance and Resource Recovery Act 2001* – for developing a strategy which promotes action to reduce the amount of waste generated by households, industry and government, including provisions for resource recovery and management of disposal options.

2.3 Environmentally Hazardous Chemicals Act

The EHC Act is the State's key chemicals management law. It provides a flexible legal framework for the assessment and management of environmentally hazardous chemicals and declared chemical wastes in NSW. The framework is capable of regulating priority/high-risk chemicals throughout their entire life cycles.

The main provisions of the EHC Act relate to:

- a statutory chemical assessment function
- the regulation and control of chemicals via licences, Regulations and chemical control orders
- the establishment of a statutory advisory group, the Hazardous Chemicals Advisory Committee.

Following the commencement of the EHC Act, the Commonwealth *Industrial Chemicals (Notification and Assessment) Act 1989* established the National Industrial Chemicals Notification and Assessment Scheme (NICNAS) in 1989. As a consequence, it was mutually agreed that the chemical assessment provisions in the EHC Act would not be used by DECC in a broad assessment program. Instead, NICNAS recommendations on environmental matters (that arise from a chemical assessment) can be adopted by NSW under the EHC Act or the POEO Act as appropriate.

Chemical control orders

Chemical control orders are a primary regulatory tool under the EHC Act. They may be made under the EHC Act when chemicals or chemical wastes pose serious threats to the environment and there are particular challenges in their management. They also complement other environmental legislation by providing a rapid and flexible mechanism for responding to emerging chemical issues.

Chemical control orders can set controls on activities throughout a particular chemical's life cycle through general requirements and by requiring that certain things be subject to particular licence conditions. These activities can include the manufacture, processing, transport, buying, selling or disposal of the chemical or declared waste.

An order can be made in relation to single substances, groups of substances or particular waste streams (for example aluminium smelter wastes). There are currently five chemical control orders in place in NSW covering:

- aluminium smelter wastes containing fluoride and/or cyanide
- dioxin-contaminated waste materials
- scheduled chemical wastes
- organotin waste materials
- polychlorinated biphenyl (PCB) wastes and materials.

EHC Act licences

EHC Act licences are only issued to persons who are required by a chemical control order to hold a licence. Consequently, the primary driver for licensing is a concern about the chemical involved that requires specific actions to be undertaken.

An EHC Act licence can selectively address an activity of concern, cover any or all chemical control orders, cover any or all activities regulated under such an order, and cover multiple premises. For example, one EHC Act licence under the PCB

Chemical Control Order sets out requirements for the keeping and conveyance of PCBs in various quantities across 13 premises.

There are currently 31 licences in force under the EHC Act. These licences vary in scope and complexity; for example, a number include conditions focused on the storage of waste, whilst a few include more substantive controls and conditions relating to large and complex projects that involve the processing of environmentally hazardous chemicals (in line with the outcome of technology assessments). All have been triggered by a chemical control order that sets down the requirement for licensing for that specific activity.

Approximately 80% of EHC Act licensees also hold an Environment Protection Licence under the POEO Act.

Technology assessments

Australia is a signatory to the Stockholm Convention on Persistent Organic Pollutants and as such is bound to take particular care with activities involving persistent organic pollutants, including PCBs, certain organochlorine compounds (for example DDT) and dioxins. This Convention is implemented in Australia by the National Strategy for the Management of Scheduled Wastes which is given effect in NSW through chemical control orders issued under section 22 of the EHC Act.

Technologies for treating or destroying those chemicals listed under the National Strategy are assessed in accordance with the National Protocols for Approval/Licensing of Trials of Technologies for the Treatment/Disposal of Schedule X Wastes 1994 and/or the National Protocol for Approval/Licensing of Commercial-Scale Facilities for the Treatment/Disposal of Schedule X Wastes 1994.

A technology assessment is generally carried out as part of a licensing process for specific premises or mobile treatment plant. Approval of the use of a treatment technology always requires the specific characteristics of the site and the declared chemical waste to be evaluated by DECC.

The Hazardous Chemicals Advisory Committee

The Hazardous Chemicals Advisory Committee (HCAC) is a 17 member body established under Part 2 of the EHC Act. Membership of this committee is determined by Schedule 1 of the Act. Members are drawn from a number of government agencies, industry and the private sector. There is no fixed term for HCAC committee membership and as a result members may continue to serve after they have retired from an active role in the organisation that they were representing.

The functions of the committee are primarily to advise DECC on the assessment and controls required for chemicals which have been identified to be environmentally hazardous. Consultation usually occurs in regards to the development of a chemical control order or amendments that are required for existing chemical control orders. The committee can also be called upon to provide advice to DECC on whether it is appropriate to use a particular technology to treat chemical wastes at a particular contaminated site.

2.4 Environmentally Hazardous Chemicals Regulation 1999

The EHC Regulation is a short instrument containing administrative provisions relating to the operation of the EHC Act. The EHC Regulation provides for:

- **committee operations** – the appointment of alternate members to the HCAC
- **fee setting** – the setting of fees for (1) technology assessments undertaken by DECC relating to a chemical process or declared chemical waste, and (2) EHC Act licences (applications, renewals and transfers) to undertake prescribed activities in relation to environmentally hazardous chemicals
- **specifying the information to be provided** in applications for assessments of prescribed activities; notices issued by DECC about applications for licences; and registers under the EHC Act (relating to substances that are declared chemical wastes, chemical control orders and licences)
- **other administrative matters** relating to appeals against DECC decisions (time allowed) and property seizures (for example receipts for seized property) under the EHC Act.

3 Alternative options

The EHC Act confers many functions upon the Government, such as assessments of chemicals and prohibited activities and decisions about licence applications. Review of the current EHC Regulation has identified the main issue that needs to be addressed is recovery of the costs associated with the administration of these functions, most notably to account for increases in the complexity of applications for technology assessments that have occurred since the current EHC Regulation was made.

3.1 Options considered

Option 1: Allow the EHC Regulation to lapse (base case)

This approach would reduce the effectiveness of the EHC Act. In particular, it would:

- remove current time limits on when DECC must hand down a decision and when appeals must be lodged
- prevent the appointment of alternate members to the HCAC
- reduce transparency regarding the information that is to be included in the registers under the EHC Act
- remove requirements that mandate *consistent* reporting of information by DECC when:
 - gazetting a notice for the assessment of a chemical (for example details of the chemical, information relating to making public submissions and location of relevant data for public inspection)
 - publishing licences in the NSW Government Gazette (for example name of applicant and address of premises, description of the chemical, details of any chemical control orders, and details of the activities being applied for)
 - retaining a register of scheduled chemicals waste, records of chemical control orders and registers of licences.
- remove requirements that mandate the *consistent* provision of information by applicants needed by DECC for:
 - assessment of a prohibited activity (for example the name, description or formula of the chemical and data relating to toxicological tests and chemical wastes)
 - approving activities in relation to a chemical which is the subject of a chemical control order
 - transferring a licence to another party.

It would also affect the regulation, control and assessment of environmentally hazardous chemicals and declared chemical wastes due to the following:

- DECC charges licensing fees to fund the administration and implementation of the EHC Act licensing system. Licences are issued only when there is concern about a chemical and a chemical control order requires specific activities to be undertaken with respect to that chemical. A 'no EHC Regulation' option would essentially be a 'no fee' option since chemical control orders under the EHC Act require licences to be issued for such a situation. The State would therefore bear the cost of all licensing activity.
- DECC charges a fee for conducting technology assessments which are generally carried out as part of a licensing process for specific premises or mobile treatment plant. Again, a 'no EHC Regulation' option would require the State to bear the cost of conducting technology assessments, since these would still be required by chemical control orders under the EHC Act.

Option 2: Renew the current EHC Regulation

This option consists of renewing the current EHC Regulation without making any changes. This would continue all provisions and ensure that all sections of the EHC Act would remain operative. There would be no changes to fees.

Option 3: Proposed EHC Regulation

This option consists of a new EHC Regulation that continues the provisions in the current EHC Regulation that makes the EHC Act effective and updates the fees to reflect the changed circumstances and administration costs since 1999.

4 The proposed EHC Regulation

The objective of the proposed EHC Regulation is to ensure the continued efficiency and effectiveness of the EHC Act. The proposed EHC Regulation will do this by repealing and remaking the existing EHC Regulation without substantial alteration, but with updated fees.

4.1 Unchanged provisions

The following aspects of the EHC Regulation would remain unchanged:

- **committee operations** – arrangements for the appointment of alternate members to the HCAC
- **the information to be provided** in applications for assessments of prescribed activities; notices issued by DECC about applications for licences; and registers under the EHC Act (relating to substances that are declared chemical wastes, chemical control orders and licences)
- **other administrative matters** relating to appeals against DECC decisions (time allowed) and property seizures (for example receipts for seized property) under the EHC Act.

4.2 Updated licence fees

The fees for EHC Act licensees to carry on prescribed activities in relation to environmentally hazardous chemicals would be updated to reflect the changes in administrative and compliance costs since 1999.

It is proposed to update the licence fees to appropriately recover costs and ensure the continuation of the protection of the environment and human health provided by licensing activities. The new fee rates would be amended to more appropriately align them with changes in the cost of providing licence-related services, resulting in an initial application fee of \$1030 (increased from \$900), renewal fees of \$650 (increased from \$600), transfer fees of \$120 (decreased from \$300), and licence possession fees of \$520 (increased from \$180). There would be no change in the fees for the assessment of prohibited activities.

The proposed fees are shown in Table 1 and are compared with the fees that currently apply.

Fee type	Current fees (\$)	Proposed fees (\$)	Difference (\$)
Application fee for assessment of a prohibited/prescribed activity	1680	1680	0
Application fee for a new licence	900	1030	130
Application fee for licence renewal	600	650	50
Licence possession fee *	180	520	340
Licence possession fee for licence granted or renewed for less than 1 year	180	520	340
Licence transfer fee	300	120	-180

* For each year a licence is granted or renewed

4.3 Updated technology assessment fees

As previously noted, a technology assessment is generally carried out as part of a licensing process for specific premises or mobile treatment plant relating to a chemical process or declared chemical waste. In recent years there has been a general increase in the scale and complexity of technology assessments as a result of major remediation works for land contamination (such as those occurring on the Rhodes Peninsula) and the application of novel technologies to treat declared chemical wastes. This situation is expected to continue for the foreseeable future. As a result, the current maximum fee of \$2100 now invariably only recovers a small proportion of the actual costs of a technology assessment application processed by DECC.

The number of technology assessments expected over the next five years is two or three per year. The fee estimated to cover the cost of technology assessments in the last EHC Regulation remake has since been significantly outpaced by changes in the true costs of this activity to DECC. The cost to DECC of a standard assessment has been estimated at around \$7600, based on the time taken by DECC officers charged at the corresponding hourly rate. This cost is significantly larger than expected when the fee was introduced in 1999 due to the necessity for DECC officers to make an appraisal of whether the technology proposed by industry is adequate to meet current environmental health standards, statutory requirements and Australia's international treaty obligations. Necessary tasks now include detailed review by DECC specialists, evaluation of complex technical documentation, field visits, liaison

with proponents and their consultants, evaluation of environmental monitoring and performance data and consultation with other jurisdictions.

It is proposed that maximum fees for technology assessments undertaken by DECC should be adjusted annually by \$1250 on a staged basis over the next five years.² By year 5 the maximum fee would be \$8400, although DECC would retain the discretion to charge a smaller fee should this be considered justified.³ The staged approach would minimise the impact of cost increases on applicants and would progressively allow a more appropriate level of cost recovery to ensure the continuation of quality control provided by the assessment function. This staged increase proposed for technology assessment fees is shown below in Table 2.

	Amount	% of costs recovered
Current	\$2100	25%
Year 1 (2008)	\$3350	40%
Year 2 (2009)	\$4600	55%
Year 3 (2010)	\$5850	70%
Year 4 (2011)	\$7150	85%
Year 5 (2012)	\$8400	100%

4.4 Index fees in the interim years between remakes

The preferred option utilises indexation of fees in the interim years, between remakes of the EHC Regulation. The indexation process would ensure that fees closely reflect changes in costs to DECC and any adjustment to fees in future EHC Regulation reviews would be minimal. The index is a combination of the projected wage and non-wage costs to DECC expected over the next five years.⁴

5 Costs and benefits

The net *economic* costs⁵ of Option 1 are expected to be slightly higher than those of Options 2 and 3, which are expected to be similar. Some costs and benefits were unable to be estimated due to their intangible nature. Where this has occurred, these values are discussed in a qualitative context.⁶ The most significant economic costs arise from administering the EHC legislation, the cost of which does not change with the different options. What does change is the distribution of *financial* costs between industry and Government, depending on the fees charged for EHC activities (such as licence fees). Charging of fees enables DECC to apportion some of these costs to the affected industry, with any residual being paid by DECC. While the overall *economic* cost is comparable under all three options, the distribution of *who* pays

² Technology assessment fees are increased by \$1300 in the fifth year to account for the effects of rounding.

³ This technology assessment fee of \$8400 represents the estimated increase in costs to DECC by Year 5 (2012).

⁴ It is based on expected changes in NSW public sector wages (DPC 2007) and CPI (NSW Treasury 2007a).

⁵ The distinction between *economic* and *financial* values should be noted prior to assessing the options. *Financial* values are the amount of money that a person actually pays or gains, for example through fees. *Economic* values measure the true resource cost to society. The two values are rarely the same.

⁶ It should be noted that those costs and benefits not estimated are considered to be relatively minor and are unlikely to affect the overall analysis.

(industry or Government) changes depending on the amount of revenue charged and collected under the EHC Regulation.

5.1 Option 1: Base case (no EHC Regulation)

Costs and benefits to industry

There are no tangible benefits to industry from allowing the EHC Regulation to lapse. The EHC Act would still operate, requiring the relevant industry to obtain and renew licences for the handling of environmentally hazardous chemicals.

The absence of an EHC Regulation may potentially result in small additional information costs to industry arising from uncertainty over the type and form of information to be reported to DECC. For example, this uncertainty would affect licence applications, renewals, technology assessments, and applications for licence transfers. It is not expected that these costs would be significant and they have not been included in this analysis.

Costs and benefits to Government

There are no tangible benefits to DECC from allowing the EHC Regulation to lapse. Under the base case, DECC would still bear the costs of administering the EHC Act, including reviewing, approving, and renewing of EHC Act licences. It is likely that DECC would maintain the existing process for managing the EHC Act licences register even in the absence of guidance from the EHC Regulation on what content these records are to include. However, DECC may undergo some additional administrative costs associated with the absence of requirements for consistent reporting of information by industry in applications, for instance. These additional costs are considered to be minor and have not been estimated.

Under the base case, DECC, and consequently NSW taxpayers, would be fully subsidising private industry in administering the EHC legislation. Without the EHC Regulation, DECC would be unable to raise revenue from EHC Act licensing activities and would be unable to cover any costs from administering the EHC legislation. Under the base case, DECC would pay the full cost of administering the EHC legislation. The present value of these costs is estimated at \$230 000 over the five years of the proposed EHC Regulation.⁷

Costs and benefits to the wider community

There are no tangible benefits to the wider community from allowing the EHC Regulation to lapse.

A cost to the community from an absence of the EHC Regulation may be in the form of additional search costs resulting from the absence of requirements for *consistent* reporting of information to the public about hazardous chemicals, for instance, information reported in the NSW Government Gazette on chemical assessments or EHC Act licences. These additional search costs to the community are not considered to be substantial and have not been estimated. Taxpayers would also pay the full cost of DECC activities associated with EHC legislation; that is, they would fully subsidise the relevant industry for EHC-related activities.

⁷ Future values have been discounted at a rate of 7% to arrive at present values, in accordance with NSW Treasury (2007b).

5.2 Option 2: Remake existing EHC Regulation

Costs and benefits to industry

Compared to the base case, industry may benefit from time savings involved with the transparent requirement for consistent information to be included in, for instance, licence applications. The requirement for the provision of consistent information reduces the effort needed by industry to make an application. However, the value of these benefits is considered to be minimal and has not been calculated for this analysis.

Over the five year period of the EHC Regulation, it is expected that affected industry would pay the equivalent of \$105 000 (present value) in EHC Act fees under Option 2. If these fees were averaged across all licence holders, the annual cost to each firm would be less than \$1000, which is a relatively small cost compared to the overall operating costs of the average EHC Act licensee.

Costs and benefits to Government

Under Option 2, the EHC Regulation ensures the continuity of representation on the HCAC, enhancing its contribution as an advisory body to DECC. The proper functioning of the committee supports the role of DECC as regulator through providing experienced advice on matters such as the suitability of technologies for the treatment of contaminated soil and chemical wastes. The value of this is intangible and has not been estimated.

Under Option 2, there may be small efficiency gains in the time taken by DECC officers to process information that is presented to them in a *consistent* format. These administrative cost savings are considered to be relatively minor and have not been calculated for this analysis.

Whilst the *economic* cost of administering the EHC legislation remains unchanged under Option 2, DECC is authorised under the EHC Regulation to collect fees from industry, which reduces the net cost to DECC of administering the EHC legislation. Expressed in present values, over five years this net cost falls from \$230 000 under the base case to \$125 000 under Option 2.

Costs and benefits to the wider community

Under Option 2, the presence of an EHC Regulation provides timeframes for the public to make submissions and to appeal relevant matters. It also ensures adequate information about activities involving environmentally hazardous chemicals is made available for their general knowledge and wellbeing. Established and publicly known timeframes provide the community with sufficient time to plan for these activities. Public access to information about environmentally hazardous chemicals is important to members of the community, particularly to those who live near affected sites, community groups or persons who are chemically sensitive. While the values of these benefits are intangible, they support the wider public right to become involved in decisions affecting the community.

Option 2 provides benefits to the NSW community through a reduction in the net costs to DECC, which places a considerably lower burden on NSW taxpayers to fund this subsidy to affected industry. The amount of this burden was noted in the previous section as a net cost to DECC of \$125 000 (present value over five years).

However, Option 2 still involves a *positive* net cost to the NSW Government that would increase the burden on NSW taxpayers.

5.3 Option 3: Change fees to enable cost recovery

The benefits to industry, Government and the community outlined under Option 2 are maintained and built upon under Option 3.

Costs and benefits to industry

As with the previous option, adopting Option 3 would benefit industry through minor time savings from the requirement to provide consistent information to DECC in applications and assessments.

Industry would face increased costs from the change in the fee for technology assessments proposed under Option 3. The staged increase of fees over the five years of the proposed EHC Regulation is proposed to avoid placing an immediate burden on affected industry, while progressively moving towards full recovery of costs to DECC. This increase is not expected to have a significant impact on industry demand for technology assessments as in most cases this is a necessary requirement of firms operating their business. It is expected that industry demand for technology assessments is unlikely to vary with the proposed increase in their cost. The majority of the impact from an increase in fees would therefore be expressed through increased costs to industry, rather than a reduction in the number of technology assessments.

Under Option 3, the present value of all fees expected to be paid by industry over the five years of the proposed EHC Regulation is \$210 000. Compared to the base case, the increase in EHC Act fees represents only a relatively minor increase in firms' overall operating costs, equating to an annual cost of just over \$1200 if averaged over all licensees.

Costs and benefits to Government

The benefits to Government listed under Option 2 also apply under Option 3. These include the benefit in support to DECC from an adequately functioning HCAC, and the minor cost savings from receiving *consistent* information needed for exercising statutory functions such as considering EHC Act licence applications.

Option 3 also has the potential to promote increased efficiency within DECC through its exposure to industry which is required to pay cost-recovery charges.⁸ The implementation of cost recovery has increased the efficiency of DECC in undertaking activities directly related to EHC Act fees. However, additional tasks performed by DECC to support the EHC legislation are now greater than when costs were last calculated in 1999.⁹

The *net cost* to DECC is lower than for Options 1 or 2, although it remains positive due to the subsidy that DECC would provide to industry in the form of partial cost

⁸ The Productivity Commission (2001, p95) stated that 'Cost recovery can encourage users to take a greater interest in the cost effectiveness of agency activities and to demand improved agency accountability'.

⁹ Examples of these tasks include advice provided to industry on EHC Act licence activities, EHC Act licence review and compliance and administrative tasks.

recovery of technology assessments.¹⁰ The net cost to DECC, represented as the present value over five years, is \$20 000. This represents the greater proportion of the total economic cost of the EHC legislation being paid by industry as opposed to by DECC.

Costs and benefits to the wider community

Option 3 also provides the same benefits to the public as those already listed under Option 2, through the provision of adequate information to the public on chemical activity and timeframes for submissions and appeals.

Option 3 may also improve *economic efficiency* in NSW by having market prices in affected industries reflecting the full costs of production (including regulation). By incorporating the costs of administering the EHC Regulation into the prices of regulated products, the costs become more apparent to producers and consumers. There is some incentive to reduce these additional costs through, for example, industry or the community reducing their reliance on products containing environmentally hazardous chemicals. However, the impact of this efficiency effect has not been calculated due to a lack of available data, and is probably small.

To simplify analysis, and considering the impacts outlined in the preceding paragraph are likely to be minor, it was assumed that increased EHC Act fees translate directly into increased costs to industry, with no reduction in industry demand for EHC Act activities. It is common for such additional costs to be shared between consumers of related products and the industry that is responsible for environmentally hazardous chemicals or chemical wastes. No estimation was made of the potential cost impact on the community from higher EHC Act fees.

Compared to the base case, Option 3 represents a more equitable distribution of financial costs away from the wider community to the producers and consumers in the industry that handles these chemicals. The price of products that contain or result in environmentally hazardous chemicals should reflect the full cost to society of handling these chemicals (including regulation). These costs would then be shared between the producers and consumers of these products, rather than being subsidised by the wider NSW community. Under Option 3, the net cost to DECC of \$20 000 (present value over five years) ultimately represents a smaller subsidy by NSW taxpayers to affected industry for EHC legislation.¹¹

5.4 Summary of options

The net economic cost of Option 1 is expected to be slightly higher than Options 2 and 3, which are expected to be similar.¹² The most significant economic costs are from administering the EHC legislation, the cost of which does not change with the different options (shown by the same total cost for each option in Table 3). The

¹⁰ The cost (to DECC) of undertaking technology assessments is considered too large to pass on to industry immediately. To avoid prohibitively large fees for technology assessments, it is proposed that DECC partially subsidise this service by staging the increases in technology assessment fees over five years to achieve full cost recovery by the final year.

¹¹ Under Option 3, this subsidy still exists due to the staged increase of fees for technology assessments.

¹² The costs and benefits which were unable to be estimated (due to either their intangible nature or a lack of available data) are considered to be minor and are not expected to significantly affect the analysis.

options are distinguished by the way the costs of administering the EHC legislation are distributed. These costs can either be apportioned to DECC (and potentially NSW taxpayers) or to the industry that generates a public need for regulation. The issue then becomes one of apportioning costs.

The economic costs which were estimated are shown below in Table 3. Under Option 1 (the base case), the absence of EHC Act fees results in DECC (and subsequently NSW taxpayers) paying for the full cost of administering the EHC legislation. Under Option 2, leaving EHC Act fees unchanged results in a small proportion of these costs being paid by industry with the majority still paid by Government. Option 3 results in the lowest net cost to DECC as industry pays a greater proportion of the cost.

Table 3: Summary of options			
	Option 1	Option 2	Option 3
Actual cost to industry/EHC fee revenue	\$0	\$105 000	\$210 000
Net cost to DECC/subsidy to industry by NSW community	\$230 000	\$125 000	\$20 000
Total economic cost	\$230 000	\$230 000	\$230 000

All figures expressed as five-year present values using a discount rate of 7%.

Under the polluter-pays principle, the costs of administering EHC legislation should not be subsidised by the wider NSW community (through DECC), but rather paid by the industry that handles environmentally hazardous chemicals and therefore generates a public need for regulation.¹³ Under Option 3, a greater proportion of these fixed economic costs would be apportioned to industry than to the wider NSW community. Option 3 is therefore the preferred option.

¹³ Refer to the *Protection of the Environment Administration Act 1991*, Part 3, section 6(2)(d)(i).

6 Assessment and conclusions

The EHC Act is the State's key chemicals management law. It provides a flexible legal framework for the assessment and management of environmentally hazardous chemicals and declared chemical wastes in NSW.

The current EHC Regulation (Option 2) supports the regulation, control and assessment of environmentally hazardous chemicals. The EHC Regulation does this by ensuring the proper functioning of the Government's advisory committee, and the prescription of fees for licensing activities and technology assessments. The collection of these fees ensures that the Government has the resources to adequately regulate hazardous chemicals and can properly assess proposed remediation technologies. Without the EHC Regulation not only would the Government (and hence NSW taxpayers) be fully subsidising industry's activities, but it may not be in a position to ensure that high risk chemicals are properly remediated. Not only could this jeopardise international obligations, but the Government may be held liable by future generations for not ensuring the proper remediation of high risk chemicals, thereby unnecessarily exposing the community and the environment to the dangers they present.

Although the proposed EHC Regulation (Option 3) would result in the same economic cost as the current EHC Regulation, the financial costs of Options 2 and 3 differ. Option 3 would result in the lowest net cost to DECC (and the NSW taxpayers), with industry paying a greater proportion of the costs of administering the EHC Act compared to Option 2. The financial costs to industry that would occur with more appropriate cost recovery would improve the efficiency and equity with which Government services are produced and consumed. It would also ensure that industry shares the responsibility for the cost of regulating chemicals that they are potentially profiting from.

Option 1 (no EHC Regulation) would not achieve the objective and would result in the foregoing of potential benefits from the EHC Act. Option 2 would achieve the objective and help achieve the potential benefits of the EHC Act. Option 3 would achieve the objective, the potential benefits of the EHC Act, and also the benefits of appropriate cost recovery.

The proposed EHC Regulation (Option 3) is the preferred option for replacing the current EHC Regulation when it is repealed on 1 September 2008.

Appendix 1: Assumptions used in economic analysis

General assumptions

- In accordance with NSW Government guidelines, a rate of 7% has been used to discount future values to arrive at present values. Sensitivity analysis was undertaken for alternative discount rates of 4% and 10%.
- It is assumed that DECC officers will be employed in productive activities for 48 weeks per year (assuming four weeks of annual leave). A standard work day for a DECC officer is assumed to be seven hours. Costs to DECC are based on average salary rates for each corresponding pay grade. Wage rates are as at 01/07/2007.
- A general value of on-costs for DECC staff has been calculated at 50% (to account for overheads such as employer's contribution to superannuation, insurance and payroll tax, as well as office rentals, computers etc.). This calculation was based on wage-related costs and overheads listed in DECC's 2005–06 annual report (DEC 2006).
- Policy development activities do not accrue any costs relevant to setting fee levels (consistent with Federal Guidelines on cost recovery (Productivity Commission 2001)).
- The cost to Government/NSW taxpayers is derived from the net cost to DECC from administering the EHC legislation (EHC Act fee revenue less actual costs).
- Expected costs (and revenue) are based on projections of EHC Act licence activity sourced from the current EHC Act licence register.
- To facilitate calculations, it was assumed that industry demand for EHC Act licences is not responsive to increases in EHC Act fees (perfectly inelastic demand with respect to price).

Option 3: Cost recovery option

- Fee levels for the first year of the proposed EHC Regulation were set to recover the cost of each activity to DECC (where possible). Costs were calculated by multiplying the time taken to complete each EHC Act licence activity with the hourly rate of the corresponding DECC officer assigned to that task. The exception to this was the fee for technology assessments (see below).
- Where costs to DECC were not attributable to a particular EHC Act licence activity, these costs were averaged over projected licence activity to recover the full cost of these tasks.
- The cost recovery option utilises indexation of fees in interim years, between remakes of the EHC Regulation. The index is based on projections of proportional wage and non-wage costs estimated by a combination of the NSW Government wage index (restricted to 2.5% under the *NSW Public Sector Wages Policy 2007*¹⁴) and CPI (estimated at 2.5% by NSW Treasury in the 2007–08 Budget¹⁵).

Fee calculation for technology assessments

- The actual costs to DECC of performing technology assessments have proven to be considerably larger than had been anticipated since the last EHC Regulation remake in 1999 when the relevant fee was introduced. These costs have been

¹⁴ DPC (2007)

¹⁵ NSW Treasury (2007a)

estimated at \$7600 for a standard assessment.¹⁶ The current fee of \$2100 will be increased by linear increments over the next five years in an attempt to recover the costs to DECC by the time the EHC Regulation is again up for renewal in 2012.

Appendix 2: Sensitivity analysis

In accordance with NSW Treasury guidelines,¹⁷ a sensitivity analysis was undertaken using alternative discount rates of 4% and 10%. The summary of values under these conditions is presented below in Table 4. The estimated costs are not significantly altered by the use of alternative discount rates; the range of values varies by no more than \$20 000.

Table 4: Sensitivity analysis			
Discount rate of 4%			
	Option 1	Option 2	Option 3
Actual cost to industry/EHC fee revenue	\$0	\$114 000	\$230 000
Net cost to DECC/subsidy to industry by NSW community	\$250 000	\$136 000	\$20 000
Total economic cost	\$250 000	\$250 000	\$250 000
Discount rate of 10%			
	Option 1	Option 2	Option 3
Actual cost to industry/EHC fee revenue	\$0	\$96 000	\$193 000
Net cost to DECC/subsidy to industry by NSW community	\$212 000	\$116 000	\$19 000
Total economic cost	\$212 000	\$212 000	\$212 000

¹⁶ Complex assessments include those completed for the Rhodes and Orica site clean-ups and similarly expensive assessments are not expected to persist into the future.

¹⁷ NSW Treasury (2007b)

References

COAG (2006), *Communiqué*, 10 February, Attachment B: *National Competition Policy Review*, Decision 5.8, p6.

DEC (2006), *Annual Report 2005–06*, Department of Environment and Conservation (NSW), Sydney.

DPC (2007), *NSW Public Sector Wages Policy 2007*, NSW Department of Premier and Cabinet, Sydney.

NSW Treasury (2007a), *Budget Papers 2007–08*, NSW Government, Sydney.

NSW Treasury (2007b), *NSW Government Guidelines for Economic Appraisal*, NSW Government, Sydney.

Productivity Commission (2001), *Cost recovery by Government agencies*, Report no. 15, AusInfo, Canberra.



New South Wales

Environmentally Hazardous Chemicals Regulation 2008

under the

Environmentally Hazardous Chemicals Act 1985

[The following enacting formula will be included if the Regulation is made:]
Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Environmentally Hazardous Chemicals Act 1985*.

Minister for Climate Change and the Environment

Explanatory note

The object of this Regulation is to remake, with some amendments, the *Environmentally Hazardous Chemicals Regulation 1999* which is repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation increases a number of fees payable under the Act.

This Regulation also makes provision with respect to the following:

- (a) the matters to be included in certain applications and notices made or issued under the *Environmentally Hazardous Chemicals Act 1985* (**the Act**),
- (b) the time within which appeals under the Act may be made,
- (c) the form of a receipt for property seized by authorised officers and the manner of advertising the proposed forfeiture of seized property,
- (d) the information to be included in registers under the Act,
- (e) the appointment of alternate members of the Hazardous Chemicals Advisory Committee,
- (f) the payment of fees,
- (g) savings and formal matters.

This Regulation is made under the *Environmentally Hazardous Chemicals Act 1985*, including sections 13 (2) and (3), 19 (2), 28 (1) (b) and (3) (a), 29A (2) (b) and (4) (a), 37 (1), 38 (1), 39 (1), 45 (3), 48 (3) (b), 52 (2) and 58 (the general regulation-making power) and clause 4 of Schedule 1.

Public consultation draft

Environmentally Hazardous Chemicals Regulation 2008

Explanatory note

Public consultation draft

Environmentally Hazardous Chemicals Regulation 2008

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Clause 1 Environmentally Hazardous Chemicals Regulation 2008

Environmentally Hazardous Chemicals Regulation 2008

under the

Environmentally Hazardous Chemicals Act 1985

1 Name of Regulation

This Regulation is the *Environmentally Hazardous Chemicals Regulation 2008*.

2 Commencement

This Regulation commences on 1 September 2008.

Note. This Regulation replaces the *Environmentally Hazardous Chemicals Regulation 1999* which is repealed on 1 September 2008 under section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Interpretation

(1) In this Regulation:

the Act means the *Environmentally Hazardous Chemicals Act 1985*.

(2) Notes in this Regulation do not form part of this Regulation.

4 Application for assessment of prohibited activities

For the purposes of section 13 (3) of the Act, the prescribed kinds of data relating to a prescribed activity to be restricted are as follows:

- (a) a name, description or formula of a chemical in relation to which the prescribed activity is proposed to be carried on, or any other information which would reveal its chemical identity,
- (b) any physical or chemical data which would reveal the chemical identity of a chemical referred to in paragraph (a),
- (c) data from toxicological and ecotoxicological tests, but not the results of any such tests,
- (d) genuine manufacturing or other industrial or commercial secrets,
- (e) data which are the same as, or virtually the same as, or which include, data whose disclosure has been restricted in accordance with the Act or any Act of the Commonwealth or of a State or a Territory relating to chemicals or chemical wastes.

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5 Assessment of chemicals

- (1) For the purposes of section 19 (2) of the Act, the prescribed particulars to be contained in a notice of intention to assess a chemical are as follows:
 - (a) the chemical name or identity of the chemical,
 - (b) the name and address of the person with whom submissions may be lodged and the date by which any such submissions must be lodged,
 - (c) the address at which data, if any, on the chemical may be inspected.
- (2) For the purposes of section 19 (2) of the Act, the prescribed time in relation to submissions is 30 days.

6 Notice of licence application

- (1) For the purposes of section 28 (3) (a) of the Act, the prescribed particulars to be included in a notice of an application for a licence are the particulars set out in subclause (3).
- (2) For the purposes of section 29A (4) (a) of the Act, the prescribed particulars to be included in a notice of an application for the transfer of a licence are the particulars set out in subclause (3) and the following:
 - (a) the name and address of the current holder of the licence,
 - (b) the address of the premises, if any, in respect of which the licence is held.
- (3) A notice of an application for a licence or a transfer of a licence is to include the following particulars:
 - (a) the applicant's name and address,
 - (b) the address of the premises, if any, in respect of which the application is made,
 - (c) the name or description of the chemical or declared chemical waste to which the application relates,
 - (d) details or a description of any chemical control order in force in respect of the chemical or declared chemical waste,
 - (e) a list and details of the prescribed activities for which the licence is sought.
- (4) Nothing in this clause requires:
 - (a) the inclusion in the notice of any matter that is required by the Act not to be disclosed, or
 - (b) the disclosure of any matter except in the manner in which it is required by the Act to be disclosed.

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Clause 7 Environmentally Hazardous Chemicals Regulation 2008

7 Time before appeal may be made

For the purposes of section 37 (1) of the Act, the prescribed time within which the Authority must notify the terms of a chemical control order made by it or its determination not to make any such order is 60 days.

8 Time within which appeal may be made

- (1) For the purposes of section 38 (1) of the Act, the prescribed time within which a person may appeal against a chemical control order or a determination made under section 20 (d) of the Act is 30 days.
- (2) For the purposes of section 39 (1) of the Act, the prescribed time within which a person may appeal against a decision of the Authority about a licence is 30 days.

9 Form of receipt

For the purposes of section 45 (3) of the Act, the prescribed form of receipt to be given by an authorised officer is the form in Schedule 1.

10 Seized property

For the purposes of section 48 (3) (b) of the Act, the prescribed manner for advertising a notice of an application for forfeiture of seized property is by advertising in a newspaper circulating throughout New South Wales.

11 Registers of declared chemical wastes, chemical control orders and licences

For the purposes of section 52 (2) of the Act, the prescribed particulars to be included in a register are as follows:

- (a) in the case of the register of declared chemical wastes—a copy of every order in force under section 10 of the Act,
- (b) in the case of the register of chemical control orders—a copy of every chemical control order in force,
- (c) in the case of the register of licences—a certified copy of each licence currently in force.

12 Alternate members of Hazardous Chemicals Advisory Committee

- (1) For the purposes of clause 4 of Schedule 1 to the Act, a person or body entitled to nominate one or more nominees for membership of the Committee is entitled to nominate an alternate member for each nominee of the person or body.
- (2) The Local Government Association of New South Wales or the Shires Association of New South Wales, or both, may nominate alternatives for the persons nominated by them.

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- (3) The Minister may select:
 - (a) from the persons nominated under subclause (2), a person as an alternate member for the member selected from persons nominated by the Local Government Association of New South Wales or the Shires Association of New South Wales, or both, and
 - (b) a person as an alternate member for the member of the Committee selected by the Minister to represent major users of chemicals in New South Wales.
- (4) During the illness or absence of a member of the Committee, the alternate member has and may exercise the functions of the member.

13 Technology assessment

- (1) A person may request the Authority to carry out an assessment of any technology that the person proposes to use in relation to processing a chemical, or a declared chemical waste, that is the subject of a chemical control order.
- (2) The Authority may, in respect of any such assessment, charge a fee that does not exceed:
 - (a) \$3350— if the assessment is commenced on or after 1 September 2008 and on or before 31 December 2008, or
 - (b) \$4600—if the assessment is commenced on or after 1 January 2009 and on or before 31 December 2009, or
 - (c) \$5850—if the assessment is commenced on or after 1 January 2010 and on or before 31 December 2010, or
 - (d) \$7150—if the assessment is commenced on or after 1 January 2011 and on or before 31 December 2011, or
 - (e) \$8400—if the assessment is commenced on or after 1 January 2012.

14 Fees

- (1) The fees set out in Column 2 of Schedule 2 are the prescribed fees for the matters set out opposite those fees in Column 1 of that Schedule.
- (2) The Authority may at any time waive payment of part or all of a fee payable under this Regulation, whether in a particular case or in a class of cases.

15 Savings

Any act, matter or thing which had effect immediately before the repeal of the *Environmentally Hazardous Chemicals Regulation 1999* is taken to have effect under this Regulation.

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Environmentally Hazardous Chemicals Regulation 2008

Schedule 1 Form

Schedule 1 Form

(Clause 9)

Environment Protection Authority

Environmentally Hazardous Chemicals Act 1985 (section 45 (3))

Receipt for taking sample of substance or removing substance or container

- This receipt is to:
(name of occupier of premises)
(address of premises)
- I (name of authorised officer):
an authorised officer under the Environmentally Hazardous Chemicals Act 1985,
acknowledge by this receipt that:
(delete whichever of the following does not apply)
 - I have today taken from the above premises a sample of the following
substance in the following quantity:
(name or description of substance)
(approximate quantity of substance)
 - I have today removed from the above premises the following substance or the
following container/s:
(name or description of substance)
(size and number of containers)
- Signature of authorised officer:
Address of authorised officer:
.....

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Environmentally Hazardous Chemicals Regulation 2008

Fees

Schedule 2

Schedule 2 Fees

(Clause 14)

Column 1	Column 2
Matter for which fee is payable	Fee \$
Application under section 13 (1) of Act	1680
Application for a new licence made under section 28 (1) of Act on or after 1 September 2008 and on or before 31 December 2008	1030
Application for a new licence made under section 28 (1) of Act on or after 1 January 2009 and on or before 31 December 2009	1060
Application for a new licence made under section 28 (1) of Act on or after 1 January 2010 and on or before 31 December 2010	1090
Application for a new licence made under section 28 (1) of Act on or after 1 January 2011 and on or before 31 December 2011	1120
Application for a new licence made under section 28 (1) of Act on or after 1 January 2012	1140
Application to renew a licence made under section 28 (1) of Act on or after 1 September 2008 and on or before 31 December 2008	650
Application to renew a licence made under section 28 (1) of Act on or after 1 January 2009 and on or before 31 December 2009	660
Application to renew a licence made under section 28 (1) of Act on or after 1 January 2010 and on or before 31 December 2010	680
Application to renew a licence made under section 28 (1) of Act on or after 1 January 2011 and on or before 31 December 2011	690
Application to renew a licence made under section 28 (1) of Act on or after 1 January 2012	710
Fee for each year for which a licence is granted or renewed if the grant or renewal is made on or after 1 September 2008 and on or before 31 December 2008	520
Fee for each year for which a licence is granted or renewed if the grant or renewal is made on or after 1 January 2009 and on or before 31 December 2009	530
Fee for each year for which a licence is granted or renewed if the grant or renewal is made on or after 1 January 2010 and on or before 31 December 2010	540
Fee for each year for which a licence is granted or renewed if the grant or renewal is made on or after 1 January 2011 and on or before 31 December 2011	560

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Environmentally Hazardous Chemicals Regulation 2008

Schedule 2 Fees

Column 1	Column 2
Matter for which fee is payable	Fee \$
Fee for each year for which a licence is granted or renewed if the grant or renewal is made on or after 1 January 2012	570
Application to transfer a licence made under section 29A of Act on or after 1 September 2008 and on or before 31 December 2009	120
Application to transfer a licence made under section 29A of Act on or after 1 January 2010 and on or before 31 December 2011	125
Application to transfer a licence made under section 29A of Act on or after 1 January 2012	130
