

Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Amendment Regulations 1999 (No. 1) 1999 No. 74

EXPLANATORY STATEMENT

Statutory Rules 1999 No. 74

Issued by the Authority of the Minister for Environment and Heritage

Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Amendment Regulations 1999 (No. 1)

Section 62 of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the Act) provides that the Governor-General may make regulations for the purposes of the Act.

The Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations among other things, implement the OECD's control system (set out in OECD Decision (C92)39/FINAL) for transfrontier movements between OECD countries of hazardous wastes destined for recovery operations. The OECD Decision operates on a system of prior notification by the country of export to the country of import, and written or tacit consent from the latter. Imports and exports of hazardous wastes under the Regulations require permit approval, with applicants required to meet specified requirements relating to, for example, insurance and contractual arrangements.

Schedule 2 of the Regulations adopts into the Regulations the lists of wastes regulated under the OECD Council Decision. These lists are reviewed periodically by the OECD's Environment Policy Committee, and amendments by that Committee to the lists were most recently adopted by the OECD Council on 23 December 1998. The version of these lists previously incorporated into Schedule 2 of the Regulations have now been replaced with this revised version.

The Regulations have also been amended to address a number of other points.

The most significant of these is a series of amendments drafted in response to a request from the Standing Committee on Regulations and Ordinances. The Committee suggested that provision should be made to allow an applicant or permit-holder under the Regulations to be advised of any adverse material taken into account by the Minister for the Environment in considering whether to grant, vary or revoke a permit. The Committee suggested that provision should also be made to allow the applicant or permit-holder the right of reply to such material before a decision was made by the Minister. The amendments make such provisions, and also give the Minister scope to withhold the source of the information from the applicant or permit-holder if appropriate; this protects so-called "whistle-blowers" within an applicant's or permit-holder's own company, for example. The amendments also ensure that, if required, additional time is available for the Minister to assess the applicant's or permit-holder's response to adverse material before making a decision.

The remainder of the amendments improve the manner in which the Regulations work in practice.

The Regulations have been amended to allow a permit for import, export or transit to have effect for a period of one year from the date on which it commences. Previously, the Regulations only allowed for a permit to have effect for one year from the date on which it was granted. Under these amendments, the Minister can grant a permit on 1 **January** 2000, stipulating either that it has effect from 1 January 20.00 to 31 **December** 2000, or from 1 February, 2000 to 31 January 2001.

Consistent with the OECD control system, the Regulations previously allowed the Minister for the Environment to assume tacit consent from the country of **import** if that country's government

had not consented or objected to a proposed import 30 days after it had received and acknowledged notification from Australia. The OECD control system further stipulates that such tacit consent has effect for 12 months after the expiry of that 30-day period. However, the Regulations as previously drafted only provided for tacit consent to have effect for one year from the date of the original acknowledgement of notification. The amendments bring the Regulations into line with the OECD Decision on this point, by indicating that tacit consent is in effect for 12 months from 30 days after the acknowledgement date.

As previously drafted, the Regulations allowed the usual decision period to be extended by five days after any delays in the completion of certain specific considerations. Those considerations were the provision of non-tacit consent from an importing country to a proposed export, or the completion of work under the Environment Protection (Impact of Proposals) Act. The amendments have altered this extension to five working days, rather than simply five calendar days, to allow a more practicable timeframe.

The rest of the amendments also address apparent oversights in the drafting of the original Regulations, and are essentially mechanical in nature.

The definition of "recovery operations" in the Regulations previously referred to the definition adopted in the Basel Convention for the Control of Transboundary Movements of Hazardous Wastes and their Disposal. To an extent, this was consistent with the OECD control system, because the OECD's definition is identical to that of the Basel Convention; but was clearly preferable to reference the definition directly from the OECD control system that the Regulations are designed to implement. The amendments instead quote the definitional table directly in the text of the Regulations, identify the relevant OECD Council Decision as the source of that table, and incorporate into a Schedule the relevant appendix from that Council Decision.

Two typographical errors have also been addressed in Regulations 8 and 16.

Finally, the Regulations previously allowed the Minister to extend the period within which he must make a decision on a permit if consent to the proposed waste movement has not been received from any OECD transit countries. However, this did not allow for similar extensions of time in the case of delays in receiving such consent from any nonOECD transit countries. The amendments have created provision for extension of the decision period in such circumstances.

The Regulations were developed in consultation with the Hazardous Waste Act Policy Reference Group on which various industry and environment groups, overseas aid and development organisations, trade unions, and relevant Commonwealth, State and Territory Departments are represented.

Details of the Regulations are attached., A Regulation Impact Statement is also attached.

The Regulations commence on gazettal.

ATTACHMENT 1

Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Amendment Regulations 1999

Details of the Regulations are as follows:

Regulation 1 is a citation provision.

Regulation 2 provides that the Regulations will commence on gazettal.

Regulation 3 provides for the Schedule to the amending Regulations to amend the principle regulations, the Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations.

Schedule 1 - Amendments of Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations

Regulation 1 amends the citation in the principle Regulations to reflect the fact that they have been amended in 1999

Regulation 2 inserts into the definitional principle subregulation 4(1) a definition of the EPIP Act, which is referred to at various points in the principle and amending Regulations.

Regulation 3 amends the definition of recovery operations in principle Subregulation 4(1). This corrects the existing reference in principle Subregulation to the definition of recovery operations in the Basel Convention for the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

Regulation 4 amends the definition of "red list hazardous waste" in principle Subregulation 6(1)(a) to reflect the changes made by the OECD, to its waste

lists, and refers to the amended version of those lists included by these amending Regulations in Schedule 2 to the principle Regulations.

Regulation 5 inserts a reference note after principle Subregulation 6(1)

advising of the OECD's amendments to its waste lists on 23 December 1998.

Regulation 6 amends the definition of "amber list hazardous waste" in principle Subregulation 7(1)(a) to reflect the changes made by the OECD to its waste lists, and refers to the amended version of those lists included by these amending Regulations in Schedule 2 to the principle Regulations.

Regulation 7 inserts a reference note after principle Subregulation 7(1) advising of the OECD's amendments to its waste lists on 23 December 1998.

Regulation 8 inserts a clarifying note after principle Regulation 7, advising that the OECD's amendments to its waste lists on 23 December 1998 also extended to an additional list of wastes not referenced in this part of the principle Regulations.

Regulation 9 inserts the word "must" into principle Subregulation 8(4), from the original drafting of which it was accidentally omitted.

Regulation 10 consequentially amends an existing reference in principle Regulation 13 to principle Regulation 15, to make provision for changes made to principle Regulation 15 by amending Regulation 12.

Regulation 11 creates a new provision in principle Regulation 14 to allow access to applicants for special export permits to any adverse information taken into consideration in assessment of their application. The new provision also gives the applicant right of reply to such material, and requires that the applicant's reply is also taken into consideration in reaching a decision on their application.

Regulation 12 amends principle Subregulation 15(1) to extend the decision period within which an application must be granted or refused, to allow for the additional considerations provided for in amending Regulation 13 relating to adverse information.

Regulation 13 amends the definition of "Ministerial receipt day" in principle Subregulation 15(2) to indicate more clearly the principle Subregulation to which the definition applies.

Regulation 14 provides for an extension of the decision period in principle Regulation 15, to allow sufficient time for the additional considerations created in amending Regulation 11, which related to applicants' rights of reply to adverse information.

Regulation 15 corrects a typographical error in the spelling of "Minister" in principle Subregulation 16(2).

Regulation 16 corrects a typographical error in the spelling of "Minister" in principle Subregulation 16(3).

Regulation 17 amends principle Subregulation 16(6) to provide for tacit consent from a country of import to be in effect for 12 months from 30 days after that country's initial acknowledgement of notification of the proposed import. This replaces the current provision in principle Subregulation 16(6) which only allows tacit consent to be in effect for 12 months from **the date** of the importing country's original acknowledgement of notification.

Regulation 18 makes provision in principle Regulation 17 for special export permits to commence on a date after the date on which they are granted.

Currently, principle Regulation 17 only allows for special export permits to commence on their date of granting.

Regulation 19 amends the heading of principle Regulation 19 from "Interpretation" to "Definition for Division 2", to give greater clarity to the scope of that principle Regulation.

Regulation 20 consequentially amends an existing reference in principle Regulation 19 to numbered paragraphs in principle Regulations 21 and 22, to make provision for changes made to the order of paragraphs in principle Regulations 21 and 22 by amending Regulations 22 and 23.

Regulation 21 creates a new provision in principle Regulation 20 to allow access to applicants for special import permits to any adverse information taken into consideration in assessment of their application. The new provision also gives the applicant right of reply to such material, and requires that the applicant's reply is also taken into consideration in reaching a decision on their application.

Regulation 22 provides for an extension of the decision period in principle Regulation 21, to allow sufficient time for the additional considerations created in amending Regulation 21, which related to applicants' rights of reply to adverse information.

Regulation 23 amends principle Regulation 22 to extend the decision period within which an application must be granted or refused, to allow for the additional considerations provided for in amending Regulation 21 relating to adverse information.

Regulation 24 makes provision in principle Regulation 24 for special import

permits to commence on a date after the date on which they are granted.

Currently, principle Regulation 24 only allows for special import permits to

commence on their date of granting.

Regulation 25 amends the heading of principle Regulation 26 from "Interpretation" to "Definition for Division Y to give greater clarity to the scope of that principle Regulation.

Regulation 26 consequentially amends an existing reference in principle Regulation 26 to numbered paragraphs in principle Regulations 27 and 28, to make provision for changes made to the order of paragraphs in principle Regulations 27 and 28 by amending Regulations 27 and 28.

Regulation 2 creates a new provision in principle Regulation 27 to allow access to applicants for special transit permits to any adverse information taken into consideration in assessment of their application. **The new** provision also gives the applicant right of reply to **such material, and requires** that the applicant's reply is also taken into consideration in reaching a decision on their application.

Regulation 28 provides for an extension of the decision period in principle Regulation 28, to allow sufficient time for the additional considerations created in amending Regulation 27, which related to applicants' rights of reply to adverse information.

Regulation 29 makes provision in principle Regulation 30 for special import permits to commence on a date after the date on which they are granted. Currently, principle Regulation 30 only allows for special import permits to commence on their date of granting.

Regulation 30 inserts the word "special" into principle Subregulation 34(2), from the originally drafting of which it was accidentally omitted.

Regulation 31 amends a reference in principle Subregulation 34(2) from .paragraph (a)" to paragraph (1)(a), correcting an error in the original drafting of the principle Regulations.

Regulation 32 amends a reference in principle Subregulation 34(2)(b) from "paragraph (c)" to paragraph (1)(c), correcting an error in the original drafting of the principle Regulations.,

Regulation 33 creates a new provision in principle Regulation 34 to allow access for permit-holders to any adverse information taken into consideration in deciding whether to revoke their permit. The new provision also gives the permit-holder right of reply to such material, and requires that the permitholder's reply is also taken into consideration in reaching a decision on their application.

Regulation 34 makes a consequential amendment to principle Subregulation 39(1), reflecting changes made by amending Regulation 35 to principle Subregulation 39(3), and thus allowing the decision period for variation of a permit to be affected by the consideration of a permit-holder's response to any adverse material.

Regulation 35 creates a new provision in principle Regulation 39 to allow access for permit-holders to any adverse information taken into consideration in deciding whether to vary their permit. The new provision also gives the permit-holder right of reply to such material, and

requires that the permit-holder's reply is also taken into consideration in reaching a decision on the variation.

Regulation 36 provides for an extension of the decision period in principle **Regulation 40, to allow sufficient time for the additional considerations created in amending Regulation 35**, which related to permit-holders' rights of reply to adverse information.

Regulation 37 creates a new provision in principle Regulation 41 to allow access for permit-holders to any adverse information taken into consideration in deciding whether to vary their permit without a request from the applicant for such a variation. The new provision also gives the permit-holder right of reply to such material, and requires that the permit-holder's reply is also taken into consideration in reaching a decision on the variation.

Regulation 38 removes a footnote from the first page of principle Schedule 1, thus deleting an obsolete reference to abstention by one member country of the OECD Decision which forms principle Schedule 1. It replaces the footnote with a reference to a definitional issue addressed in a separate OECD Decision but now incorporated into the Regulations by amending Regulation 3.

Regulation 39 replaces Schedule 2 of the principle Regulations with a new Schedule, thus replacing the previous version of the OECD control system's waste lists in that Schedule with the new versions as revised by the OECD Council on 23 December 1998.

Amendments to the Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations 1996

REGULATION IMPACT STATEMENT

Introduction

in 1996, the Hazardous Waste (Regulation of Exports and Imports) (OECD Decision) Regulations were tabled to implement the OECD's control system (set out in OECD Decision C(92)39 / FINAL) for transfrontier movements between OECD countries of wastes destined for recovery operations. The OECD Decision operates on a system of prior notification by the country of export to the country of import, and written or tacit consent from the latter. Imports and exports of wastes under the Regulations require permit approval, with applicants required to meet specified requirements relating to, for example, insurance and contractual arrangements.

A number of amendments are now proposed to these Regulations. The most significant of these amendments, and the one examined in this Regulation Impact Statement, relates to minor changes to the lists of wastes subject to the Regulations.

Schedule 2 of the Regulations adopts into the Regulations the lists of wastes regulated under the OECD Council Decision. These lists are reviewed periodically by the OECD's Environment Policy Committee, and ten minor amendments were adopted by the OECD Council on 23 December 1998. These changes did not expand the number or type of wastes to be regulated, but rather provided greater clarity on which wastes are explicitly excluded from regulation. The version of these lists currently incorporated into Schedule 2 of the Regulations now requires to be replaced with this revised version. A sun-unary of the changes to the lists is attached.

1. Problem or issue identification

Each of the ten changes made by the OECD to its waste lists provides greater clarity to industry and governments alike as to what wastes are regulated, and which are excluded from regulation, under the OECD control system. Failure by the Commonwealth to adopt these changes into its own implementing Regulations would result in those Regulations providing less certainty to industry and government itself on whether or not the wastes in question are subject to control. Uncertainty of this type arises from the sometimes broad waste descriptions in the OECD's waste lists, which may require expert interpretation. The recent OECD amendments aim to reduce this problem.

When such uncertainty arises, Australian industry has to contact Environment Australia for advice as to whether a waste is subject the OECD control system, and therefore regulated under the Regulations. Because of the technical complexity often surrounding such questions, the matter often has to be put to the Hazardous Waste Technical Group, a statutory committee consisting of technical experts in the hazardous waste and related fields appointed by the Minister for the Environment to provide advice on more complex technical issues arising from implementation of the Act.

Failure to amend the Regulations to reflect the OECD's changes to its waste lists could also result in discrepancies between the wastes controlled by Australia under the OECD control system, and those controlled by our OECD trading partners. This could lead to a situation where an import or export of waste under the OECD control system was regulated by Australia, but not by the other OECD countries involved in the trade.

2. Specification of the desired objective

The objective of this proposed amendment to the Regulations is to provide greater immediate certainty, to industry and the Commonwealth as to what wastes are subject to regulation under the OECD control system and the Regulations. This would reduce the need for time-consuming consultation by industry with Environment Australia and the Technical Group.

3. Identification of options

The Commonwealth has two options for addressing this issue. The first is to remain with the status quo; that is, to ignore the clarifying amendments to the OECD's waste lists. This would mean continuing on with the current system of identification of wastes subject to regulation in Australia by requiring industry to contact Environment Australia with any uncertainties, and Environment Australia to then refer on any difficult questions arising to the Hazardous Waste Technical Group.

The alternative option is for Australia to implement the OECD's changes to its waste lists by adopting the amended lists into the Regulations. This would provide more immediate and internationally recognised guidance on whether those wastes affected by the changes are subject to the Regulations. In the majority of cases, industry, the community and the Commonwealth will be able to identify more quickly and easily which wastes are subject to control.

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4. Assessment of impacts

By implementing the changes to the OECD's waste lists through the amendments to the Hazardous Waste Act, the Commonwealth would provide the means for swifter and easier identification by industry of whether or not the wastes affected by the OECD's amendments are subject to regulation in Australia. This would impose no costs on industry or government. Instead, it would reduce the costs and time for both industry and government in the current processes required for answering such questions.

5. Consultation

The Commonwealth undertakes consultation with State and Territory governments as well as hazardous waste stakeholder groups through the Hazardous Waste Act Policy Reference Group (PRG), which is convened approximately three to four times each year by Environment Australia.

State and Territory governments are represented by a senior official of the Environment Protection Authority of Victoria, who was nominated by State and Territory environment agencies to attend meetings on their behalf and report back to them on any issues of interest or relevance. Representatives from Australian industry and environment groups are also represented on the PRG, as are officers of interested Commonwealth government departments and agencies.

The PRG acts as a forum for the Commonwealth to raise issues of policy development with stakeholders, and to receive their direct feedback. It also provides a conduit for interested parties to report on any issues they consider to be of importance to the implementation of the Hazardous Waste Act, and the development of briefing positions for Australian delegations to Basel Convention meetings.

Environment Australia consulted with the PRG on the proposal to amend the Regulations to adopt the OECD's amendments to the lists of wastes. Support was received from industry and environment groups for the amendments. The State government representative did not raise any concerns about the proposal.

6. Conclusion and recommended option

Environment Australia recommends that the OECD Council's clarifying changes to its waste lists be implemented by amendments to the lists in the Regulations. This will reduce the time required to answer questions on whether a given waste is subject to regulation, while imposing no new obligations on either industry or government.

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7. Implementation and review

Environment Australia will monitor the impact of the amendments to the Regulations on an ongoing basis. In addition Environment Australia has in place consultative arrangements to obtain regular feedback from industry and environment group stakeholders on the effectiveness of the OECD control system and the Regulations.

ATTACHMENT

OECD COUNCIL DECISION C(98)202/FINAL:

FIFTH AMENDMENT TO THE LISTS OF WASTES INCLUDED IN

DECISION C(92)39/FINAL CONCERNING THE CONTROL OF

TRANSFRONTIER MOVEMENTS OF WASTES DESTINED FOR

RECOVERY OPERATIONS

A. AMENDMENTS TO THE GREEN LIST OF WASTES

(1) Within the GA main category: "Metal and metal-alloy wastes in metallic, non-dispersible form", **deletion of the sub-heading: "The following ferrous waste and scrap of iron or steel" and its relevant entries GA040 to GA110 inclusive, to be replaced by the following new single entry:**

GA430 7204 Iron or steel scrap

(2) Modification of the existing wording of entry GB030: "Aluminium.

skimmings", as follows:

GB 030 Aluminium skimmings (excluding those that are

flammable or emit, upon contact with water, flammable gases in dangerous quantities)

(3) Modification of the existing entry CE010: "Cullet and other waste and

scrap of glass except for glass from cathode-ray tubes and other

activated glasses," as follows:

CE010 ex 700100 Cullet or other waste and scrap of glass except for glass from cathode-ray tubes and other activated (with coatings) glasses

(4) Modification of the existing wording of entry CO040: "Waste photographic film base and waste photographic film not containing silver," as follows:

GO040 Waste photographic film and paper (including

base and silver-sensitive coating), whether or not

containing silver and not containing silver in free

ionic form

B. INCLUSION OF NEW GREEN LIST ENTRIES:

(1) Within the main category CC: "Other wastes containing metals",

inclusion of the following sub-heading including nine new entries, CC090 to CC170:

The following metal and metal alloy wastes in metallic dispersible form:

GC090 Molybdenum

GC100 Tungsten

GC110 Tantalum

GC120 Titanium

GC130 Niobium

GC140 Rhenium

GC150 Gold

GC160 Platinum (the expression "platinum" includes

platinum, iridium, osmium, palladium, rhodium

and ruthenium)

GC170 Other precious metals, e.g. silver

(2) Within the main category GG: "Other wastes containing principally inorganic constituents, which may contain metals and, organic materials", inclusion of:

GG160 Bituminous materials (asphalt waste) from road construction and maintenance, not containing tar

(3) Within the main category GJ: "Textile wastes", inclusion of:

GJ140 ex 6310 Waste textile floor coverings, carpets

(4) Within the main category GM: "Wastes arising from agro-food industries", inclusion of"

GM140 ex 1500 Waste edible fats and oils of animal or vegetable origin (e.g. frying oils)

C. AMENDMENT TO THE AMBER LIST

(1) Modification of an existing Amber List entry:

As a consequence of the inclusion of the new Green List entry GG160 for bituminous materials, the entry AC020: "asphalt cement wastes" has been modified as follows:

AC020 Bituminous materials (asphalt waste) not elsewhere specified or included

D. AMENDMENT TO THE RED LIST

(1) Modification of an existing entry:

As a consequence of the inclusion of the new Green List entry GG160 for bituminous materials and the modification of the related Amber List entry AC020, the Red List entry RA020 has been modified as follows:

RA020 Waste tarry residues (excluding those listed in AC020) arising from refining, distillation and any pyrolytic treatment of organic materials