NSW EDO
DEFENDING THE ENVIRONMENT
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EDO NSW
ABN 72 002 880 864
Level 5, 263 Clarence Street
Sydney NSW 2000 AUSTRALIA
E: edonsw@edonsw.org.au
W: www.edonsw.org.au
T: + 61 2 9262 6989
F: + 61 2 9264 2412

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Strategic Project Team
Reform and Compliance Branch
Environment Protection Authority
PO Box A290
Sydney South NSW 1232

By email: POEO.Consultation@epa.nsw.gov.au

Dear Director

Consultation on risk-based pollution licensing and the *Protection of the Environment Operations (General) Amendment (Licensing Fees) Regulation 2013*

As a community legal centre specialising in public interest environmental law, EDO NSW welcomes the opportunity to comment on the Environment Protection Authority's (**EPA**) proposal for risk-based licensing, the accompanying *Protection of the Environment Operations (General) Amendment (Licensing Fees) Regulation 2013* (**Amendment Regulation**), and the draft Environmental Management Calculation Protocol (**Protocol**).

EDO NSW generally supports a risk-based licensing approach, as it can provide incentives for reducing pollution, and focus limited agency resources on more significant risks to the environment and public health. Nevertheless, we have concerns regarding some features of the proposed amendments and the draft Protocol. In order to achieve the best possible outcomes from the finalised legislation and policy, we make eight recommendations below.

1. ***New applicants for existing premises should not be exempted from risk-based calculation.***
   The Amendment Regulation and draft Protocol set out a three-step process that the EPA will use to calculate the administrative fee for risk-based pollution licensing.[1] However, clause 10(2)(c) of the Amendment Regulation exempts licence applicants from the risk-based calculation where they have not held a licence for that premises before. This is despite the likelihood that the premises, the new applicant and/or its directors, may well have a relevant history of compliance or non-compliance; and the fact that the premises' equipment is the same as under the previous licence holder.

   EDO NSW submits that the exemption for 'new' applicants in cl 10(2)(c) be deleted, and that the risk-based licensing approach should instead factor-in any compliance history of the existing premises, and the new applicant and its directors (if they have held licences at other premises). Otherwise scrutiny and penalties could be avoided wherever a premises or licence changes hands. The risk assessment and calculation of administrative fees should reflect not only the history of the applicant, but also of the plant and premises. This will ensure a more thorough risk-based approach, based on holistic past performance and management practices.

2. ***Environmental management weighting should be based on past five years' performance, rather than three years.***

[1] (1) Calculation of administrative fee units; (2) Determination of the environmental management category ('A' to 'E'); (3) Calculation of administrative fee (multiplying step 1 amount by step 2 factor). Draft Protocol p 3.

The draft Protocol provides that 'The environmental management weighting is based on a licensee's performance over the past three years.' (pp 5-6) EDO NSW submits that a three-year compliance history is insufficient. For example, investigations can take considerable time, and there may be situations where there have been major incidents which are still in the courts and where management responses are yet to be agreed. In addition, resourcing constraints may mean the EPA is not able to bring as many proceedings (including following up repeat offenders) as may be warranted over a three-year period.

EDO NSW recommends the risk-based approach should cover a *five-year* historical compliance period, with a staged reduction in weighting of older non-compliances similar to the draft Protocol (such as -20% to -90% from years two to five). The commencement provisions of the Protocol and Amendment Regulation should allow for consideration of offences five years prior to the passage of the Amendment Regulation (see Amendment Regulation clause 10A(3); and POEO Act s 144AB(3)).

Assessment of environmental management scores over a five-year period will build a more accurate picture of the licensee's compliance history; and allow for long-term environmental management issues to be assessed. This period would also reflect recent changes under the *Protection of the Environment Operations Amendment (Illegal Waste Disposal) Act 1997* (NSW). Section 144AB(2)(b) of the POEO Act now provides special procedures for waste offences where a person "commits a waste offence on a separate subsequent occasion within 5 years after that conviction", whether "before or after the commencement of this section."

3. *Exemptions are too broad when considering 'trends' in licensees' non-compliance*

The draft Protocol states that the EPA will consider 'trends' in licensee performance when determining environmental management scores under step 2. EDO NSW is concerned that the proposed consideration of non-compliance 'trends' creates a range of unjustified exemptions from inclusion when calculating risk categories. If trends *are* considered, we also recommend a period of five years rather than three.

In particular, the draft Protocol appears to exempt one-off incidents (in three years) from being considered as poor performance, which means 'that regulatory action is not included in the environmental management category calculation.' (Protocol, p 7) Furthermore, even where non-compliance has occurred in past years *one and three* of the three-year period, the licensee will not be considered to have a 'trend' of non-compliance (see draft Protocol, Table 3 (p 7)). The breadth of exemptions proposed by the draft Protocol's 'trend-based' approach has the potential to undermine the effectiveness and incentives of the risk-based licensing.

We submit that both 'one-off' regulatory action and non-compliances in any two out of three-year period (for example) should be included in calculating the licensee's environmental risk category. Any exclusion of 'one-off' incidents should only be considered where the applicant demonstrates that the incident was due to circumstances beyond the licence holder's (or operator's) control, and was rectified promptly and in good faith, and therefore is not a reflection of their management practices. We believe this is a fairer cause for exemption and would create more effective incentives to comply.

4. Consideration of cumulative impacts should be taken into account

The proposal for risk-based licensing is limited to 'premises-based' considerations. We submit that the cumulative impact of risks within an area should be built into the consideration of risk levels. For example, the cumulative impact and associated increased risks of an area subject to higher air pollution should be weighted differently.

5. ***Implement appropriate delay between licensee's environmental improvements and the relaxation of EPA compliance and monitoring requirements.***
   The regulatory impact statement (**RIS**) for the proposal states that the preferred option will "recognise where licensees have made improvements to rectify issues".[2] This is appropriate, but there should be a lag-time between premises implementing improved management mechanisms and the EPA relaxing its compliance and monitoring requirements. This delay would ensure that the new mechanisms are effective in mitigating the risks so as to justify the reduction in regulatory oversight. If the improvements are poorly implemented or unsatisfactory, the EPA should continue a higher level of monitoring until the effective improvements are in place.

6. ***Fees should provide an incentive for improved environmental management and disincentive from poor performance.***
   Under the proposed changes, clean-up, prevention and noise control notice fees are proposed to be increased in line with costs. Only requiring a polluter to cover the EPA/local council costs of issuing such a notice may not be a particular disincentive against poor practices. Also, clean-up costs may not reflect full environmental costs. We submit that the above fees should be substantially increased to provide an incentive for maintaining adequate environmental management systems. In addition, although the RIS states that load-based licensing (**LBL**) fees will be considered separately, in our experience, LBL fees are not high enough to act as a deterrent. We submit that substantial increases in LBL fees are required.

7. ***The EPA should provide more information in the final Protocol****, including:*
   a. How EPA priorities are defined and what constitutes a low, moderate and high regulatory priority.
   b. How the environmental management category and EPA priorities interact to create a risk level.
   c. What compliance activities or management requirements are associated with each risk level.

   Without this information it is not possible to predict which industries will fall into which categories, and whether that level of oversight is appropriate for the given industry.

8. Clear application and close oversight of the Risk Assessment Tool
   In reviewing the draft Risk Assessment Tool spreadsheet, it is unclear how the subject assessment criteria will be completed. For example, is it the intention that the licence operator will complete the assessment of whether their management and operations should be considered 'good', 'fair' or 'poor'? If so, clear measures on what constitutes an appropriate response should be included. What checking will occur to ensure these sections are completed accurately? If not, the EPA should be clear on how it will define each category. This comment applies to a number of the questions.

We hope this submission and recommendations assist the EPA in finalising a risk-based licensing approach that is robust, fair, and encourages regulatory compliance, sound environmental management and continuous improvement. For further information please contact Mr Nari Sahukar, Senior Policy & Law Reform Solicitor on 02 9262 6989.

Yours sincerely,
EDO NSW

Rachel Walmsley, Policy Director

[2] NSW EPA, *Regulatory impact statement: Proposed Protection of the Environment Operations (General) Amendment (Licensing Fees) Regulation 2013*, p 7, 'Option 3'.