



**Submission on the proposed amendment of the *Protection of the Environment Operations (General) Regulation 2009* to require licensees to fund the Upper Hunter Air Quality Monitoring Network.**

prepared by

**EDO NSW**

**19<sup>th</sup> October 2012**

## About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

**Successful environmental outcomes using the law.** With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

**Broad environmental expertise.** EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

**Independent and accessible services.** As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their [states](#).

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## Introduction

EDO NSW is a community legal centre specialising in public interest environmental law. We have regularly engaged in legal advice and law reform for communities and individuals affected by air pollution. In 2012, EDO NSW published a report: *Clearing the Air – Opportunities for improved regulation of pollution in NSW*.<sup>1</sup> The report makes a number of recommendations for law reform.

In this context, we welcome the opportunity to make a submission on the proposed regulation to levy fees on Pollution Licenses for the purpose of funding a pollution monitoring system in the Hunter Valley. EDO NSW agrees that regulation is required to equitably and consistently implement a producer pays system consistent with adopted policy and law.

In order to obtain timely, independent and accurate information on air quality in the Upper Hunter, we submit that it is essential that the monitoring process is not dependent on voluntary deeds entered into by private corporations.

## Background

Air quality in the parts of NSW and in the Upper Hunter particularly has been a controversial issue for some time. The community of Singleton, including local professionals, have been articulating the need for objective data on air quality and an ongoing monitoring system for some years.<sup>2</sup>

Data from the National Pollution Index shows levels of PM10 and PM2.5 produced in Singleton to be more than 20 times greater than produced in the Newcastle Local Government Area, and more than 100 times greater than produced in Maitland.<sup>3</sup>

The adverse impacts on the health of local communities from exposure to air pollution has been identified internationally.<sup>4</sup> In an article focusing on the Hunter Valley, Higginbottom et al state that, “meta-analyses of air pollution studies globally found considerable evidence linking air pollution with daily mortality; PM10, CO,NO2,O3 and SO2 are all positively and significantly associated with all-cause mortality.”<sup>5</sup>

Most recently, the NSW Department of Health maintained its opposition to the approval of the Ashton Coal South Eastern Open Cut Project because of the potentially adverse impacts from fine particulates on the surrounding community.

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<sup>1</sup> Environmental Defender’s Office, *Clearing the Air: Opportunities for improved regulation of pollution in New South Wales* (2012), Environmental Defender’s Office (NSW) Ltd, Sydney, Australia.

<sup>2</sup> Singleton Shire Healthy Environment Group, *Is Air Quality Adversely affecting the Health of Singleton Shire Residents* (Submission made to NSW Government, 3 November 2009).

<sup>3</sup> The Singleton Shire Healthy Environment Group (SSHEG) used the NPI data to clearly demonstrate the effect of mining and power generation on the local air quality: *Ibid*, 21.

<sup>4</sup> Bert Brunerkeef & Stephen Holgate, ‘Air Pollution and Health’ (2002) 360 *The Lancet* 1233, 1233-42.

<sup>5</sup> Higginbottom, Freeman, Connor & Albrecht, ‘Environment injustice and air pollution in coal affected communities, Hunter Valley Australia’ (2010) 16 *Health & Place* 259, 260.

NSW Health's position follows the release in May 2010 of their report showing that there are higher than average rates of respiratory and cardiovascular problems in the region as a whole - but reaches no conclusion about the role of air pollution.<sup>6</sup>

In the face of consistent community, professional and Department level concern over the health consequences of air pollution in the Upper Hunter, maintaining a robust air quality monitoring system should be a priority for the NSW Government.

***Protection of the Environment Operations Act 1997 (POEO Act).***

We note that the objectives of the POEO Act include:

- s.3(a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development,*
- (b) ...*
- (c) to ensure that the community has access to relevant and meaningful information about pollution,*

The principles of ecologically sustainable development are defined in section 6(2) of the *Protection of the Environment Administration Act 1991* and include both the precautionary principle and the polluter pays principle.<sup>7</sup> EDO NSW submits that the Government has a duty to implement both the polluter pays and the precautionary principle with regard to air quality monitoring in the Upper Hunter.

With the evident level of concern expressed by NSW Health over the generation of fine dust particulates by open cut mining,<sup>8</sup> and the prior concerns raised by community groups and local professionals,<sup>9</sup> EDO NSW believes a precautionary approach supports the establishment of an ongoing robust system of data gathering.

It is fitting that the monitoring and data gathering be paid for by those who are responsible for contributing to the emissions.

EDO NSW notes that the section 66 of POEO Act authorises licenses to be conditioned with the requirement to monitor relevant ambient conditions both on and off site.

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<sup>6</sup> NSW Department of Health, *Respiratory and cardiovascular diseases and cancer among residents in the Hunter New England Area Health Service* (2010)

<[http://www0.health.nsw.gov.au/pubs/2010/hne\\_respi\\_cardio.html](http://www0.health.nsw.gov.au/pubs/2010/hne_respi_cardio.html)>.

<sup>7</sup> The precautionary principle states that "that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation"; and the polluter pays principle states that "those who generate pollution and waste should bear the cost of containment, avoidance or abatement." See *POEA Act* section 6(2)(a) and (d)(i).

<sup>8</sup> See for example, letter from NSW Health to the Planning Assessment Commission, 4 June 2012 in Ashton Coal Mine -South East Open Cut Project PAC Determination Report, Appendix 2

<<http://www.pac.nsw.gov.au/Projects/tabid/77/ctl/viewreview/mid/462/pac/173/view/readonly/myctl/rev/default.aspx>>.

<sup>9</sup> See above n 2.

The Act has recently be amended to provide for the holder of a license with the relevant condition to mandatorily publish, within 14 days, the results of the monitoring, either on their own webpage or on that of an appropriate authority.

### **Scope and application**

The ability for pollution licenses to be conditioned with a contribution levy towards offsite independent monitoring is supported by the legal framework, and is appropriate for the conditions. A particular concern with fine particulates is their ability to travel long distances while airborne.<sup>10</sup> Therefore the cumulative effects of airborne pollution are just as, or more, important than simply monitoring conditions onsite. EDO NSW submits therefore, that monitoring funded by levies must include comprehensive onsite and offsite monitoring.

Furthermore, while we acknowledge that the Upper Hunter is a priority area, we recommend the geographic scope of the regulation should be expanded. EDO NSW supports the Regulation being applicable to pollution licenses generally in NSW. The Regulation should allow the EPA to condition licenses where appropriate, and should not be limited to the Upper Hunter area only. For example, independent comprehensive monitoring should be funded in areas where mining activities may expand, such as Boggabri and Gunnedah.

### **Funding formula**

EDO NSW makes the following comments regarding the funding formula contained in the public consultation draft of the regulation.

The draft regulation proposes a funding formula that attributes the quantum of levy to the proportion of particulates emitted by a licensed facility to the overall amount of particulates emitted in the Upper Hunter area.

EDO NSW proposes that only 50% of funding is derived from the proportionate formula, with the other 50% comprising of a base charge. A base charge combined with a proportional charge would be more appropriate for ensuring adequate ongoing funding. A base fee component is a necessary safeguard in case data on emissions is not accurate, or where a license holder makes no emission in any one year but should still contribute to an ongoing effective system of monitoring.

*For further information, please contact Rachel.walmsley@edonsw.org.au.*

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<sup>10</sup> *Upper Hunter Air Quality Monitoring Network* (22 October 2012), NSW Office of Environment and Heritage Website <<http://www.environment.nsw.gov.au/aqms/uhaqmfaq.htm>>.