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03 May 2012

Code of Practice Comments
NSW Trade and Investment
PO Box 344
Hunter Regional Mail Centre NSW 2310

By email: minerals.comments@industry.nsw.gov.au

Dear Sir/Madam,

Draft Code of Practice for Coal Seam Gas Exploration

The Environmental Defender's Office (NSW) (EDO) is a community legal centre with 25 years' experience in public interest environmental and planning law issues. Through our litigation, law reform and outreach activities, we have a strong history of engagement with government regulation of mining and coal seam gas (CSG) activities. To date in the 2012 financial year, we have conducted ten workshops to educate members of the community on the law concerning CSG and mining. We have also provided submissions to various government consultations and inquiries on CSG and related topics. These include submissions to,[1] and an appearance at,[2] the NSW Legislative Council Inquiry into Coal Seam Gas and a submission on the NSW Coal and Gas Strategy.[3] We have also published a discussion paper on mining law in NSW.[4] In addition, we have undertaken public interest litigation on behalf of a number of clients concerned about the environmental impacts of CSG and mining developments.[5] We welcome the opportunity to comment on improving CSG regulation and policy to assist the community and landholders, and in this instance, to comment specifically on the Draft Code of Practice for Coal Seam Gas Exploration (Code).

Our principal concern with the drafting of the Code is that there are numerous inconsistencies between it and the law. We understand that the Code is intended to be binding on all explorers, through insertion of a condition in all new and renewed licences that explorers must abide by the Code. However, the interaction between the Code and the law is not clear. In addition to amendments to address inconsistencies, we submit that the legal status of the Code and the legal mechanisms for implementing the Code should be clarified.

In our view, making the Code in its current form binding on explorers is likely to lead to confusion and uncertainty. This in turn is likely to limit the benefits that can be obtained by landholders. We believe this to be the case for two reasons in particular.

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[1] www.edo.org.au/edonsw/site/pdf/subs/110912csg_inquiry.pdf; www.edo.org.au/edonsw/site/pdf/subs/110912csg_inquiry_appendix1.pdf.
[2] www.edo.org.au/edonsw/site/pdf/subs/111208csg_inquiry.pdf.
[3] www.edo.org.au/edonsw/site/pdf/subs/110415nsw_coal_gas_strategy.pdf.
[4] www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf.
[5] See, for example, Barrington-Gloucester-Stroud Preservation Alliance Incorporated v Planning Assessment Commission and AGL Upstream Infrastructure Investments Pty Limited (points of claim available at www.edo.org.au/edonsw/site/pdf/casesum/110705bgspa_points_of_claim.pdf).

First, many of the requirements in the Code are expressed in the language of 'should', rather than 'must'. [6] This makes it highly questionable whether a failure by an explorer to perform a 'should' requirement could lead to any enforcement action for breach of a licence.

Secondly, it is unclear from the wording of the Code what is required currently under the law, and what is proposed to be additional to current requirements. To the extent that the Code intends to impose additional requirements (rather than providing clarity on how existing legal obligations are to be met), we submit that these additional requirements should be incorporated into legislation or regulation. Not to do so creates confusion and uncertainty, especially where the requirements in the Code are less stringent than the requirements in the law.

The following examples illustrate our concern about the discrepancies between the nature of the obligations contained in the Code, and those set out in the law.

1. In relation to access arrangements, the Introduction to the Code states that CSG explorers must be able to demonstrate that it is essential to carry out work on a particular property before a formal arbitration process for negotiating these arrangements can be commenced.[7] This requirement is not found in the law. Under the law, all that is required before arbitration is sought is that 28 days have elapsed since the explorer issued an intention to seek an access arrangement, and that the explorer and the landholder have been unable to agree on the terms of an access arrangement.[8]

2. The Code states that the explorer *should* be willing to reimburse all reasonable legal costs in relation to an access arrangement, so the landholder is not out of pocket. Elsewhere, the Code states that landholders *must* be compensated for reasonable costs associated with their time and legal costs.[9] The Code does not make clear that there is a legal requirement that where a landholder asks for his or her costs to be met, a provision to this effect must be contained within the access arrangement.[10] The Code should require explorers to inform landholders of this right.

3. The Code states that as landholders are responsible for the management of all chemicals on their land, it is essential that the explorer provide specific details of all chemicals they bring onto the land.[11] While we do not object to any requirement that the explorer provide details of chemicals they bring to a landholder's land, the statement that the landholders will be responsible for their management is likely to create confusion. The law provides that a landholder has general immunity for any action, liability, claim or demand arising as a consequence of the CSG explorer's acts or omissions on their land – a provision that we note is also set out in the Introduction to the Code.[12]

   The Code sets out what information should go into an access arrangement, by reference to the law and to additional obligations set out within the Code.[13] The law sets out a number of matters which *may* be provided for in the arrangement, but provides for few items that *must*

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[6] For example, 'the explorer should offer to document the status of existing water bores…'(p 10); 'explorers should be prepared to provide general information…' (p 10); 'regular water monitoring should continue during the lifetime of the project' (p 10); The community should be engaged at an early stage of the exploration process. The exact timing of this will depend on circumstances, but should occur before any access agreements have been signed, or perhaps even before the exploration licence is granted (p 12); 'the site should be monitored for as long as necessary' (p 15).

[7] Code, p 7.

[8] *Petroleum (Onshore) Act 1991* (NSW), s 69F.

[9] Code, p 9.

[10] *Petroleum (Onshore) Act 1991* (NSW), s 69D(2A).

[11] Code, p 10.

[12] *Petroleum (Onshore) Act 1991* (NSW) s 141, Code, p 10.

[13] Code, pp 8 and 9.

be included.[14] By contrast, the Code states that a number of matters *must* be provided for, beginning with the statement 'additionally, where appropriate, access arrangements must address matters such as...' before going on to list a number of additional items.[15] Separately from this list, it sets out some further requirements, such as 'an access arrangement involving core holes or wells must stipulate exactly where the core holes or wells are going to go and how the explorer intends to access them.' It also states 'the access arrangement must specify the times and days of the week when operations will take place and contain clear start and finish dates.'[16]

In our view, the Code should provide greater clarity as to the source of these obligations, in particular the requirements that are not contained in the list at pages 8-9. It is also our view that the appropriate place to set out mandatory requirements is the *Petroleum (Onshore) Act 1991* or its Regulation, rather than in a separate document to be incorporated into a licence. This will provide greater clarity to landholders and the general public as to what they should expect of exploration activities.

4. There are further examples within the Code where the document should specify the sources of the obligations and requirements it discusses. This includes such matters as the banning of evaporation ponds and the use of BTEX chemicals.

In addition to the matters set out above, we propose some amendments to the requirements surrounding baseline studies. The Code states that the explorer 'should offer to document the status of existing water bores on the property and test the quality and quantity of shallow groundwater on the property before pilot production…'[17] In our view, this requirement should be mandatory and the Code should be expanded to require the explorer to document property value, air quality, ambient noise, water quality and soil condition. This documentation should be undertaken by independent assessors. The Code should state that explorers must advise landholders to engage independent assessors, and should urge explorers to pay the costs of such assessments. We understand that the effectiveness of this recommendation may be limited unless there are corresponding amendments to the legislation. Accordingly, we also strongly urge that the appropriate legislative amendments be made.

For further information please contact zsofia.korosy@edo.org.au or (02) 9262 6989.

Yours sincerely
Environmental Defender's Office (NSW) Ltd

Rachel Walmsley
Policy & Law Reform Director

[14] *Petroleum (Onshore) Act 1991* (NSW), s 69D. Items that must be included are provisions for the payment of legal costs, where requested by the landholder, and where an access arrangement is determined by an arbitrator, the amount of compensation to which the landholder is entitled.
[15] Code, pp 8-9.
[16] Code, p 10.
[17] Code, p 10.