ABN: 72 002 880 864

Environmental Defender's Office Ltd

5/263 Clarence Street
Sydney NSW 2000
Tel (61 2) 9262 6989
Fax: (61 2) 9264 2414

Office1 Level 1
71 Molesworth Street
PO Box 868
Lismore NSW 2480
Tel: 1300 369 791
Fax: (61 2) 6621 3355

email: edonsw@edo.org.au
web: www.nsw.edo.org.au

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Mr Steve Barry
Acting Director, Environmental Sustainability
Coal Seam Gas Working Group
PO Box 344
Hunter Region Mail Centre
NSW 2310
By email: coalseamgas.minres@industry.nsw.gov.au

Dear Mr Barry

Consultation on Mineral Resources' draft Environmental Impact Assessment Guidelines

The Environmental Defender's Office NSW (**EDO**) welcomes the opportunity for public comment on draft *Environmental Impact Assessment Guidelines – For prospecting, mining and petroleum production activities subject to Part 5 of the Environmental Planning and Assessment Act 1979* (NSW) (**the Guidelines**), issued by the NSW Department of Trade and Investment (**the Department**).[1]

The EDO is a community legal centre specialising in public interest environmental law. NSW mining law is a key area of focus through our policy and law reform, public education and litigation work. In recent months, the EDO has produced two publications that are particularly relevant to this area which may be of interest to the Department:

- Our June 2011 discussion paper, *Mining Law in NSW*, sets out the need for mining law reform across three areas – environmental assessment and planning, community participation, and compliance and enforcement.[2]
- A further issues paper called *Ticking the Box: Flaws in the Environmental Assessment of Coal Seam Gas Exploration Activities* (November 2011) illustrates a number of problems with reviews of environmental factors (**REFs**) to date.[3]

We note that the REF process generally applies to mining activities subject to environmental assessment under Part 5 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) – activities to which the proposed Guidelines will apply.

We provide specific comments on the Guidelines below and **attached**. Our general view is that the Guidelines, if followed, should improve the conduct of REFs. In particular we note some forward-thinking and welcome requirements for REFs, such as the consideration of ecologically sustainable development (**ESD**) (main Guidelines at 1.6); analysis of feasible alternatives (1.7); and detail on a range of specific environmental, cultural and cumulative

[1] See http://www.dpi.nsw.gov.au/minerals/community-information/coal-seam-gas/consultation, accessed November 2011.
[2] Available at http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf.
[3] Available at http://www.edo.org.au/edonsw/site/pdf/pubs/ticking_the_box.pdf.

impacts (4.1-4.8). The supplementary CSG assessment guidelines, where they apply, would also seem to improve the thoroughness of REFs.

Noting these potential improvements, the practical environmental consequences of improved REFs is not, in itself, entirely clear. In our view, a combination of three factors means that environmental impact assessment of exploration activities does not facilitate positive environmental and social outcomes. These factors are:

1) the existing legal framework in which REFs are conducted (which is geared towards rapid extraction rather than adequate assessment and avoidance of impacts), including the fact that REF procedures are not set out in legislation, making enforcement harder;
2) the limited avenues for early public participation in mining decisions (including at the exploration licensing stage; and the REF assessment stage, noting REFs are not made public until *after* the activity is approved[4]); and
3) structural and resource limitations on compliance monitoring and enforcement action.[5]

While more stringent guidelines may improve the quality of REFs, such guidelines will not by themselves address this broader range of legal and structural factors. We believe resolving these factors is fundamental to the improvement of environmental impact assessment for mining and CSG exploration in NSW.

Other key problems with the current regulatory framework for mining and CSG exploration include:

- potential lack of independence of REFs (conducted by or on behalf of proponents);[6]
- inaccurate or incomplete data, and lack of transparency or enforcement to correct it;[7]
- level of assessment of REFs by Government, and inadequate resourcing to do so;[8]
- potential and perceived conflict of interest for the Department in promoting, assessing and approving projects, as recently noted by the NSW Ombudsman.[9]

We would welcome the Government's commitment to resolve these issues, both in the context of the draft Guidelines where practicable, and through broader legal and regulatory reform.

A summary of our recommendations on the draft Guidelines follow, and our detailed comments are **attached**.

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[4] This lack of transparency contrasts with State Goals 31 ('Improving government transparency by increasing access to government information') and 32 ('Involve the community in decision making on government policy, services and projects'). See NSW Government, *NSW 2021: A plan to make NSW number one* (September 2011).
[5] See EDO, *Mining Law in NSW* discussion paper (June 2011), referenced above.
[6] For an example of this problem from Western Australia, see J. Mayman, "Miner 'demanded change to survey'", *Sydney Morning Herald*, 23 November 2011, at http://www.smh.com.au/national/miner-demanded-change-to-survey-20111122-1nszc.html.
[7] See EDO NSW, *Ticking the Box*… (November 2011), referenced above.
[8] Ibid.
[9] See NSW Ombudsman, Submission to NSW Parliamentary Inquiry into Coal Seam Gas (September 2011), at: http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/ad721dc3eb00c54eca25791b00115c73/$FILE/Submission%200436.pdf

Summary of recommendations on the draft Guidelines

- The content requirements in the REF Guidelines, and the legal framework more generally, should better mandate *avoiding and minimising* environmental impacts, rather than considering such impacts acceptable (or allowing offsets to be considered upfront).
- The Guidelines should require 'best practice' environmental assessment and protection.
- Clarify the type and proportion of CSG exploration to which the Guidelines would apply.
- The Guidelines should make increased commitments to monitoring, enforcement and reporting of the Department's actions regarding REFs and approval conditions.
- To deliver practical improvements,the Department and Guidelines should be clearer on:
    - the circumstances in which a mining exploration activity will be rejected;
    - when an EIS process will be ordered; and
    - how the Guidelines ensure robust conditions are placed on exploration activities.

  While the Guidelines require that impacts be quantified (eg medium/high adverse outcome), it is not clear how these quantified impacts affect the Department's decisions.
- Consistent with State Goals 31 and 32, public access to REFs should be made available via the Mineral Resources website *as soon as practicable after the proponent provides the REF to the Department*, not 'following approval of an activity'.
- The Guidelines should also include a mandatory process for public comment on REFs' accuracy, before the Government makes a decision on whether to approve the activity.
- To improve clarity and enforceability, the language used in the Guidelines needs to be directive, rather than suggestive as sometimes occurs (use 'must' instead of 'should').
- Outline measures for assessing the effectiveness of the Guidelines in improving environmental outcomes.
- A range of other brief suggestions/inclusions are outlined at the end of the document.

Broader recommendations for reform include:

- Resolving Industry and Investment's (the Department's) conflict of interest as the promoter, assessor and approver of mining and CSG activities.
- Placing more stringent and binding conditions at the earlier exploration licensing stage.
- Strengthening penalties for false, misleading or inaccurate information to boost compliance and industry self-regulation.

We hope these comments assist the Government to finalise the draft REF Guidelines and progress further reforms.

Yours sincerely
Environmental Defender's Office (NSW) Ltd

Mr Nari Sahukar
Acting Policy and Law Reform Director

EDO NSW submission on draft REF Guidelines – Attachment A: Specific comments and recommendations

Need for legal requirements to avoid and mitigate impacts, and protect the environment

As the introduction to the draft Guidelines notes, Reviews of Environmental Factors (**REFs**) have no specific legal basis. Rather, they are a tool employed in practice to assist the Department (as the determining authority) to comply with its duty to consider environmental impacts of activities under Part 5 of the EP&A Act (**Part 5**). In particular, section 111(1) requires the determining authority to "examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity."

Despite the obligation to 'take into account' matters affecting the environment, what is missing is specific legal obligations to avoid or minimise those effects or impacts. We note that under section 112 of the EP&A Act, a determining authority is not to carry out or approve an activity that is likely to significantly affect the environment (or threatened species etc) *unless* an environmental impact statement (**EIS**) has been prepared. A species impact assessment (**SIS**) and consultation or concurrence of the Office of Environment and Heritage (**OEH**) may also be required where a significant impact is likely.[10]

However, even if the s 112 threshold is met, it requires a certain procedure to be followed, rather than actually requiring protection of the threatened species or mitigation of the impact.[11] We note that the draft Guidelines state (*Introduction*, at D, p 3):

> *The REF must clearly demonstrate that the authorisation/title holder has sought to avoid and minimise adverse impacts on the natural environment and communities to the fullest extent practicable…*

While this would be welcome, the issues and questions under *Content requirements for a REF* (pp 6-37) don't sufficiently reflect this requirement. It is also not clear that the introductory comments are binding or mandatory, as distinct from the 'Content requirements' (referred to as mandatory on p 2). The Content requirements must give effect to the upfront commitment, requiring clear demonstration of harm avoidance/minimisation.

Application of the Guidelines

We understand that the Guidelines will regulate how REFs are conducted for many mining and (some) petroleum exploration activities that are permissible without development consent.[12] These activities, such as coal and gold exploration, are assessed under Part 5 of the EP&A Act. The Guidelines would therefore play a significant role wherever REFs are used. They should accordingly ensure 'best practice' environmental assessment and protection of environmental assets.

The type and proportion of *coal seam gas* (**CSG**) projects to which the Guidelines[13] would apply is understood to be limited. The supplementary CSG guidelines are said to apply to CSG activities under Part 5 of the EP&A Act that 'involve drilling, hydraulic fracturing and

[10] See, eg, EP&A Act 1979, Part 5, Division 3.

[11] See, eg, Farrier, David *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations? (1995)* 19(2) Harvard Environmental Law Review 303-408.

[12] See the activities listed in the SEPP (Mining, Petroleum and Extractive Industries) 2007 (clause 6).

[13] The draft Guidelines include a supplementary document, *Additional Part 5 REF requirements for petroleum prospecting*.

management of produced formation water…'.[14] However, we understand that CSG exploration activities will now largely be classified as State Significant Development (**SSD**) rather than Part 5 activities.[15] SSD attracts a separate environmental assessment process, including an environmental impact statement (**EIS**).[16] While the likely scope of their application could be clarified, if they are followed, the additional CSG guidelines appear to be a significant improvement on the depth of issues covered by prior REFs (see end comments).

Enforceability of the guidelines – what if they are not followed?

The Guidelines will be departmental 'guidelines' on the REF process which itself is not enshrined in law (unlike the EIS process, which does have legal procedures attached[17]). The lack of legal procedures and requirements for REFs or the Guidelines raises a key question – what happens if the Guidelines are not followed?

The draft Guidelines say that REFs "…must comply with the REF content requirements. Non-complying submissions *may* be rejected." However, it is not clear there are any legal consequences of non-compliance (as opposed to a breach of EIS requirements or licence conditions[18]), or opportunities for third party enforcement. In our experience, there are few options for a community to seek redress if an REF is inadequate, other than costly court proceedings. Levels of compliance and the Government's enforcement of the REF Guidelines will be a key indicator of the Guidelines' success.

The EDO suggests the Guidelines include commitments to increased enforcement, auditing and reporting of the Government's activities regarding REFs and exploration conditions.

More broadly we recommend:

- the Government resolve the Department's conflict of interest as promoter, assessor and decision-maker regarding mining and CSG activities – such as by using independent assessment panels, or elevating the role and resourcing for OEH in environmental assessment and approvals.
- strengthening penalties for inaccurate information beyond 'knowingly false or misleading'. Offences should apply to negligent or reckless material inaccuracies. In addition, the maximum penalty under the *Petroleum (Onshore) Act 1991* (200 penalty units) should be increased for consistency with the *Mining Act 1992* (500 penalty units).[19]

What is the practical effect if the Guidelines *are* followed?

One positive aspect of adopting detailed Guidelines is that complying REFs should *reveal more information* about environmental impacts of exploration activities before they can be approved. We are interested in the *practical effect* of having 'more information' available, particularly in terms of positive environmental outcomes. More information is not sufficient if it has no effect on what sort of projects are approved, or what conditions are placed on them.

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[14] Introduction to the supplementary guidelines, *Additional Part 5 REF requirements for petroleum prospecting*.
[15] As a result of the expanded range of petroleum projects captured as (**SSD**) under the *State Environmental Planning Policy (State and Regional Significant Development) 2011* (**SRSD SEPP**), Schedule 1, clause 6.
[16] As set out in the EP&A Act, Part 4, Div 4.1; and the EP&A Regulation 2000.
[17] See EP&A Act, Part 5, Division 2; other requirements are set out in the EP&A Regulation 2000.
[18] See *Petroleum (Onshore) Act 1991* (NSW), s 136A; *Mining Act 1992* (NSW), s 378D.
[19] See *Petroleum (Onshore) Act 1991* (NSW), s 135, compared with *Mining Act 1992* (NSW), s 378C. Higher maximum penalties can increase deterrence and compliance. We note clause 283 of the EP&A Regulation 2000 also sets out an offence for false or misleading statements, but does not specify a penalty.

i) Will more projects be required to undertake environmental impact statements?

Based on additional REF information, the Department may require more exploration activities to undergo an EIS/SIS process.[20] This is positive as it allows more in-depth consideration of impacts, legal procedures to follow, and greater opportunity for local input via public exhibition requirements (although we note there is no specific requirement to *avoid* environmental impacts). To some degree though, interpreting the threshold for requiring an EIS relies on departmental discretion, and the draft Guidelines say little about the Department's decision making processes or protocols.

ii) Will the Guidelines result in more stringent conditions on exploration activities?

We note that REFs occur after exploration licences are granted. Therefore the opportunity to place enforceable conditions on the exploration licence itself has passed.[21] The Draft guidelines (p 4) say "In most cases, the approval will be subject to conditions. … [T]hese conditions will usually require compliance with any commitments made in the REF." However, we are not aware of the legal basis of such conditions on Part 5 approvals, or if they can be enforced if breached (other than, perhaps, by injunction requiring a new REF).

Furthermore, there are no legal safeguards, or commitments in the Guidelines, to ensure that:

- conditions are placed on activities *by default* (such as avoiding environmental harm);
- conditions are rigorous enough (especially if REF data is questionable or 'commitments' are few); or
- compliance with conditions is sufficiently monitored or enforced.

The Department and the Guidelines need to provide stronger guarantees regarding enforceable conditions on Part 5 approval, avoidance of impacts, and follow-up audits as suggested above. On questions of enforceability, it should also be considered whether more conditions should placed upfront on exploration licences where practicable, rather than on activity approval.

iii) Will the public have greater opportunities to see and provide input on REFs?

According to the draft Guidelines, the answer is no. As now, the draft Guidelines state that REFs will not be revealed to the public until *after* the Part 5 activity has been approved.[22] Given the REFs are prepared by the proponent, there is understandable public concern that the information they contain is designed to achieve a positive outcome for the proponent.

Notwithstanding this, there is no opportunity for public scrutiny of the REF, which may reveal important inaccuracies or omissions, before the Government makes decisions. This is a major barrier to public transparency and participation in decision-making (see Goals 31 and 32 in the Government's State Plan, *NSW 2021*). We recommend that:

- public access to REFs be made available online as soon as practicable after the proponent provides the REF to the Department (not 'following approval of an activity'); and
- the Guidelines include a mandatory process for public comment on REFs' accuracy and comprehensiveness.

[20] See draft Guidelines, at F, 'REF or Environmental Impact Statement?'
[21] A breach of exploration licence is an offence. See *Petroleum (Onshore) Act 1991* (NSW), s 136A; *Mining Act 1992* (NSW), s 378D.
[22] The draft Guidelines state that "REFs are made publicly available on the Mineral Resources website for unrestricted public access following approval of an activity." (at (L), p 5)

iv) How will the practical effect of the Guidelines be measured?

As noted above, while the Guidelines may improve the conduct of REFs for mining and CSG exploration activities, their practical effect in terms of positive environmental protection remains unclear. The EDO would welcome information on how the Guidelines' effectiveness will be measured. This is particularly important given the inadequacy of current REF processes which these Guidelines propose to address.

As noted in the EDO issues paper, *Ticking the Box* (2011), to our knowledge, no EIS has been required for any CSG exploration licence application, even where exploration is occurring in sensitive environmental areas where threatened species exist (such as the Pilliga, Putty and Wollombi). Nor have any CSG exploration activities been delayed because the REFs have been found to be inadequate or inaccurate.[23]

We also therefore reiterate that the Guidelines should commit to increased enforcement, auditing and reporting of departmental actions regarding REFs and exploration conditions. For example, we would welcome published information on:

- the number and proportion of exploration activities refused, and referred for EIS, relative to the number of applications (before and after the Guidelines are adopted);
- the level of investigations and prosecutions, including for provision of false and misleading information in REFs;
- the proportion of exploration projects that will be audited for:
    - compliance with the Guidelines;
    - accuracy of information in REFs (whether knowingly or otherwise inaccurate);
    - operational compliance with REF claims and approval conditions.

Further brief comments and suggestions

- Other agency guidelines (D, p 2) – the reference that applicants 'must have regard to' any guidelines of other agencies whose approval is required, should say 'must comply with'.
- *Statement of objectives* (1.3, p 6) – some terms here could be clearer. What does 'meeting the required environmental standards' refer to? What does documenting 'any plans for future expansion' encompass? We would seek a broad interpretation relating to all stages of mining. A key problem with REFs to date is that they may focus on a small aspect of a much larger project, thereby avoiding the context of future and cumulative impacts.
- *Mitigation strategy* (1.5, pp 7-8) – this section needs stronger language. To ensure REFs are comprehensive, it should require mitigation measures for *all* environmental impacts not just *identified* ones. Suggestive language should be directive (*must* instead of *should*).
- Premature offsetting references (pp 7-8) – This section seems to allow for biodiversity offsetting at the REF stage (see also pp 3 and 36). We strongly believe the designation of offsets should not occur at this early stage, and requirements to *avoid* impacts should be emphasised. Proposing offsets in REFs may impair the proper assessment of an activity's impact on its own. The OEH *Threatened species assessment guidelines* note that in-depth assessment (such as an SIS) is often required to determine whether offsetting is suitable.[24]

[23] See EDO issues paper, *Ticking the Box…*, at http://www.edo.org.au/edonsw/site/pdf/pubs/ticking_the_box.pdf.
[24] See OEH, *Threatened species assessment guidelines* (2007), p 12: "In many cases where complex mitigating, ameliorative or compensatory measures are required, such as translocation, bush restoration or purchase of land, further assessment through the species impact statement [SIS] process is likely to be required."

- *Stakeholder consultation* (1.8, p 9) – While we welcome references to broad consultation, the draft Guidelines only require that 'consultation must be considered', and explanation when it is not. Further guidance on appropriate consultation should be provided.[25] Elsewhere, the Guidelines presuppose that the proponent will know the importance of sites to the community 'to the degree that consultation is deemed appropriate'(Community impacts, 4.3, p 28). However consultation may be required to *assess* the site's importance.
- Greenhouse gas emissions (4.1, pp 21-22) – We suggest some additional dot points here.[26]
    - First, REFs should be required to identify the potential for the activity to contribute to NSW, national and/or global greenhouse gas emissions.[27]
    - Second, references to minimising, identifying and quantifying 'waste generation' should clarify or add that this includes greenhouse gas emissions.
    - Third, noting the reference to 'approved guidelines, processes or policies' in determining impact level (p 22), the Department should as a priority clarify and document its policies on how greenhouse gas emissions are accounted for.
- *Biological impacts* (4.2, pp 23-27) – EDO welcomes the series of factors outlined here.
    - An additional subheading and notes on 'key threatening processes' should supplement the brief reference on p 27. REFs should have to note the extent to which the activities constitute or contribute to key threatening processes.[28]
    - 'Duration' should be added to the matters to consider in determining impact on fauna and ecological communities of conservation significance (pp 25-26).
    - There should be greater emphasis on applying 'conservation solutions' for environmental impacts, as there is for Aboriginal cultural heritage impacts (4.5, pp 30-32). As noted, in 4.1-4.2, the focus seems to be on *identifying* likely impacts rather than determining/applying conservation solutions to avoid harm.
- *Assessment of economic factors* (4.3, p 28) – This section should require the economic costs of environmental damage to be specifically considered.[29] Despite references to ESD, economic aspects of the environment aren't mentioned elsewhere in the Guidelines.
- Consultation with indigenous groups (4.5, p 33) – Under 'Further investigations and impact assessment', the Guidelines suggest 'involvement and participation of appropriate Aboriginal people will greatly assist… but is not mandatory at this point.' Noting the benefits, the Guidelines themselves could presumably mandate consultation at this point?
- *Historic cultural heritage impacts* (4.6, p 34) – These dot points note that REFs 'should' (sic) identify items listed in the State Heritage Register. We suggest that the Guidelines also require identification of items listed by local councils in Local Environmental Plans. Subsequent reference to 'the above registers' (plural) suggests this may be an oversight.
- *Cumulative impacts* (4.8, p 36) – The EDO welcomes the requirement to address cumulative impacts. This is a key deficiency of REFs and others assessments under the

[25] For example, see the resources of the International Association for Public Participation Australasia, at http://www.iap2.org.au/resources, accessed November 2011.
[26] Under *Does the activity involve the generation or disposal of gaseous, liquid or solid wastes or emissions?*
[27] See, eg, similar terms used in the supplementary CSG guidelines, p 5, *Venting, flaring and fugitive emissions*.
[28] See http://www.environment.nsw.gov.au/threatenedspecies/KeyThreateningProcessesByDoctype.htm.
[29] This would be consistent with the reference to principles of ecologically sustainable development (ESD), at section 1.6, which include 'that environmental factors should be included in the valuation of assets and services'.

EP&A Act. Further guidance could be given or referenced on how to do this effectively. Also, the reference to 'other projects' could more clearly include future/planned projects.

- In the Additional Guidelines for CSG (under *Description of the Activity*, 1.4), we suggest additional consideration of: environmental rehabilitation (under *Drilling*…); risk analysis, persistence and toxicity (under *Hydraulic fracturing* and *Chemical use and contaminants*); reference to the 'avoid, minimise and mitigate' hierarchy (under *Water management*); and quantity, composition, concentration and duration of fugitive emissions (uinder *Venting, flaring and fugitive emissions*).