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Denise Warren
Industry and Investment NSW
PO Box 344
Hunter Region Mail Centre NSW 2310

10th June 2010

Dear Ms Warren,

Proposed Mining Regulation 2010

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the proposed Mining Regulation 2010. The EDO is a community legal centre specialising in public interest environmental law.

The EDO made a submission to the *Mining Act 1992* review in 2005 where we commented on the environmental protection measures proposed at that time.[1] We were supportive of the following proposed amendments:

- Inserting an explicit object to promote the principles of ecologically sustainable development;
- Broadening the definition of 'environment' to include all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social grouping;
- Introducing a requirement to take into account environmental performance of title holders when considering applications;
- Introducing mandatory environmental protection conditions, including rehabilitation conditions;
- Introducing mandatory environmental reporting;
- Broadening of offence and penalty provisions; and
- Broadening the Minister's powers to give directions to rehabilitate land.

The *Mining Amendment Act 2008* incorporated the majority of these amendments. The current proposed Regulation operationalises many of these amendments which we support.

We provide brief comments on the following issues:

- Environmental performance record
- Rehabilitation and environmental management plans
- Penalty notices
- Continuing offences
- Derelict mine sites

[1] EDO NSW, *Submission on Discussion Paper – Proposals for Amendment to the Mining Act 1992,* September 2005. Found at: http://www.edo.org.au/edonsw/site/pdf/subs05/mining050907.pdf

1. Environmental performance record

Under section 238 of the *Mining Amendment Act 2008*, decision-makers must take into account the environmental performance of applicants (whether individuals or corporations) when considering whether to grant an authorisation under the *Mining Act 1992*. In our 2005 submission we proposed that 'environmental performance record' should include consideration of the performance of parent or sister companies operating in NSW, interstate and abroad.

Clause 4 of the proposed regulation includes a definition of 'environmental performance record' Under this definition the record will include:

- *any conviction by a person under environmental protection legislation or other relevant legislation in the 5 years immediately before the application is made:*
    - *if the person is a natural person – any convictions by a corporation of which the person was a director at the time of the offence leading to that conviction*
    - *if the person is a corporation—any convictions by each director of the corporation, any related corporation of the corporation and any other corporation of which a director was also a director at the time of the offence leading to that conviction; and*
- *details of any legislative approvals that have been revoked or suspended in the 5 years immediately before the application is made.*

The EDO strongly supports the requirement to consider the record of related corporations and other corporations which share similar directors. This definition would encompass parent or sister companies and subsidiary companies. Such a broad definition will ensure that the overall environmental record of individuals and corporate groups is considered, not individuals and corporations in isolation.

The EDO also supports the new requirements in the proposed regulations for all applications for an exploration licence, assessment lease or mining lease to include an environmental performance record.

2. Rehabilitation and environmental management plans

In the EDO's experience, the rehabilitation of mining areas is infrequent and cursory. One example is opal mining and prospecting. In opal mining areas there are often unrestricted 50 x 50 metre opal prospecting blocks that affect the natural and cultural values of the area. The cumulative environmental impacts of these blocks on the landscape are significant. However, rehabilitation rarely occurs, such as in the Lightning Ridge area where the EDO recently acted for landowners concerned about the impacts of opal mining. There are currently 7500 opal prospecting blocks in the Lightning Ridge area Mandatory rehabilitation of such areas is critical. The EDO therefore strongly supports the clauses in the draft Regulation prescribing the information that must be included within a rehabilitation and environmental management plan (REMP).

We support the requirement for an environmental assessment to be included in the REMP in accordance with gazetted guidelines under section 246F of the *Mining Act 1992*. However, the EDO submits that these guidelines must require all potential environmental impacts to be considered, and must require environmental impact statements where there is likely to be a significant impact on the environment or threatened species. Moreover, any such guidelines must be publicly exhibited, and comments sought, prior to gazettal.

3. Penalty notices

In our previous submission we strongly supported the increased enforcement and investigatory powers that were proposed in 2005 and introduced by the *Mining Amendment Act 2008*. We also supported a three tiered approach to better frame the offence provisions. This hierarchy of offences should be based on: Tier 1 – intentional offences, Tier 2 – strict liability offences where a defence of honest and reasonable mistaken of fact exists; and Tier 3 – absolute liability offences where penalty notices are appropriate. We therefore strongly support the introduction of Tier 3 offences in the legislation. The proposed regulation operationalises these provisions by prescribing the financial penalties for these offences in Schedule 11.

The rates proposed in Schedule 11 are broadly comparable to those in the *Protection of the Environment Operations (General) Regulation 2009* which we support. We recommend that the rates are continually reviewed to ensure that they are consistent with other environmental legislation.

4. Continuing offences

As we noted in our previous submission, the EDO strongly supports continuing offence provisions for titleholders and former titleholders. 'One off' penalties do not create a sufficient deterrent for large companies, which could easily factor a fine into an often substantial operating budget. We note that these provisions have not been included in the draft Regulation. However, the Regulatory Impact Statement foreshadows that such provisions will be included in future.[2] The EDO recommends that these provisions be incorporated into the regulation during this amendment process, rather than through future amendments. It is important that all proposed enforcement mechanisms are introduced contemporaneously.

5. Derelict mine sites

In our previous submission we supported the proposed amendments allowing the Minister to declare derelict mine sites where mines had been abandoned or were no longer used, and to allow the Minister to take steps to ensure that rehabilitation of derelict mine sites occurs. Section 242A was subsequently introduced by the *Mining Amendment Act 2008* giving the Minister this power. However, in declaring a derelict mine site, the Minister must take into account any matters prescribed by the regulations.[3]

We note that no such matters have been prescribed in the proposed regulation. The EDO submits that specific matters should be included to ensure that there are objective criteria that the Minister must taking into account in determining whether to make a derelict mine declaration.

For further information relating to this submission please contact Rachel Walmsley on (02) 9262 6989.

Yours sincerely,
Environmental Defender's Office (NSW) Ltd

Rachel Walmsley
Policy Director

[2] Industry and Investment NSW, May 2010, *Mining Regulation 2010 – Regulatory Impact Statement* at p12.
[3] Section 242A(3), *Mining Amendment Act 2008*.