



Submission to the Legislative Council inquiry into performance of the NSW Environment Protection Authority (EPA)

prepared by

EDO NSW

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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.

Submitted to:

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Introduction

As a community legal centre specialising in public interest environmental and planning law, EDO NSW welcomes the opportunity to provide input on the Legislative Council inquiry (**the Inquiry**) into the performance of the Environment Protection Authority (**EPA**).¹

We note the Inquiry's terms of reference relate to:

- a) EPA's performance against its objectives under the *Protection of the Environment Administration Act 1991* (NSW) (POEA Act)
- b) Specific cases or incidents relating to:
 1. land contamination (Botany and Hillsdale),
 2. coal dust (Hunter Valley),
 3. coal seam gas (CSG) (the Pilliga Forest),
 4. land pollution (Girraween),
 5. pollution from cruise ships (White Bay, Balmain) and
 6. forestry (Royal Camp State Forest, Northern Rivers), and
- c) Any other related matters.

EDO NSW sees the Inquiry as an opportunity to examine:

- the EPA's effectiveness (including strengths and weaknesses),
- the adequacy and use of its powers,
- the scope and limits of its regulatory role,
- its relationship to industry, the community and other regulators, and
- ultimately, opportunities to strengthen and improve EPA's governance, effectiveness and public confidence in protecting the NSW environment and its people.

EDO NSW has a history of constructively engaging with the NSW EPA. We have made numerous law reform submissions (on specific issues and general compliance and enforcement policy), participated in consultation processes on various programs and policies (such as licensing reviews, load-based licensing and contaminate lands), and engaged on behalf of community clients in relation to specific projects and pollution incidents. Many callers on our community advice line are referred to us by the EPA.

In the wake of the Orica Kooragang Island incidents of 2011, and the subsequent Legislative Council inquiry,² EDO NSW prepared a report for the Nature Conservation Council of NSW (**NCC**) – *Clearing the Air: Opportunities for improved regulation of pollution in NSW* (2012).³ That report provides extensive analysis that is relevant to the EPA's role and objectives.

Clearing the Air made 33 reform recommendations across five key areas: the overarching regulatory framework (recommendations 1-2); strategic planning and cumulative impacts (3-6); pollution management and licensing (7-17); community engagement (18-24) and compliance and enforcement (25-33). These recommendations, and a June 2012 EPA response, are tabled at **Attachment A**.

The report proposed improvements to pollution management in NSW that would:

- place duties on regulators and polluters to minimise and prevent pollution;

¹ Inquiry details available at http://parliament.nsw.gov.au/prod/parlament/committee.nsf/0/743BDB8875807D85CA257CFC002142D1?open&reftnavid=CO3_1, accessed August 2014.

² See EDO NSW *Submission to Inquiry into the Kooragang Island Orica chemical leak* (Nov. 2011) - **Download PDF**.

³ Available at www.edonsw.org.au/pollution_policy, 'Discussion Papers'.

- set pollution management on a more objective and holistic foundation;
- strengthen the EPA's role in strategic planning and decision-making;
- strengthen pollution licencing and transparency of information;
- broaden use of existing tools to minimise pollution and drive continual improvement;
- strengthen community engagement in pollution management decisions; and
- enhance the EPA's role as an independent regulator.

The bulk of these recommendations remain relevant, even though the EPA provided a preliminary response to the *Clearing the Air* report, and is making progress in some key areas. For example, since 2011-12 there have been improvements to the public register of pollution licences and publication of monitoring data. The EPA has also had recent success in prosecuting Orica for breaches at its Kooragang Island and Botany plants. However, recent community and EPA stakeholder survey results still indicate issues with community engagement, responsiveness, and perceptions about regulatory independence.

Importantly, this report (and relevant law reform submissions), draw on EDO NSW's experience in advising on environmental laws and bringing public interest cases in the NSW Land and Environment Court on behalf of local communities. In some of these cases, civil proceedings were necessary because the EPA refused to take legal action. This includes a case of pollution of the Cocks River (Blue Mountains) by state-owned Delta Electricity (Wallerawang power station).⁴ In the area of forestry breaches, civil enforcement is not an option. This absence of public rights to bring proceedings increases reliance on the EPA to prosecute and deter breaches effectively.

Finally, it is worth the Inquiry reflecting on the promise of 'wide ranging reforms to control pollution' under POEO Bill 1996. As a parliamentary research report concluded at the time, commentators identified 'many positive aspects... as well as several "disappointments":

*The positive aspects include the commitment to ecologically sustainable development principles, protection of the environment policies [PEPs], new sentencing options and the general simplification of the pollution laws. Some of the disappointments include the lack of enforceability of PEPs, lack of public participation in the licensing process and the role of local government. However, it is apparent that the introduction of reforms will lead to a greatly enhanced ability for the EPA to protect our environment.*⁵

After nearly two decades of operation, we submit that 'positive aspects' such as ESD commitments and PEPs could have been better implemented, while several 'disappointments' noted above remain drawbacks today.

This submission notes some of the strengths of the current regulatory scheme – for example, some of the regulatory tools that the EPA has available to it under current legislation. However, we also identify areas in need of reform, as illustrated by case studies and our experience in assisting local communities who deal with the EPA.

This submission examines **4 key areas for an effective regulator** and makes recommendations relating to:

- 1. The use of regulatory tools**
- 2. Community awareness, involvement and access to information**
- 3. Compliance monitoring and enforcement**
- 4. The regulatory context, resourcing and government priorities**

⁴ *Blue Mountains Conservation Society v Delta Electricity* (2011) www.edonsw.org.au/pollution_cases; see also *Macarthur Bushwalking & Cycling Club v Endeavour Coal & Illawarra Coal Holdings* (2012).

⁵ Smith, S., 'Proposed New Pollution Control Legislation in NSW: Background and Commentary' (March 1997), NSW Parliamentary Library Research Service, Briefing Paper no. 5/97.

Overarching recommendation:

The Inquiry should consider the recommendations of the 2012 report from EDO NSW/ NCC NSW on the EPA and general pollution regulation, Clearing the Air; and further recommendations in this submission. The Committee should make recommendations to amend EPA legislation and policy to give effect to these proposals.

Objectives and performance of the EPA

The Inquiry is to consider the EPA's performance against the objectives of the Authority under the POEA Act (section 6).

Primary objectives

The EPA's two primary objects are:

- (a) to protect, restore and enhance the quality of the environment in NSW, having regard to the need to maintain ecologically sustainable development, and
 - (b) to reduce the risks to human health and prevent the degradation of the environment
- ...

The EPA's objectives in section 6 are complemented by the broader objects of the POEA Act itself: to set up the EPA; integrate the administration of environment protection (replacing five previous pollution laws);⁶ and to require the EPA to 'perform particular tasks' relating to 'the quality of the environment, environmental audit and reports on the state of the environment.' The POEA Act objects are further reinforced in the *POEO Act 1997*, which also emphasises public involvement in environmental decision-making and access to meaningful information.

The EPA's legislative object establishes the concept of *ecologically sustainable development (ESD)*⁷ as a key reference point for *improving the quality* of the NSW environment.⁸ According to the POEA Act, ESD 'requires the effective integration of economic and environmental considerations in decision-making processes.' Further, ESD can be achieved by implementing a number of 'principles and programs'.⁹

The POEA defined ESD for the first time in NSW legislation. ESD has gone on to be adopted in over 50 NSW statutes on pollution, planning, environmental protection and local

⁶ See also *POEO Act 1997*, s 3(e)-(f).

⁷ ESD can be traced to the report of the World Commission on Environment and Development (1987), principles of the *Rio Declaration on the Environment* (1992) and has been given domestic effect through Australia's Intergovernmental Agreement on the Environment (1992), and more recently in national law via the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁸ The *environment* is broadly defined to include land, air, water, atmosphere, organisms, built and natural environment etc (POEA Act 1991, Dictionary).

⁹ See EPA objectives *POEO Act 1997* sections 6(1)(a) and 6(2) for the meaning of ESD. Principles include:

- **the precautionary principle** – take precautionary measures where there is scientific uncertainty but also significant risk of harm,
- **inter-generational equity** – maintain or enhance environmental health and diversity,
- **conservation of biodiversity and ecological integrity** – as a fundamental consideration in decision-making,
- **improved environmental valuation, pricing and incentive mechanisms** – so that 'the polluter pays' for environmental damage, prices reflect full product lifecycles/environmental costs, and there are incentives to innovate and achieve environmental goals efficiently).

government, backed by government policy and case law.¹⁰ Nevertheless, application and implementation of ESD has been ad hoc, limited and sometimes tokenistic.

Part of the reason is that, while NSW pollution laws (and others) may refer to ESD in their objects, there are very few legal obligations for the EPA and other appropriate regulatory authorities (**ARAs**¹¹) to consider ESD principles or the Act's objectives in day-to-day decision-making. The rare specific requirements to consider ESD principles relate to:

- decisions relating to economic measures, emissions trading and 'green offsets'¹²
- decisions to vary conditions on certain licences under the Clean Air Regulation¹³
- an aim of the 'load-based licensing' scheme is to provide incentives to reduce the load of pollutants emitted based on the *polluter pays* principle.¹⁴

EPA obligations and commitments to achieve its aims by implementing ESD should be more clearly demonstrated, and linked to a long-term vision of a healthy society and environment. For example, the EPA Strategic Plan 2013-2016 does not refer to ESD whereas the DECC Corporate Plan 2008 – 2012 identified ESD as a long-term specific goal.

Recommendation:

- *Amend the POEO Act to operationalise the ESD objective. This means relevant provisions must require consideration and application of ESD and its principles in a wider variety of day to day decision-making, and require the EPA to demonstrate how ESD has been applied in decisions and strategic priorities, including in the strategic plan.*

The performance of the EPA in relation to its objectives is discussed below in relation to a number of case studies and current legislative and regulatory requirements and processes. We make a number of recommendations as to how the EPA could more effectively meet its objectives in 4 key areas.

¹⁰See for example, *Protection of the Environment Operations Act 1997*; *Environmental Planning and Assessment Act 1979*; *Threatened Species Conservation Act 1995*; *Native Vegetation Act 2003*; *National Parks and Wildlife Act 1974*; *Local Government Act 1993*. In other jurisdictions see, for example, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 3-3A; *Sustainable Planning Act 2009* (Qld), s 5. See also P Stein, 'Are decision-makers too cautious with the precautionary principle?' (2000) 17 *EPLJ* 3. See further, *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133.

¹¹ ARAs are established under the 'one site, one regulator' rule (EPA, local council or another agency)

¹² s.294A inserted 2000, amended 2005. Economic measures include emissions trading/green offsets

¹³ *Protection of the Environment Operations (Clean Air) Regulation 2010*, cl 37(1)(d).

¹⁴ *Protection of the Environment Operations (General) Regulation 2009 (POEO Regulation)*, cl 13(a).

Four key areas for an effective regulator

For the EPA to be an effective regulator, and make progress towards these important and substantial aims, there are a number of aspects that can be assessed. These include:

- i) **effective use of regulatory tools** (whether new or existing)
- ii) **community engagement** (including involvement in decisions, access to information)
- iii) **compliance and enforcement** (deterrence and punishment)
- iv) **broader regulatory context, resourcing and government priorities**

We explore these areas below.

i) Use of EPA regulatory tools

The EPA has a number of discretionary tools to support the broad aims of environmental protecting and improvement, and reducing health and environmental impacts. These include strong enforcement powers, as well as education, advisory, standard-setting and community consultative roles. For example, the EPA's legal object (b) sets out 10 suggested means to reduce health risks and environmental degradation. These can be grouped into 4 key areas:

- i) promoting pollution prevention, and reducing discharges 'to harmless levels'
- ii) waste minimisation, regulation and recycling
- iii) adopting 'minimum environmental standards' and 'setting mandatory targets' for improvement
- iv) community awareness, involvement in decisions and access to pollution information.

While these powers and responsibilities provide useful and important guidance to the EPA, they are expressed in general terms. The EPA is not bound by law to exercise them in any particular way. The lack of any specific or enforceable duties on the EPA to undertake these functions makes it more difficult to ensure that functions are fulfilled and aims are achieved.

Establishing EPA duties to regulate & corporate duties to minimise pollution

Pollution laws in other jurisdictions in Australia and overseas do prescribe specific duties – either for the EPA itself or licensed polluters. We give some examples below.

First, the US *Clean Air Act* requires the US EPA to publish and revise a list of pollutants; prescribe air quality criteria for those pollutants; and set two types of ambient air quality standards where criteria have been issued. 'Primary standards' are to protect *public health*. 'Secondary standards' are to protect *public welfare* – including environmental and property damage.¹⁵ Notably, these standards are not dissimilar to NSW EPA objects to safeguard health and prevent environmental degradation. Although the POEO Act objects also refer to adopting standards and setting targets, a key difference is that the NSW EPA is not obligated to do so.

The US EPA is further required to list the major *sources* of almost 200 dangerous pollutants identified by Congress, and regulate emissions by reference to the cleanest existing facilities. New and existing plants must then do what is necessary to meet those standards. Again, this broadly aligns with POEO Act objects to build-in pollution prevention and to reduce discharges to 'harmless levels'. However, the US approach means that facilities are regulated and expected to adopt cleaner technology, and the EPA can be held to account.¹⁶

¹⁵ See EDO NSW/NCC NSW, *Clearing the Air* report (2012), p 13. See further *Clean Air Act*, 42 USC ss 7401-7671; sections 7408-09.

¹⁶ See *Clearing the Air* report (2012), p 14; see also *Massachusetts v EPA* 549 US 1 (2007).

In considering costs and benefits of this approach, research from Columbia University found:

costs of \$9 billion in forgone earnings of labor in newly regulated plants under the Clean Air Act Amendments for the six years after the change in policy. While this is doubtless significant, the health benefits from this regulation are estimated at between \$160 billion (\$160 thousand million) and \$1.6 trillion (\$1 thousand six hundred billion), several orders of magnitude higher.¹⁷

Second, EDO NSW has suggested that duties on the NSW EPA should be supported by duties on polluters to minimise pollution. Laws in many Australian jurisdictions such as Queensland, South Australia, Tasmania, the ACT and NT make it unlawful to carry out any activity likely to cause environmental harm, unless all *reasonable and practicable measures* are taken to prevent or minimise the harm.¹⁸ Some jurisdictions also adopt an offence for causing environmental nuisance, including environmental harm through pollution or contamination.¹⁹

To address these issues and improve the overarching pollution regulation framework, the EDO/NCC *Clearing the Air* report (2012) made two recommendations, reiterated here:

Recommendations

- *The EPA's responsibilities for regulating air, water and land pollution should be specified in the legislation as enforceable duties. These duties should require that the EPA sets and reviews lists of pollutants and emissions standards, and impose best practice standards on all licenced facilities.*
- *Legislation should impose a general duty on all facility operators to prevent or minimise environmental harm arising from their activities.*

More effective use of existing regulatory tools

The POEO Act provides for numerous planning and licencing mechanisms that can be used to improve environmental protection. These mechanisms include: annual returns; protection of the environment policies (**PEPs**); load based licencing (**LBL**) fees; market-based mechanisms (including financial assurances, bubble licencing and cap and trade systems); pollution reduction plans (**PRPs**); and load reduction agreements. We make brief observations below with reference to the *Clearing the Air* report.

Licensing should take better account of the receiving environment's capacity

Under the POEO Act, the EPA has the power to issue *environment protection licences (pollution licences)*.²⁰ These licences are required for activities listed in Schedule 1 of the POEO Act. The EPA is required to consider a number of important factors in determining whether or not to grant a licence.²¹

A key criticism of the current system is that it is primarily administrative in nature.²² There are currently no overarching standards that define 'acceptable' levels of pollution, with no set

¹⁷ W. Reed Walker, 'The transitional costs of sectoral reallocation: evidence from the Clean Air Act and the workforce' (2011), cited in P. Sukhdev, Corporation 2020, p 107.

¹⁸ See for example, *Environmental Protection Act 1994* (Qld), ss 440, 443; *Environmental Protection Act 1993* (SA), s 82 and s 3. See further G. Bates, *Environmental Law in Australia*, p 616.

¹⁹ See *Environmental Protection Act 1994* (Qld), s 15; *Environmental Protection Act 1993* (SA), s 3.

²⁰ POEO Act ch 3.

²¹ POEO Act s 45.

²² I.A. Wright, S. Wright, et al. 'Environmental protection and management: A water pollution case study within the Greater Blue Mountains World Heritage Area, Australia' (2011) 28 *Land Use Policy* 353-360.

standards under which these matters must be considered and no consideration of the long term impact of pollution. This makes the decision to grant a licence highly discretionary.

Adequate environmental pollution management in NSW requires a significant shift in emphasis. The EPA must establish objective, scientifically based levels of acceptable pollution based on the receiving environment's ability to accept that pollution. In addition, Schedule 1 to the POEO Act should be revised to ensure it requires all relevant activities to be licensed. (Community participation in licensing decisions and reviews is discussed below.)

'Protection of the Environment Policies' could prevent pollution and reduce discharges

The POEO Act allows for the development of PEPs to manage cumulative impacts on the environment of existing and future human activities.²³ Enlivening this tool may assist the EPA to further its objectives to 'promote pollution prevention' and reduce discharges to 'harmless levels'.

Unfortunately, no PEPs have yet been developed, despite the fact they provide an opportunity for EPA to set environmental standards at a state, catchment or airshed level, that must be considered by a consent authority when making a decision under the Planning Act.²⁴ PEPs may be developed in respect of the entire state, or segments of the environment, and must specify an environmental goal, standard, protocol or guideline.²⁵

Other states have demonstrated the role of pollution policies in setting pollution standards and establishing a mechanism for managing cumulative pollution impacts. In Victoria, the EPA has gazetted State Environment Protection Policies for air, water, groundwater, land and noise pollution.²⁶ The State Environment Protection Policies specify quantitative limits for pollution.²⁷ All Victorian pollution licences must comply with relevant State Environment Protection Policies. Queensland uses similar tools under its *Environment Protection Act 1994*.

Other existing tools for pollution reduction

The *Clearing the Air* report (pp 20-21) provided options for improved use of other existing tools to provide a stronger focus on adequately pricing polluting activities so that the long term cost of managing pollution does not fall on the community, as is often the case with existing polluted sites.²⁸ It is important that pollution law in NSW reflects the changing attitude of society, including the social licence to operate.²⁹ There are a number of perceived failures of government to adequately regulate pollution, enforce consent conditions,³⁰ or

²³ POEO Act s 10.

²⁴ POEO Act s29.

²⁵ POEO Act s11.

²⁶ State environment protection policies (SEPPs), www.epa.vic.gov.au/about_us/legislation/sepps.asp

²⁷ For example, the Victorian SEPP – Ambient Air Quality, adopting the standards recommended by the NEPC/EPHC sets out state goals for all Victorian ambient air, to achieve protection of 'beneficial uses including human health and well-being; life, health and well-being of other forms of life including animals and vegetation'. In addition to ambient air standards, the SEPP (Air Quality Management) specifies design criteria and intervention levels for indicator substances in an air-shed, as well as emission limits for stationary sources for up to 19 substances. Although not perfect, the Victorian model demonstrates the need for both point source and ambient (or receiving environment) concentration limits.

²⁸ See also the recent Auditor-General's audit of contaminated land management (July 2014).

²⁹ The report of the United Nations Secretary-General's high-level panel on global sustainability (2012). *Resilient People, Resilient Planet – A Future Worth Choosing*, Overview. NY: United Nations.

³⁰ A.L. Morrison, 'An assessment of the effectiveness of lead pollution reduction strategies in North Lake Macquarie, NSW, Australia' (2003) 303 *The Science of the Total Environment* 125-138.

provide incentives for innovators to develop cleaner technologies.³¹ Stronger use should be made of available pollution reduction mechanisms, including to manage cumulative impacts and embed continual improvement. We note four examples below.³²

First, *Load Based Licensing (LBL)* fees are intended to cover the cost of the potential impact of assessable pollutants on the environment,³³ by encouraging polluters to reduce their pollution loads. Areas where LBL reform is necessary are:

- The schedule used to calculate fees is too low, and is not a sufficient incentive;
- The LBL system covers an inadequate range of pollutants, especially compared with the National Pollutant Inventory;
- Greenhouse gases are not regulated as pollutants (a long-standing issue);
- The fees generated from the LBL system could be better used to advance environment protection goals.

Second, the POEO Act provides for *financial assurances* to be imposed as a condition of pollution licences. The aim is to guarantee that the licence holder will fund the works or programs required under a licence.³⁴ Financial assurances provide certainty to the community that a polluting facility will be appropriately managed or, if not, that resources will be available to rectify any environmental damage caused by the facility. More regular use of financial assurances will help to ensure that facilities do not leave a legacy of contamination, and will reduce the risk that facilities will allow breaches of their licence conditions to occur.

Third, the EPA has the power to administer a pollution licence that aggregates the emissions from multiple facilities.³⁵ Where multiple polluters discharge to the same water body, a *'bubble licence'* (or cap and trade scheme) would ensure ambient water quality is protected.³⁶ Bubble licences provide the EPA with an opportunity to drive industry to develop innovative and cost-effective ways to reduce pollution.³⁷

Fourth, the EPA has the power to order licenced facilities to implement *Pollution Reduction Programs (PRPs)* to prevent, control, abate or mitigate pollution.³⁸ PRPs are a potentially powerful but under-utilised tool for reducing pollution. In some cases they have been used inappropriately as a substitute for enforcement action in response to repeated breaches. PRPs are therefore often seen by the community as a weak approach to compliance. A better approach to ensure continuous improvement in pollution control may be to impose PRPs as a *standard licence condition* at the time of licence approval (and for existing facilities, progressively introduce PRPs at the five-yearly licence review).

Recommendations:

The EPA should utilise the strong regulatory tools available to it, and implement:

- *Protection of the Environment Policies, so that all regulatory agencies are required to ensure ambient environmental conditions are met;*

³¹ J.M. Montero, 'A note on environmental policy and innovation when governments cannot commit' (2011) 33 *Energy Economics* 513-519.

³² Further detail in the *Clearing the Air* report, pp 20-21.

³³ DECCW (2008). Regulatory Impact Statement. POEO (General) Regulation.

³⁴ POEO Act s 296.

³⁵ Protection of the Environment Operations (General) Regulation 2009, r.23.

³⁶ We understand the EPA has created one such licence, a bubble licencing scheme in the South Creek area of the Hawkesbury-Nepean River NSW Office of Environment and Heritage, South Creek Bubble Licencing Scheme.

³⁷ Guidance is available to the EPA in setting ambient environmental limits. For pollution to water, the ANZECC and AMRCANZ water quality guidelines provide recommendations for developing concentration limits that will protect the various uses of fresh and marine water. For air pollution, the Environment and Heritage Protection Council (former National Environment Protection Council) has set uniform standards for ambient air quality.

³⁸ POEO Act s 68.

- *Financial assurances to ensure that polluters remain financial responsible for minimising pollution and repairing associated environmental degradation;*
- *Capping and allocating the amounts of pollutants that can be emitted into a particular zone, based on the capacity of the receiving environment to maintain its environmental values (bubble licenses); and*
- *Pollution Reduction Programs should be imposed as a standard, mandatory licence condition. These should require industry to conform to continuous improvement of technology to reduce pollution. Their effectiveness should be audited and assessed at the 5-yearly licence review*

The Committee should consider other recommendations to improve pollution management and licensing contained in the EDO NSW/NCC Clearing the Air report (2012), recommendations 7-17:

- *Pollution licensing should be based on objective standards considering the receiving environment.*
- *Legislation should state that, unless expressly authorised, any pollution discharge is unlawful.*
- *The EPA should utilise the strong regulatory tools available to it*
- *The EPA should cease to rely on Pollution Reduction Programs to enforce compliance*
- *Revise Schedule 1 to the POEO Act to ensure it includes a current list of all significant pollution*
- *Load based licensing should be extended to include a more comprehensive list of pollutants.*
- *The EPA should be empowered to immediately suspend pollution licences where necessary.*
- *Revise the pollution licences in a number of ways to drive compliance and continual improvement*
- *Increase the detail, explanation and comparative data reported in facility operators annual returns.*
- *Five-yearly review of pollution licences should include commitment to Best Available Technology.*
- *End of project licence revocation should occur based on independent assurance that pollution has ceased.*

ii) Community awareness, involvement & access to information

Community engagement is one of the most important areas for improved EPA performance. It is also an area emphasised in the objects of the EPA³⁹ and the POEO Act 1997.⁴⁰ Public engagement allows two-way feedback on local pollution problems, enables community enforcement action where necessary, and is important aspect of public trust in the EPA. The Government strongly backed the importance of community engagement during the 2011 reforms, and transparency and accountability are reinforced in State Plan goals 30-32.

Key issues that undermine EPA efforts to achieve these aims include:

- the lack of formal opportunities to participate in licensing decisions and reviews;
- the removal of community representation from the EPA Board;
- community perceptions about lack of independence; and
- useful but limited access to pollution information.

We briefly explore each of these issues in turn. This is followed by analysis of a community and EPA stakeholder survey conducted in 2013.

³⁹ POEA Act 1991, s. 6(2)(b) lists specific ways the EPA can protect public health and the environment, including:

- *promoting community involvement in decisions about environmental matters,*
- *ensuring the community has access to relevant information about hazardous substances arising from, or stored, used or sold by, any industry or public authority,*
- *conducting public education and awareness programs about environmental matters*

⁴⁰ POEO Act, s. 3:

(b) *to provide increased opportunities for public involvement and participation in environment protection,*
(c) *to ensure that the community has access to relevant and meaningful information about pollution,*
(d)(v) *the monitoring and reporting of environmental quality on a regular basis,*

EPA stakeholder and community survey 2013

In 2013 the EPA commissioned Ipsos to survey stakeholder and community perceptions of the EPA's role, relationships and performance.⁴¹ EDO NSW welcomes this decision, along with the EPA's commitment to a second stakeholder survey in 2015.⁴² While the survey focused on communication and perception rather than environmental effectiveness or governance, the results do provide useful context for this Inquiry.⁴³

Seven key themes emerged from the Ipsos report:

- *The EPA is viewed through multiple lenses (regulator, enforcer, partner, adviser)*
- *Be more timely and responsive*
- *The EPA needs to balance competing priorities*
- *Transparency and feedback build trust*
- *Perceptions about independence from industry are important*
- *Does the EPA have enough of the right people? (resources and expertise)*
- *"We need more meaningful consultation" (genuine, proactive, balanced, responsive).*

EDO NSW's experience, client feedback, and calls from the public all support these themes.

Based on these themes, Ipsos made eight recommendations to the EPA (emphasis added):

1. *Clearly communicate the EPA's role to stakeholders*
2. *Be as transparent as possible in all transactions and communications with stakeholders*
3. *Timeliness – ensure that the EPA understands and manages stakeholder expectations around prompt responses to submissions and enquiries*
4. *Responsiveness – ensure that the EPA understands and manages stakeholder expectations around responsiveness to submissions and enquiries*
5. *Demonstrate how the EPA balances competing stakeholder priorities and evidence in the regulation and compliance process*
6. *Communicate the EPA's approach to compliance*
7. *Communicate how the EPA ensures appropriate levels of staffing and access to expertise*
8. *Ensure consultation with stakeholders is meaningful.*

Some further key findings of the survey include:

- In the general population survey, 53% 'knew nothing about the EPA', 8% said they had detailed knowledge, and only 2% said they knew of the EPA via direct contact.
- Only 17% out of 22 community and environmental stakeholders saw the EPA's management of specific issues in a positive light.⁴⁴
- There was a general perception that environmental impacts of CSG were poorly managed. Only 16% in the general population survey said management is fairly/ very good.⁴⁵
- Respondents with knowledge of the EPA were more likely to rate the management of environmental issues in NSW as poor than those who had no knowledge.⁴⁶

⁴¹ Ipsos Social Research Institute, *NSW EPA Stakeholder Survey* (October 2013) at epa.nsw.gov.au.

⁴² *EPA response to the stakeholder survey* (December 2013), at epa.nsw.gov.au.

⁴³ Ipsos surveyed 386 NSW residents; 130 industry, government, community and environment stakeholders (community/environment = 22 respondents); conducted 45 interviews and 4 mini-groups.

⁴⁴ Ipsos SRI, *NSW EPA Stakeholder Survey* (2013), 4.

⁴⁵ Ipsos SRI, *NSW EPA Stakeholder Survey* (2013), p 5.

⁴⁶ Ipsos SRI, *NSW EPA Stakeholder Survey* (2013), p 5.

The EPA's response notes that the survey is 'an important first step' to improving and prioritising environmental management practices and stakeholder engagement activities.⁴⁷ While the response does not specifically accept all the Ipsos recommendations, it does set out relevant and specific EPA initiatives. These include website updates and improvements, customer service training, a 'subject matter expert program', making EPA policies more visible (compliance policy, risk licensing tool, new Stakeholder Engagement Guidelines), and improving channels for the public to report environmental incidents (phone, web, mobile).⁴⁸

EDO NSW supports these approaches to improving engagement, visibility and public trust. It is important that these initiatives are supported by regulatory and governance changes, including those proposed in this submission and the EDO/NCC *Clearing the Air* report.

Community involvement in pollution decisions

Genuine participation in pollution regulation requires a formal process for public notification and consultation on licensing decisions, together with measures aimed at assisting community members to engage in an informed and meaningful manner in these and related processes (including policy changes⁴⁹). This is not currently reflected in the POEO Act.

The main opportunity for community members to comment on new polluting facilities is the development consent process (under planning laws, rather than pollution licensing laws). Unlike the development consent process, the POEO Act does not require the EPA to invite public submissions on licensing decisions, or to notify neighbours of a new licence application.⁵⁰ However, the EPA is required to take any submissions it does receive into consideration when exercising its licensing functions.⁵¹

Once a facility is up and running, the EPA is required to review pollution licences every five years, and must give public notice of such reviews in a newspaper.⁵² The EPA states that it welcomes submissions from the public at any time on licence review applications. However, again the legislation does not provide a formal requirement to invite or receive these submissions. The EPA is also required to audit (on an industry-wide or regional basis) compliance with pollution licence requirements, and whether these requirements reflect best practice.⁵³

The EPA also has powers to vary licences. The EPA need only invite public submissions if it intends to vary a licence in a manner that will *significantly increase* the impact of the activity on the environment (and the variation has not been subject to environmental assessment and public comment under planning laws).⁵⁴

This limited approach to community consultation is inconsistent with the government's commitment to a more open and inclusive system of pollution control. To enhance community participation in licensing decisions, the POEO Act should provide more formal opportunities for input on licensing decisions (especially five-yearly reviews). The 'significant increase' threshold for inviting consultation on licence variations should be removed.⁵⁵ The

⁴⁷ EPA response to the stakeholder survey (December 2013), p 1, at epa.nsw.gov.au.

⁴⁸ EPA response to the stakeholder survey (December 2013), p 4, at epa.nsw.gov.au.

⁴⁹ Policy changes may be skewed where consultation is dominated by industry submitters and views.

⁵⁰ This is important because the list of factors the EPA is required to consider in approving a licence application (POEO Act s 45) will differ from the factors a consent authority considers in approving a development application (DA). Submissions to the DA process might not deal with licensing issues.

⁵¹ POEO Act s 45(l).

⁴⁵ POEO Act, s 78.

⁵³ POEO Act 78(4A).

⁵⁴ POEO Act s 58(6).

⁵⁵ This could be replaced with requirements to consult unless a variation will *improve* the environment.

EPA should also consider reviewing licences in industry clusters. This would facilitate meaningful public participation and maximise the efficiency of licence reviews for all parties.

EPA Board membership

The 2011 amendments to the EPA's structure removed community representatives from the EPA Board. This further limited community involvement in pollution management at a time when public confidence was already at a low point. The change contradicted the O'Reilly Report's post-Orica recommendation that EPA Board membership include representatives from community interests.⁵⁶ It was also inconsistent with the Government's pledge to accept all of the O'Reilly Report's recommendations.

A sense of community disengagement is reflected in the Ipsos EPA stakeholder survey (2013). Larger stakeholders with close relationships and frequent contact with the EPA (such as industry bodies and government stakeholders) stated that the EPA does a good job of listening to (if not always implementing) their feedback.⁵⁷ By contrast, community and environmental stakeholders often felt their perspectives were not heard by the EPA, and their concerns not given the weight they deserve.⁵⁸ Taken together, 69% of stakeholders were satisfied with the EPA's communication methods.⁵⁹ However, participants generally wanted more proactive and meaningful engagement. They defined this as genuinely consultative, balanced, with appropriate feedback.⁶⁰

The O'Reilly Report also recommended the establishment of community reference groups. If they are to play a useful role, such groups require appropriate resourcing, effective chairs and access to evidence-based research. The performance of the Newcastle and other EPA Consultative Committees should be carefully assessed and reported on annually. Importantly, such committees should be genuinely engaging – by seeking out the aims, needs and preferences of the communities in which they operate; and providing a proper conduit to policy makers and decision makers (including the EPA Board) regarding effective pollution control.

Restoring community representation on the EPA Board would be an important component of improving engagement and public trust. If 'business expertise' is to be represented,⁶¹ community expertise should also be represented.

Importance of independence

A key finding of the Ipsos community and EPA stakeholder survey (2013) was that *Perceptions about independence from industry are important*.⁶² Relatedly, 78% of stakeholder respondents rated objectivity in decision-making as *essential* for the EPA.⁶³

⁵⁶ See Recommendation 7, Brendan O'Reilly, *A review into the response to the serious pollution incident at Orica Australia Pty Ltd ammonium nitrate plant at Walsh Point, Kooragang Island on August 8, 2011*, <www.nsw.gov.au/sites/default/files/Orica-review.pdf>. It is also not clear that this meets the Government's pledge to accept all of the O'Reilly Report's recommendations. See NSW Government, *Tough New Pollution Laws: O'Reilly Report Accepted in Full*, 5 October 2011, <www.nsw.gov.au/news/tough-new-pollution-laws-o%E2%80%99reilly-report-accepted-full>.

⁵⁷ Ipsos SRI, *NSW EPA Stakeholder Survey* (2013), p 7.

⁵⁸ Ipsos SRI, *NSW EPA Stakeholder Survey* (2013), p 7.

⁵⁹ Noting that only 17% of total stakeholders were from the environment and community sector.

⁶⁰ Ipsos SRI, *NSW EPA Stakeholder Survey* (2013), p 11-12.

⁶¹ See *Protection of the Environment Legislation Amendment Act 2011*, sch 1, cl 4, which alters s 15 of the POEA Act. In particular, the new s 15(3)(d) of the POEA Act provides that a member of the board is to have 'expertise in business'.

⁶² Ipsos SRI, *NSW EPA Stakeholder Survey* (2013), p 9.

⁶³ Ipsos SRI, *NSW EPA Stakeholder Survey* (2013), p 7.

A nascent strength of the EPA is its potential to be seen as a more ‘arms-length’ regulator than other government departments, which may be responsible for *promoting or facilitating* an activity (mining, forestry) as well as regulating it. The Ombudsman has previously raised this potential for ‘conflicting duties’ in relation to NSW Trade & Investment and CSG.⁶⁴

Acknowledging this potential positive, there is however significant community perception that the EPA is not as independent as it could be. In the Ipsos general population survey, only one in three respondents (32%) saw the EPA as ‘independent’ (although only 8% said they had detailed knowledge of the EPA’s role).⁶⁵

The Ipsos survey also revealed a perceived split between the regulatory approach within different levels of EPA staff. 37% of EPA stakeholder respondents *disagreed* that *staff across all levels of EPA have a similar approach to regulation*, while only 28% stakeholders *agreed*. The general perception was that higher-level management adopted a ‘partnership’ stance, while officer-level staff adopted more of an ‘enforcer’ approach.⁶⁶ (‘Compliance and enforcement’ is considered in further detail below.)

Recommendation:

- *In addition to other recommendations on community engagement as noted, the EPA should develop, consult on and publicise a new policy clarifying how its roles are balanced, how its decisions are made, and how its independence is assured.*

Access to information

The EPA is required to keep a public register which is to be available for public inspection.⁶⁷ It must record matters such as details of licence applications, decisions relating to licences, details of environment protection notices, outcomes of court proceedings and summaries of audit reports.⁶⁸

New requirements were introduced in the 2011 POEO Act amendments. The Register must now include details of any mandatory audit, pollution study or pollution reduction program required by a pollution licence condition; and details of any penalty notice.⁶⁹

The 2011 amendments to the POEO Act also require that, where a licence includes monitoring conditions, that monitoring data must be published (or otherwise made available) within 14 days.⁷⁰ However, this information is not included on or linked to the EPA Register.

These changes are positive steps, and the EPA Register remains an important tool for public transparency and at-a-glance performance. Nevertheless, the actual information published on the register could be improved.

For example, there is presently no requirement to publish *reasons for licence decisions* on the public register. This would assist transparency and consistency of the licensing process. Also, while licensees are required to submit *annual returns* to the EPA in relation to their pollution licence, information from annual returns is only published in summary form. With

⁶⁴ See NSW Ombudsman submission to the NSW parliamentary inquiry into Coal Seam Gas (2011).

⁶⁵ Ipsos SRI, *NSW EPA Stakeholder Survey* (2013), p 4.

⁶⁶ Ipsos SRI, *NSW EPA Stakeholder Survey* (2013), p 9.

⁶⁷ POEO Act ss 308 and 309.

⁶⁸ POEO Act s 308.

⁶⁹ POEO Act 1997, subsections 308(2)(d1),(d2),(d3),(j2)

⁷⁰ *Protection of the Environment Legislation Amendment Act 2011*, Schedule 2, cl 1, which inserted subsections 66(6) and (7) into the POEO Act. The data is to be published on the licensee’s website or, if there is no such website, the data must be provided to anyone who requests it. This requirement is now supported by EPA Guidelines.

regard to new register prescriptions (2011-12), *penalty notices* are searchable, but do not always appear under the 'licence summary'. Also, 'penalty notice summaries' disclose the offence, but not the penalty amount, which limits transparency for no apparent reason.⁷¹

To address these issues, the POEO Act or regulations could include more specific requirements. As well as the benefits of community participation noted above, public awareness of pollution breaches is a significant incentive for increased compliance.

In summary for this key area, the *Clearing the Air* report made six recommendations (18-24) to improve community engagement:

Recommendations

- *Reinstate the role of community and local council representatives on the EPA Board.*
- *The EPA should work with local communities to ensure best practice transparency, and access to 'relevant and meaningful' information on pollution, in line with state goals and pollution law objectives.*
- *Legislation should provide that a formal community consultation process is required for pollution licence reviews, for decisions relating to the issue, transfer or surrender of pollution licenses, and for licence variations which do not improve environmental outcomes.*
- *Ensure that the quality and effectiveness of community engagement, including community consultation committees, is monitored and reported on.*
- *Ensure that such community consultative committees seek out the aims, needs and preferences of the community and the environment, and can effectively contribute to policy and decisions on pollution control.*
- *Third party appeal rights should be implemented in relation to pollution licensing decisions.*
- *The EPA's public register should be expanded to provide for publication of all relevant details of the licensing process. This includes: licence variation applications [in full]; any public submissions received in relation to licensing decisions; and reasons for all licensing decisions.*

⁷¹ See for example the Santos NSW environmental protection licence no. 20350.

iii) Compliance and Enforcement

The EPA has responsibility for investigating, reporting on and prosecuting alleged non-compliance with NSW pollution laws.⁷² In particular, the EPA Board is to determine whether the EPA should instigate proceedings for serious environmental protection offences, provided there is evidence capable of establishing the offence (based on expert advice).⁷³ This duty applied both before and after the 2011 reform, reinforcing the Board's importance.

The consequences of committing a pollution offence include the issue of *environmental protection notices* (clean up, prevention and prohibition orders),⁷⁴ civil proceedings by the community, and criminal enforcement remedies by the EPA. Criminal offences are classified in three tiers. Consequences range from *penalty notices* (tier 3) to prosecution (tier 1).⁷⁵

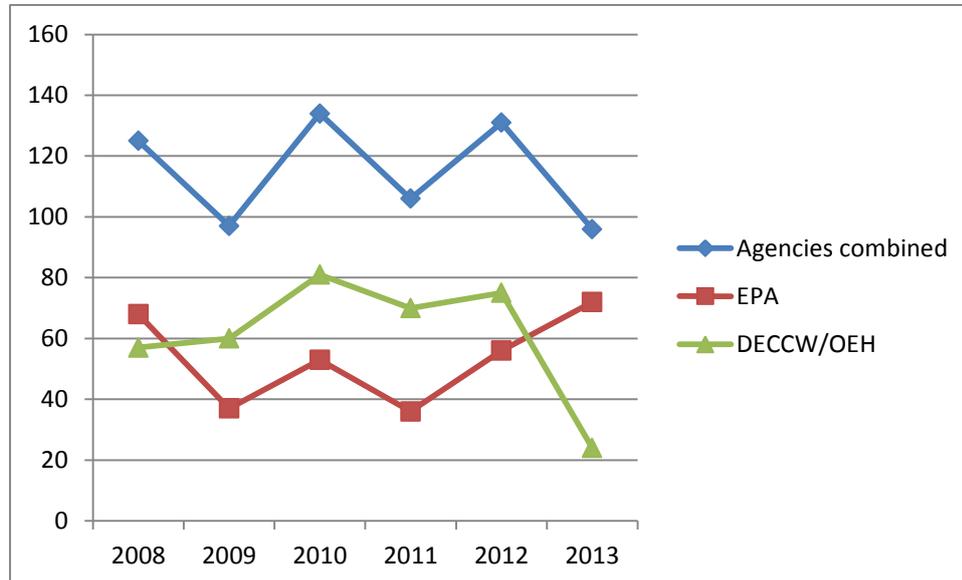
Recent enforcement statistics

It can be difficult to draw definitive conclusions from enforcement statistics.⁷⁶ However, the NSW Auditor-General has recently noted:

*Of the 72 prosecutions completed by the EPA in 2012-13, 69 resulted in convictions.
The average fine imposed under EPA legislation is around \$4500.
The number of larger fines imposed by the EPA fell significantly in 2012-13.⁷⁷*

EDO NSW has also reviewed enforcement statistics over a five-year period before and after the EPA separated from OEH in 2011. The two graphs below show that 2013 saw the *highest number* of prosecutions (72) under EPA legislation since 2008 (68). However, the *value of fines and penalties* in 2013 (\$388,000) were at their *lowest* since 2008 (\$363,000).

Prosecutions completed by EPA and OEH/DECCW (2008-2013 financial years)



⁷² POEA Act s 7(e). The Act defines NSW pollution laws as the 'environment protection legislation', including the POEA and POEO Acts, *Contaminated Land Management Act 1997*, *Dangerous Goods (Road and Rail Transport) Act 2008*, *Environmental Trust Act 1998*, *Environmentally Hazardous Chemicals Act 1985*, *Ozone Protection Act 1989*, *Pesticides Act 1999*, *Radiation Control Act 1990*, *Recreation Vehicles Act 1983*, *Waste Avoidance and Resource Recovery Act 2001*.

⁷³ POEA Act pt 5 div 2.

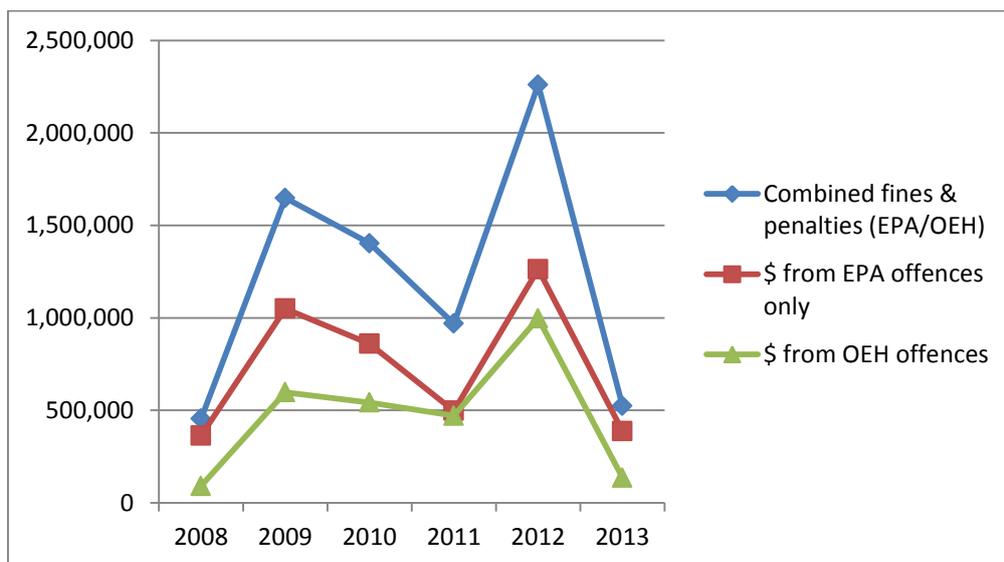
⁷⁴ POEO Act ch 4.

⁷⁵ Prosecution occurs in the Land and Environment Court or the Supreme Court of NSW.

⁷⁶ That is, cases commenced and completed vary year to year; figures include court-based penalties.

⁷⁷ *NSW Auditor-General's Report to Parliament (2013)*, Vol. 9, 'Significant items', p 3.

Value of fines & penalties from EPA and OEH/DECCW actions (2008-2013 financial years)



Below, this submission considers compliance and enforcement with reference to certain cases studies in the Inquiry TORs, enforcement statistics and the *Clearing the Air* report.

EPA investigation of water pollution – Santos CSG exploration in the Pilliga

In recent years, some community groups have questioned the EPA’s willingness to use its powers to regulate polluting industries, and have expressed frustration at a lack of transparency and effective action to prevent or redress CSG pollution, land contamination and forestry breaches.

A May 2012 report prepared by environment groups highlighted a number of breaches of petroleum exploration licence conditions following unauthorised discharges of CSG water and treated water in the Pilliga.⁷⁸ The NSW Government had conducted eight audits into the CSG operation, but none had led to any action against the companies involved. As a result of these breaches, Santos, on taking over the Pilliga CSG operation from Eastern Star Gas, halted operations in February 2012 and agreed to commit \$20 million to rehabilitate the area. However, controversy and instances of non-compliance have since dogged the project.⁷⁹

In its May 2012 report, the Legislative Council Inquiry into the impacts of CSG concluded:⁸⁰

It is inexcusable that this pollution went undetected by NSW Government authorities, despite community complaints, until Santos admitted many months later that a breach had occurred. ... This incident demonstrates the weakness in Government monitoring and enforcement activities.... Given this example... the Committee must be sceptical of the claim by the industry that all coal seam gas companies are meeting their licence conditions...

Since that inquiry, the Government has, among other things:

- created an Office of CSG as licensor and regulator (still within Trade & Investment);

⁷⁸ Wilderness Society and Northern Inland Council for the Environment, *The Truth Spills Out: A case study of coal seam gas in the Pilliga* (2012).

⁷⁹ See for example, S. Coutts, ‘Pillaging the Pilliga’, *The Global Mail* (2012), www.theglobalmail.org/feature/pillaging-the-pilliga/447/.

⁸⁰ www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/318a94f2301a0b2fca2579f1001419e5/%24FILE/Report%2035%20-%20Coal%20seam%20gas.pdf.

- increased EPA oversight by requiring *all* CSG activities to have a pollution licence;⁸¹
- created an Aquifer Interference Policy (overseen by the NSW Office of Water);
- developed 'Strategic Regional Land Use Policies' to manage CSG and agriculture;
- appointed a Land & Water Commissioner (community liaison/government adviser);

In 2014, the EPA fined Santos \$1500 for water pollution from CSG activities at its Pilliga site.⁸² The fine related to uranium and other contamination of groundwater resources caused by a leak in holding Pond 3. The use of a penalty notice, the consequent insignificant size of the fine,⁸³ and the muted public notice of the enforcement action, have further disenfranchised community members concerned about licence breaches from the project. Penalty notices are generally reserved for the least serious offences.⁸⁴

The leaking pond was installed in 2007 by previous owner, Eastern Star Gas. The EPA media release did not disclose the nature or amount of the leak. However, reports alleged that the uranium contamination was 335 micrograms per litre, which is considered 20 times over the safe drinking water level.⁸⁵ The EPA has since granted a pollution licence to Santos. It includes a legally-binding Pollution Reduction Program requiring Santos to develop and implement a Groundwater Remediation and Monitoring Plan for affected aquifers.

As recently as July 2014, the EPA has issued a 'clean-up notice' to Santos in relation to further pollution incidents from leaking water holding facilities at the Narrabri Gas Field ('Tintfield Ponds'). The notice states that a June 2012 report for Santos showed holes in the pond linings, but that Santos detected and notified the EPA of water pollution almost a year later, in May 2013.⁸⁶ The July 2014 notice states that the EPA 'reasonably suspects that a pollution incident has occurred or is occurring', being a leak of produced water from Pond 2. The clean-up notice directs Santos to drain Tintfield pond 2 and transfer all liquid to the Bibblewindi water treatment facility by 14 September 2014, and report back to the EPA. We understand the Bibblewindi facility itself has been subject to numerous compliance issues.

Forestry regulation (including breaches in Royal Camp State Forest)

In 2013, the Forestry Corporation of NSW was issued three fines of \$300 for unlawfully logging koala habitat in Royal Camp State Forest near Casino in the Northern Rivers region.⁸⁷ Environment groups criticised this amount as inadequate, arguing that such small fines would not deter any future unlawful forestry activities.⁸⁸

Forestry laws, unlike most environmental and planning laws, do not allow the community to bring civil enforcement proceedings if there is a breach of the law. It is up to the EPA, as the regulatory authority for crown land forestry, to police breaches. This case study, is one of many examples where the community consistently provided the EPA with relevant scientific studies and information on the impacts that the forestry was having on threatened species

⁸¹ *POEO Act 1997*, Schedule 1, cl 9A.

⁸² EPA media release 18 February 2014, www.epa.nsw.gov.au/epamedia/EPAMedia14021802.htm. *POEO Act 1997*, s. 120; see EPA public register, Penalty Notice 3085773240 (issued 11 Feb 2014).

⁸³ \$1500 is the prescribed penalty for a water pollution penalty notice involving a corporation (*POEO (General) Regulation 2009*, Schedule 6).

⁸⁴ Or 'opportunistic non-compliance', *EPA Compliance Policy* (2013), p 5.

⁸⁵ S. Nicholls, *Sydney Morning Herald*, 'Santos coal seam gas project contaminates aquifer' 07/3/14, www.smh.com.au/environment/santos-coal-seam-gas-project-contaminates-aquifer-20140307-34csb.html. See also, L. Herbert, 'Santos denies aquifer contamination' ABC News, 10/3/14, www.abc.net.au/news/2014-03-10/santos-contamination/5309278.

⁸⁶ The clean-up notice also states that a few days before the EPA issued the notice, the Planning Assessment Commission (**PAC**) approved a modification to the Narrabri CSG project.

⁸⁷ See for example: <http://www.abc.net.au/news/2013-07-12/koala-logging/4816422>.

⁸⁸ See: www.smh.com.au/nsw/bigger-fines-urged-to-save-nsw-koalas-20130711-2prwz.html.

and on repeated breaches of regulatory requirements to protect threatened species. The public forest estate is essential habitat for threatened species many of which are at serious risk of extinction. This case study evidences a lack of timely and effective enforcement action by the EPA.

We submit that the anachronistic barriers to third party enforcement must be removed. Community members should be empowered to act in the context of systemic breaches of forestry laws, and the lack of adequate enforcement. Furthermore, as with pollution laws more broadly, fines under forestry penalty notices must be significantly increased, and should allow for further increases based on prior breaches.

In 2011 EDO NSW prepared a report on forestry practices for NCC NSW, *If a Tree Falls: Compliance failures in the public forests of New South Wales*.⁸⁹ This report made various recommendations to improve forestry regulation and practice, which we reiterate below.

Recommendations:

- *The Committee should consider and adopt recommendations of If a Tree Falls, such as:*
 - *Strengthening maximum penalties for forestry offences,*
 - *Reviewing procedures for policing Forestry Corporation compliance,*
 - *Allowing third parties to bring proceedings to remedy breaches of forestry and other environmental legislation resulting from unlawful forestry activities, and*
 - *Increasing enforcement actions to redress systemic breaches of threatened species and pollution licence requirements.*

2014 Orica prosecution for Kooragang and Botany incidents

The EPA recently prosecuted Orica Australia Pty Ltd for nine breaches of NSW pollution law following seven separate pollution incidents at different locations in 2010 and 2011.⁹⁰ Six of the seven incidents occurred at Orica's Kooragang Island site in Newcastle, and the seventh at its Botany operations site in Sydney. Four additional charges were dropped.

Clearly these incidents caused a great deal of public concern, with the initial Kooragang Island incident being the catalyst for the 2011 reforms to emergency response and the EPA restructure.⁹¹

Orica pleaded guilty to the offences, and the Land and Environment Court issued a fine of \$768,250. This amount is the highest penalty that has been handed down by the Court for a matter prosecuted by the EPA; although it represents less than 10 percent of the maximum penalty available for these offences.⁹²

The Court found that the environmental harm caused by the offences ranged from low to serious. Orica also has a record of previous convictions for environmental offences. However, due to various mitigating factors under sentencing principles – including the fact that Orica has undertaken a number of actions to minimise the chance of similar incidents in

⁸⁹ Available at www.edonsw.org.au/forestry_clearing_vegetation_trees_policy, 'Discussion Papers'. This report addresses the state of NSW's publicly-owned native forests, the flora and fauna species that inhabit them, the regulatory framework for managing those forests, and regulatory breaches.

⁹⁰ See principal judgement: <http://www.caselaw.nsw.gov.au/action/PJUDG?jgmid=172884>. All seven judgments are on the NSW Caselaw website: <http://www.caselaw.nsw.gov.au/landenv/index.html>.

⁹¹ See Legislative Council Inquiry into the Kooragang Island incident (2011-12) <http://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/D5C264B9E319C719CA2578F7007FC585?open&refnavid=x>.

⁹² The maximum penalty for each offence is \$1 million, with a further \$120,000 for each day the offence continues.

future; submitted an early guilty plea and cooperated with the EPA; and had agreed to pay the EPA's costs of prosecution; the Court found that the penalty should be discounted.

The fine paid by Orica will go towards a number of environmental programs, including the Hunter River Health Monitoring Program, Bush Regeneration of Sir Joseph Banks Reserve, the Tomago Wetland Rehabilitation Project, and the Lower Hunter Particle Compositional Study.

Prosecution of Du Pont for alleged land pollution at Girraween

The success of the Orica prosecution contrasts with the recent prosecution of Du Pont for alleged land pollution in Western Sydney. After an extensive investigation of alleged herbicide damage to areas neighbouring a Du Pont chemical factory, EPA withdrew its case in July 2013 due to technical grounds and lack of direct evidence. The EPA wrote to residents, advising that while 'Du Pont has consistently maintained there was no emission', a key legal argument of the company was that the emissions may have occurred outside the time window alleged by the EPA, making the prosecution unlikely to succeed.⁹³ Given the limited evidence and distinct lack of assistance from the company in this matter, this may be the sort of case where corporate duties on licensees to minimise pollution could be useful.⁹⁴

These case studies all illustrate that there are areas where the regulatory role of the EPA could be strengthened and made more effective. Key recommendations are outlined below.

Recommendations:

Consider and adopt the 'enforcement' recommendations in Clearing the Air such as:

- *Empower the EPA to immediately suspend pollution licences if emissions levels are exceeded.*
- *Use pollution 'penalty notices' more appropriately, and introduce higher maximum penalties.*
- *Move civil enforcement of POEO Act breaches to an 'own costs' jurisdiction in the L&E Court.*
- *Upgrade the effectiveness of the EPA's response to industry audits and focus on benchmarking.*
- *Risk-based compliance audits should be undertaken more regularly, and findings published online*
- *Consider imposing a duty (and resources) on the EPA to investigate more local pollution incidents*
- *Review the EPA's compliance and enforcement approach and policy to ensure it minimises harm.*
- *The NSW Bureau of Crime Statistics and Research should review environmental enforcement:*
- *Expand the available alternative enforcement orders, such as disciplinary action and equity fines.*

iv) Regulatory context, resourcing and government priorities

The two primary objectives to improve the quality of the NSW environment, and reduce human health risks and environmental degradation are very broad aspirations. These must be read in the context of:

- the role of other regulators and legal frameworks,⁹⁵
- the EPA's regulatory scope and resourcing,⁹⁶ and
- government priorities and environmental goals⁹⁷ (including limited commitments to environmental monitoring and reporting).

⁹³ M. Gifford, EPA letter to householders, 11 July 2013, www.epa.nsw.gov.au/pollution/girraween.htm.

⁹⁴ See 'Establishing EPA duties to regulate & corporate duties to minimise pollution', under (i) above.

⁹⁵ such as the Office of Environment and Heritage (OEHS) and the Department of Planning, and legal frameworks (such as land use planning and development approval)

⁹⁶ Mainly air/water/land pollution; and other areas like forestry compliance and limited oversight of CSG. The EPA's budget for the 2013 financial year was slightly over \$130 million per year as at 2013

⁹⁷ Such as the State Plan, NSW 2021, www.2021.nsw.gov.au.

Regulatory scope – need for cohesive approach to environmental protection

The EPA's regulatory responsibilities are focused on significant air, water and land pollution; as well as waste, pesticides, forestry compliance, and some oversight of CSG (only via pollution licences). NSW pollution laws appoint one 'appropriate regulatory authority' (**ARA**) for any given site – usually either the EPA (licensed or *scheduled* activities) or the local council (smaller-scale activities). However, the EPA is not responsible for mining or CSG titles, major project approvals, biodiversity protection, or climate change, for example.

Aside from the EPA, the OEH and in particular the Department of Planning have very significant influence over the protection and improvement of the NSW environment – including environmental policy; and state-wide planning and major projects (respectively); and substantial areas of compliance and enforcement. Other regulators include NSW Trade & Investment (mining and CSG titles) and local councils (non-licensed pollution, local development consent and compliance). See the regulatory comparison table at **Attachment B**. We make two key points in this regard.

First, our *Clearing the Air* report made recommendations to better coordinate pollution regulation and the planning system. This would include greater EPA involvement in upfront strategic planning; management of cumulative impacts and catchment pollution limits; and more independence and transparency in setting pollution conditions for major projects. Currently, the Planning Department has overriding control over approvals and conditions on State Significant Development (**SSD**) and Infrastructure (**SSI**), and the EPA must follow Planning's decision.⁹⁸ Any future NSW planning reforms present an opportunity for improved integration of planning, pollution control and other environmental protection legislation.

Second, it is vital that regulators, including the EPA, make clear to the community who is responsible for a given issue, and what steps will be taken to investigate and resolve pollution issues. Regulators also need to work more closely *with each other and the community* to minimise the risk of confusion, 'buck-passing' or unresponsiveness.

Community members commonly call EDO NSW about pollution and environmental matters that have been raised with local councils, the EPA and other regulators, but remain unresolved. One solution to this could be to establish an EPA team to shepherding such inter-agency matters, working as a conduit between communities and other regulators.⁹⁹ Even if ultimate responsibility lies with another agency, there may be situations where it is appropriate that the EPA, as the State pollution regulator, plays a coordinating and liaison role to address ongoing community concerns. The EPA should monitor and report on such complaints.

An example of a complex matter that may need to be addressed in a coordinated way by the EPA and other state and federal regulators is the regulation of cruise passenger ships at the White Bay Cruise Terminal, where Balmain residents have reported significant concerns about diesel fumes and related pollution (including noise) from cruise passenger ships.¹⁰⁰

⁹⁸ The EPA cannot refuse a pollution licence to approved SSD or SSI; and licence conditions must be substantially consistent with the approval: *Environmental Planning & Assessment Act* ss 89K(1)(e); 115ZH(1)(e).

⁹⁹ As in the way the Planning Department shepherds major projects through various approval stages.

¹⁰⁰ See for example, *Inner West Courier* article:

http://www.sydneyports.com.au/_data/assets/pdf_file/0005/30398/More_than_100_attend_community_meeting_to_discuss_White_Bay_cruise_ship_pollution_concerns.pdf;

Recommendations

- Consider ways to strengthen the EPA's role in relation to strategic planning, and consideration of pollution and cumulative impacts for major projects in the planning system (see EDO NSW/NCC NSW, *Clearing the Air (2012)*, recommendations 3-6).¹⁰¹
- EPA should establish a small unit to shepherd complex or ongoing complaints about environmental pollution or compliance towards resolution.

Comparison to interstate EPAs

EDO NSW has undertaken a brief comparison of EPA responsibilities across Australia.¹⁰² Most EPAs have primary responsibility for licensing pollution (such as air, water and waste); monitoring ambient air pollution standards (see **NEPM**¹⁰³); and contaminated land.¹⁰⁴ NSW and ACT EPAs have almost the same statutory functions, with the exception of CSG, and are the only EPAs with primary statutory responsibility for *pesticides pollution* and *forestry compliance*.¹⁰⁵ The NSW EPA has perhaps the most significant, but still limited, responsibility for CSG regulation;¹⁰⁶ a few other EPAs have smaller roles regulating CSG (such as audits).

Several conclusions can be drawn from these comparisons:

- There is a *wide variety* of regulatory structures and responsibilities across Australia.
- NSW EPA has *broader responsibilities* than several other EPAs (including for pesticides, forestry and some CSG oversight).
- This may afford more *independent* regulation than in some jurisdictions (for example, where one department is responsible for both promoting and regulating an industry).
- Effective, independent regulation across a broad range of areas requires *resourcing*.

EPA Resourcing

The EPA and other environmental agencies need sufficient staff and budgets (resourcing) to implement programs, monitor compliance and enforce breaches. Otherwise, NSW laws cannot be efficiently or effectively implemented. Regulatory resources must also keep pace with industry expansion, to avoid increased risks to communities and the environment.

EPA resourcing has increased since the agency separated from OEHL in 2011-12, from around \$120 million to over \$130 million (noting corporate and legal services remain linked). While these increases are positive, they are the result of the EPA taking on *additional responsibilities* for regulating air quality, CSG and waste programs.¹⁰⁷

¹⁰¹ In brief, those recommendations include:

- Integrate decisions on planning, development assessment and cumulative pollution control.
- Set measurable limits on cumulative pollution allowable at a State, catchment and site level.
- Require decision-makers to take into account a project's cumulative impacts in any decision.
- Restore EPA's independence in issuing and setting major project conditions on pollution licences.

¹⁰² Queensland and WA do not have an EPA as the term is understood in NSW. Queensland has merged most EPA functions into the Department of Environment and Heritage Protection. In WA, the Department of Environment and Regulation is responsible for most regulatory actions. The WA EPA is generally responsible only for environmental impact assessments, staffed by the Office of the EPA.

¹⁰³ We understand that the NT does not apply the NEPM ambient pollution framework.

¹⁰⁴ Except WA (EPA plays a different role) and QLD (no EPA) – see below; in Victoria the EPA shares regulatory responsibility for contaminated with other agencies.

¹⁰⁵ Note the Victorian EPA also has some responsibility for regulating forestry.

¹⁰⁶ All CSG activities must have an EPA pollution licence; but Trade & Investment and NSW Planning are responsible for issuing/compliance with CSG titles; project approval, conditions and compliance.

¹⁰⁷ According to the EPA Annual Report 2012-2013 (p 101), in 2014, the projected EPA budget is \$137.7m (an increase of \$55m, or 66.5%, since 2010); the projected budget increase is a result of the transfer of air quality and CSG compliance functions to the EPA and an increase in funding for waste.

EDO NSW and many other stakeholders believe the EPA and the OEH are under-resourced for the job they do, the important values they protect, and the expectations of the community.

In 2011, evidence and submissions to the NSW CSG Inquiry noted the limited resources available to monitor activities and enforce regulatory compliance. This included the NSW Ombudsman's submission.¹⁰⁸ The Ombudsman suggested that additional industry levies or licence fees be considered as one option to address the resourcing issue. Examples that the Committee could consider include Load-Based Licensing fees, increased 'penalty notice' fines and greater cost recovery (including amending the *Contaminated Land Management Act 1997*).¹⁰⁹

In 2013, the resourcing issue was again highlighted in the Ipsos survey of EPA stakeholders: 'Across all groups, the EPA was seen as *stretched in terms of resourcing* at least in certain areas.' Significantly, 49% *disagreed* that the *EPA has enough staff*, while only 17% *agreed*.¹¹⁰

Recommendation:

- That the Committee identify additional resourcing, as well as options for industry cost recovery, as essential areas to assist the EPA and OEH to achieve objectives to protect and improve the NSW environment, and to bolster environmental performance monitoring, enforcement and reporting.

EPA and State Plan environmental goals

As noted, EPA operations will be influenced by the priorities of the government of the day. The EPA is responsible for reporting on the key activities towards achieving the two NSW 2021 goals relating to environmental protection. These goals are broadly to *Protect our Natural Environment* (Goal 22), and *Increase opportunities for people to look after their own neighbourhoods and environments* (Goal 23). Broad targets under these goals include:¹¹¹

- *Protect the local environment from pollution* (mainly EPA responsibilities)
- *Increase recycling to meet 2014 waste recycling targets* (mainly EPA)
- *Protect and restore priority land, vegetation and water habitats* (mainly OEH)
- *Increase renewable energy – 20% renewable energy by 2020*
- *New South Wales having the lowest litter count per capita in Australia by 2016.*

A related target under Goal 23 is to *Minimise impacts of climate change in local communities*.¹¹² However, the Auditor-General recently noted a lack of measures or baselines for the 20% renewable energy target.¹¹³

It is not clear how EPA and State Plan priorities link with trends and indicators from NSW environmental data, such as *State of the Environment* reports (discussed below) or the NSW Natural Resource Commission's targets for biodiversity, water quality, native vegetation etc for 2010-2015 (see **Attachment C**).¹¹⁴

¹⁰⁸ See, for example, Report of the NSW Legislative Council Committee Inquiry into CSG (2012), paras 13.52 and 13.58-61. See also EDO NSW, *Submission to the NSW Legislative Council CSG Inquiry* (October 2011).

¹⁰⁹ See for example, the POEO Amendment Bill 2014 (before Parliament); and the Auditor General's Report to Parliament on Contaminated Lands (July 2014).

¹¹⁰ Ipsos EPA Survey (2013), p 10.

¹¹¹ See NSW Government State Plan, *NSW 2021*, at www.2021.nsw.gov.au. See also *NSW Auditor-General's Report to Parliament Vol. Nine 2013*, 'Environment Overview', p 9.

¹¹² *Goal 23 – Increase opportunities for people to look after their own neighbourhoods and environments* (NSW 2021, p 46).

¹¹³ *NSW Auditor-General's Report to Parliament, Volume Nine* (2013), 'Environment Overview', p 9.

¹¹⁴ *NSW Natural Resources Monitoring, Evaluation & Reporting Strategy 2010–2015*, App 1 (cached): <http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCIQFjAA&url=http%3A%2F%2F>

Recommendation:

- *NSW Government environmental priorities should be linked to priorities identified in evidence such as the NSW State of the Environment Reports, environmental agency data and State-wide natural resource management targets.*

EPA and State of the Environment reporting

The EPA is also responsible for preparing a three-yearly *NSW State of the Environment (SOE)* Report, consistent with POEA Act objects. The last report (2012) sets out indicators and trends for 'people and the environment', atmosphere, land, water and biodiversity.¹¹⁵

Examples of findings are:

- energy production and transport contribute the most to NSW greenhouse emissions;
- NSW is meeting national standards for most air pollutants – but there are ongoing exceedences for ground-level ozone and particulate pollution;
- current land management practices lead to moderate but variable risk of degradation;
- hazardous chemicals in consumer products is an emerging issue;
- since drought broke in 2010-2012, increased natural flows and environmental water were reported to improve river health, wetland vegetation, birdlife, but not fisheries;
- estuaries and coastal catchments are facing increasing pressure from development;
- native species diversity and richness remain under threat, with 35 listings since 2009;
- clearing/habitat destruction and invasive species are the 2 key threats to biodiversity.

These non-exhaustive examples point to biodiversity loss, land management and clearing, coastal development, brown haze, particulate pollution and greenhouse emissions as some key environmental problems identified. High-level findings of improvements in other areas, including air pollution and water management, must be qualified by areas heavily affected by pollution and degradation of land, air, water or biodiversity (whether ongoing or threatened). It is also important to note that the EPA's regulatory role does not cover all of these areas; and other key issues that the EPA *does* regulate (forestry, CSG) are not highlighted above.

EDO NSW believes the NSW SOE reporting process should be made more robust and independent. This should include coordination by an independent chair and taskforce, rather than the EPA, or the establishment of a separate authority. The SOE reporting should bring together known information, highlight key information gaps, evaluate program performance (including of regulators), clearly identify environmental risks, propose priorities, and require a response from government within 12 months of each report. Such details could be legislated.

Recommendation:

- *Establish a separate State of the Environment authority or taskforce, directed by an independent chair, to coordinate the 2015 State of the Environment Report. The SOE Report should increase emphasis on meaningful monitoring, evaluation and reporting (MER), and should dedicate a section to reviewing state-wide environmental information-gathering, coordination and priorities.*

[Fwww.environment.nsw.gov.au/resources/fresources/f10977nrmmerstrat1015.pdf&ei=Nb-U_qhJ6e_sQSI3IHwAw&usq=AFQjCNE-1BGV-BW-uSTDPPwgRTUAbAbD9DQ&bvm=bv.74035653,d.cWc](http://www.environment.nsw.gov.au/resources/fresources/f10977nrmmerstrat1015.pdf&ei=Nb-U_qhJ6e_sQSI3IHwAw&usq=AFQjCNE-1BGV-BW-uSTDPPwgRTUAbAbD9DQ&bvm=bv.74035653,d.cWc)

¹¹⁵ POEO Act 1991, s 10. The SOE 'aims to provide credible, scientifically based, statewide environmental information to assist those involved in environmental policy- and decision-making and managing the state's natural resources'. See further <http://www.epa.nsw.gov.au/soe/>.

Related matters – since Kooragang Island Inquiry & Clearing the Air

This part of the submission notes a range of developments since the 2011 parliamentary inquiry into Orica's Kooragang Island incidents, and since the EDO NSW/NCC 2012 report.

Since the Kooragang Island inquiry, EDO NSW has made policy and law reform submissions on several areas of EPA regulation. These include submissions on revising the coastal Integrated Forestry Operations Approvals (**IFOAs**), risk-based pollution licensing, requirements to publish monitoring data, and regulation of CSG and windfarms as scheduled activities under the POEO Act.¹¹⁶ The common thread that binds these submissions is an aim to improve the environmental effectiveness, community engagement, governance, administration and enforcement of environmental laws.

Below we note some relevant policy developments, and recommend the Committee examine the progress of implementing these various reform recommendations.

Government response to Kooragang Island inquiry

The Kooragang Island inquiry report (February 2012) made seven recommendations on emergency response management by the EPA and NSW Government. The Government response (August 2012) supported four inquiry recommendations, supported two in principle, and partially supported one (involving NSW Health).¹¹⁷

The response also highlighted some broader reform, compliance and engagement activities:

- the Government's 2011 EPA and legislative reform package, which required
 - faster incident reporting;
 - licensees to adopt incident response plans;
 - more information on the public register about EPA regulatory actions; and
 - licensees to publicly report monitoring data;
- EPA's completion of an audit of 40 high-risk storage facilities (on risks and emergency procedures);
- ongoing oversight and prosecution of Orica (the prosecution was successful in 2014);
- EPA's establishment of a Newcastle Community Consultative Committee (late 2011);
- greater cross-agency coordination to manage pollution incident responses.

Pollution incident plans – NSW Audit Office comments

The NSW Audit Office has recently made recommendations following up these measures.¹¹⁸ In 2012 the Audit Office recommended the EPA publish on its website whether licensees have complied with the need to prepare pollution incident management response plans. In 2013, the Audit Office reported 'The EPA is progressing changes to annual returns that holders of [pollution licences] must submit. These returns report the level of compliance with

¹¹⁶ EDO NSW, *Submission on the Remake of the Coastal Integrated Forestry Operations Approvals* (April 2014) - [Download PDF](#); *Submission on risk-based pollution licensing and the Protection of the Environment Operations (General) Amendment (Licensing Fees) Regulation 2013* (Nov. 2013) - [Download PDF](#); *Submission on draft guidelines for the publication of monitoring data under the POEO Act 1997* (Feb. 2012) - [Download PDF](#); *Response to consultation on draft POEO Amendment (Wind Farms) Regulation 2012* (Jan. 2013) - [Download PDF](#).

¹¹⁷ NSW Government *Response to the Report of the Select Committee on the Kooragang Island Orica Chemical Leak* (August 2014) at:

<http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/2AAFFE5684A88AC6CA2579AC007C4430?open&refnavid=X>

¹¹⁸ See *NSW Auditor-General's Report to Parliament* (2013), Vol. 9, p 12.

licence requirements.¹¹⁹ Further, the Audit Office reports that the EPA is also currently implementing requirements to publish information about incident response plans on the EPA public register.¹²⁰

Revised compliance policies and engagement strategies

The EPA has noted that in 2013 it published its Compliance Policy, which provides additional transparency about how it regulates industry in NSW. Specific strategies will complement this policy, including new compliance strategies for public and Private Native Forestry.¹²¹ The EPA also states that it has revised its Prosecution Guidelines, although this does not seem to include substantive changes.

Protection of the Environment Legislation Amendment Bill 2014 – penalties and orders

In August 2014 the NSW Government introduced a Bill to amend the *Contaminated Land Management Act 1997 (CLM Act)*, *POEO Act* and *Radiation Control Act 1990 (RC Act)*.¹²² This Bill is a positive development, and EDO NSW supports the large majority of these proposals – particularly to expand ‘restorative justice’ orders and undertakings in court,¹²³ significantly increase penalties and financial assurance provisions in the CLM Act, and provide for ‘open standing’ in court to remedy breaches of the RC Act. The Bill would also:

- strengthen other enforcement provisions¹²⁴
- expand the types of fees/penalties paid towards EPA functions and administration¹²⁵
- clarify air purity standards, including for ‘non-point sources’ such as coal mine dust¹²⁶
- allow mandatory GPS tracking of waste transportation under the POEO Act, and
- remove pre-notification requirements before suspending/revoking a pollution licence.

We note regulatory amendments to increase some penalty notice fines have been made under the POEO Act.

NSW Audit Office report into Contaminated Land Management

As the Committee would be aware, in July 2014 the NSW Audit Office reported on the State’s management of contaminated land. The Audit Office found that ‘NSW Government agencies with large landholdings need to better manage their contaminated sites’, and that EPA management controls and administration needed improvement. In particular it found:¹²⁷

- *Most agencies could manage contaminated sites better*
- *EPA’s prioritisation and assessment of sites are inadequate*
- *Monitoring and management of significantly contaminated sites needs to improve*
- *EPA should begin recovering costs (of land management from owners or polluters).*

¹¹⁹ Licensees will firstly have to indicate whether plans have been developed; and the following year, whether these plans have been tested as the POEO Act requires.

¹²⁰ See *NSW Auditor-General’s Report to Parliament* (2013), Vol. 9, p 12.

¹²¹ *EPA response to the stakeholder survey* (December 2013), p 4, at epa.nsw.gov.au (see below).

¹²² Protection of the Environment Legislation Amendment Bill 2014, second reading 12/8/2014, at: <http://www.parliament.nsw.gov.au/prod/parliament/NSWBills.nsf/0/C8C1508E669F8722CA257D32001CE0E3?Open&shownotes>, accessed 25/8/2014.

¹²³ For example, orders requiring an offender to carry out public environmental restoration projects, and to notify concerned persons of their part in committing the offence. See Bill Sch 1.1[12], Sch 3.1.

¹²⁴ Including continuing offences (CLM Act); monetary benefits accrued (CLM Act); clean-up notices to owners as well as occupiers (POEO Act); and increased penalties for repeat offenders (RC Act).

¹²⁵ EPA Fund, under the *Protection of the Environment Administration Act 1991* (POEA Act), s 34A.

¹²⁶ The ban on exceeding air purity standards under POEO Act s 128 would apply to non-point source emissions’, and to point source emissions where air quality standards have not been prescribed.

¹²⁷ NSW Audit office, *Auditor-General’s Report to Parliament – Managing Contaminated Sites*, 10/7/14

The Inquiry should consider the responses of the EPA and other agencies to the Auditor-General's recommendations; the additional resources that may be necessary to implement the requisite changes; and monitoring and reporting plans to ensure issues are addressed.

Recommendation:

We recommend the Committee examine the progress of implementing the recent reform recommendations.

Attachment A – *Clearing the Air* recommendations and EPA preliminary response

Clearing the Air: Opportunities for improved regulation of pollution in NSW (2012) was a report prepared by EDO NSW for the Nature Conservation Council of NSW (**NCC NSW**), following the Orica incidents at Kooragang Island in 2011.

In June 2012, senior representatives of the EPA, EDO NSW and NCC NSW met to discuss the *Clearing the Air* recommendations, and the EPA provided a preliminary response (below). EDO NSW welcomes such engagement, but believes the report recommendations remain valid.

RECOMMENDATION	EPA PRELIMINARY RESPONSE
Improving the overarching pollution regulation framework	
1. The EPA's responsibilities for regulating air, water and land pollution should be specified in the legislation as enforceable duties. These duties should require that the EPA sets and reviews lists of pollutants and emissions standards, and impose best practice standards on all licensed facilities.	<ul style="list-style-type: none"> • NSW's environmental legislation provides a credible and transparent regulatory framework that requires environmental, social and economic considerations to inform decision making. • The EPA currently reviews licensed activities to ensure emission limits and controls reflect best practice. • The EPA is an independent regulator with the discretion to draw on a suite of regulatory tools to respond to environmental issues and incidents.
2. Legislation should impose a general duty on all facility operators to prevent or minimise environmental harm arising from their activities	<ul style="list-style-type: none"> • The <i>Protection of the Environment Operations Act 1997</i> (POEO Act) requires all facilities to control emissions to air, water and land. • The EPA's role in environmental protection commences in the planning stages of new development, and continues through the ongoing licensing provisions. This integrated process, includes general provisions relating to environmental performance requirements that ensure there is a robust mechanism for controlling and preventing environmental impacts.

RECOMMENDATION	EPA PRELIMINARY RESPONSE
Improving strategic planning for polluting activities	
<p>3. Decisions on strategic planning, development assessment and pollution control should be integrated to manage the cumulative impacts of existing and emerging pollution sources in a strategic manner.</p>	<ul style="list-style-type: none"> • Current policy ensures that a range of factors, including environmental factors, are considered for all classes of development, including major projects. • The overarching principles of ecologically sustainable development form the basis of the EPA's decision making. • These factors and the range of associated environmental issues are considered routinely in a holistic manner in EPA decision making associated with proposed and existing potential pollution sources.
<p>4. Measurable limits must be set on the cumulative amounts of pollution allowable at a State, catchment and site level.</p>	<ul style="list-style-type: none"> • Environmental legislation, for example the Clean Air Regulation, already sets a range of measurable limits in relation to air pollutants. • Where appropriate, the EPA considers cumulative impacts when making regulatory decisions.
<p>5. Decision-makers should be required to take into account a project's cumulative impacts in any decision on whether to approve it and must reject the project if these impacts will degrade the receiving environment.</p>	<ul style="list-style-type: none"> • Current policy ensures that a range of factors, including environmental factors, are considered for all classes of development, including major projects. • EPA decision making associated with proposed and existing potential pollution sources takes into account environmental, social and economic considerations to inform decision making. • The EPA also considers cumulative impacts when making regulatory decisions.
<p>6. The EPA's independence in issuing and setting conditions on pollution licences should be reinstated for all classes of development, including major projects.</p>	<ul style="list-style-type: none"> • Current policy ensures that a range of factors, including environmental factors, are considered for all classes of development, including major projects. • The EPA provides advice on environmental controls in the planning process. • Licences issued by the EPA can be reviewed and amended as necessary.

RECOMMENDATION	EPA PRELIMINARY RESPONSE
Improving pollution management and licensing	
<p>7. Licensing of polluting facilities should be based on objective standards that maintain environmental health, rather than procedural requirements that do not consider the receiving environment. For example, the EPA should be required to reject a pollution licence application unless the applicant can demonstrate there will be no net degradation in the quality of the receiving environment. Additional considerations, such as whether the licence holder is a fit and proper person, and long-term impacts of the proposed facility, should also be considered.</p>	<ul style="list-style-type: none"> • EPA decision making associated with proposed and existing potential pollution sources takes into account environmental, social and economic considerations to inform decision making, as well as the applicant’s ability to undertake the activity in an environmentally sustainable manner. • Licensing decisions consider the impact on the receiving environment. • EPA must consider ‘fit and proper person’ test when issuing a licence.
<p>8. Legislation should state that, unless a pollution licence expressly authorises the discharge of pollutants, any such discharge is unlawful.</p>	<ul style="list-style-type: none"> • These provisions already exist for water, land, odour and noise pollution. • Environmental legislation provides express limits for air pollutants that are considered effective.
<p>9. The EPA should utilise the strong regulatory tools available to it, and implement:</p> <ul style="list-style-type: none"> - Protection of the Environment Policies, so that all regulator agencies are required to ensure ambient environmental conditions are met; - Financial assurances to ensure that polluters remain financially responsible for minimising pollution and repairing associated environmental degradation; - Capping and allocating the amounts of pollutants that can be emitted into a particular zone, based on the capacity of the receiving environment to maintain its environmental values (bubble licenses); - Pollution Reduction Programs should be imposed as a standard, mandatory licence condition. These should require industry to conform to continuous improvement of technology to reduce pollution. Their effectiveness should be audited and assessed at the five-yearly licence review 	<ul style="list-style-type: none"> • The EPA utilises the range of policy, planning and management instruments available to it to ensure that ambient environmental conditions are met. • The EPA uses a problem identification and solving approach to all environmental issues. The use of PEPs is considered along with other tools available. To date other tools have been considered to be more practical in solving identified problems. • Financial assurances are available to and utilised by the EPA. • Bubble licences are but one of a suite of tools available to the EPA. Bubble licences are a specific regulatory tool that can be, and have been utilised in appropriate circumstances. • PRPs are used regularly to achieve significant environmental improvements based on site specific circumstances and considerations. EPA’s existing compliance programs demonstrate that PRPs clearly deliver improved environmental performance.

RECOMMENDATION	EPA PRELIMINARY RESPONSE
<p>10. The EPA should utilise the strong regulatory tools available to it, and implement:</p> <ul style="list-style-type: none"> - Protection of the Environment Policies, so that all regulatory agencies are required to ensure ambient environmental conditions are met; - Financial assurances to ensure that polluters remain financially responsible for minimising pollution and repairing associated environmental degradation; - Capping and allocating the amounts of pollutants that can be emitted into a particular zone, based on the capacity of the receiving environment to maintain its environmental values (bubble licenses); and - Pollution Reduction Programs should be imposed as a standard, mandatory licence condition. These should require industry to conform to continuous improvement of technology to reduce pollution. Their effectiveness should be audited and assessed at the five-yearly licence review. 	<ul style="list-style-type: none"> • The EPA utilises the range of policy, planning and management instruments available to it to ensure that ambient environmental conditions are met. • The EPA uses a problem identification and solving approach to all environmental issues. The use of PEPs is considered along with other tools available. To date other tools have been considered to be more practical in solving identified problems. • Financial assurances are available to and utilised by the EPA. • Bubble licences are but one of a suite of tools available to the EPA. Bubble licences are a specific regulatory tool that can be, and have been utilised in appropriate circumstances. • Pollution Reduction Programs (PRPs) are used regularly to achieve significant environmental improvements based on site specific circumstances and considerations. The EPA’s existing compliance programs demonstrate that PRPs clearly deliver improved environmental performance.
<p>11. The EPA should cease to rely on measures such as Pollution Reduction Programs to enforce compliance with pollution licences, and these should not be included as a regulatory option in compliance policies and guidelines.</p>	<ul style="list-style-type: none"> • Pollution Reduction Programs (PRPs) are not used to “enforce compliance”. The EPA utilises a range of regulatory tools to respond to environmental compliance issues. Pollution Reduction Programs (PRPs) can be used in conjunction with other tools, including the issue of penalty notices and prosecutions, and are considered to provide a very effective mechanism to secure environmental improvements.

RECOMMENDATION	EPA PRELIMINARY RESPONSE
<p>12. Revise Schedule 1 to the POEO Act to ensure it includes a current list of all activities with potential for environmental impact.</p>	<ul style="list-style-type: none"> • The EPA monitors environmental issues across NSW to ensure activities with significant potential for environmental impact are regulated appropriately. • Licensing is one of a number of regulatory tools available to the EPA. • The EPA is considering new mechanisms to respond to emerging environmental issues in a rapid and effective manner, for example by 'calling in' poor environmental performers. That is, adding them to Schedule 1 for licensing.
<p>13. The load based licensing system should be extended to include a more comprehensive list of pollutants. For load based fees:</p> <ul style="list-style-type: none"> - Revenue derived from load based fees is allocated to an EPA-managed or independent trust fund, and allocated specifically to environmental remediation projects to mitigate harm from industrial pollution. - The load based fee schedule should be revised to properly reflect the long-term costs to human health and the environment. 	<ul style="list-style-type: none"> • The EPA is currently examining a range of initiatives to improve the effectiveness of the load based licensing (LBL) system.
<p>14. The EPA should be empowered to immediately suspend pollution licences where prescribed emission levels are exceeded.</p>	<ul style="list-style-type: none"> • The EPA has a range of tools, including the power to suspend a licence, in response to serious breaches. • The EPA considers a range of factors, including the seriousness of the breach and level and extent of environmental impact, in determining the appropriate action.

RECOMMENDATION	EPA PRELIMINARY RESPONSE
<p>15. Revise the pollution licences in a number of ways to ensure that:</p> <ul style="list-style-type: none"> - the applicant has demonstrated compliance with best practice principles of waste management; - licence conditions are 'SMARTER'; - licence limits reflect the capacity of the receiving environment to bear the impacts of pollution without degradation; - licensees commit to continual improvement; - offsets are imposed on unavoidable discharges to achieve 'no net degradation' in the long term; - licences are reviewed in industry clusters to facilitate meaningful public participation; and - the community has a clear understanding of the industry and discharges. 	<ul style="list-style-type: none"> • Environment protection licences are developed, reviewed and amended where necessary to ensure they address site specific environmental issues and that compliance will prevent or mitigate environmental impact. • Licence conditions are currently developed using the SMARTER principles. • The EPA welcomes public submissions regarding specific licences at any time, not only during the formal licence review process. All information is considered when licences are reviewed. • Results of environmental audits are publicly available and are considered in licence reviews. • The Government has recently introduced legislative provisions that require licence holders to publish monitoring data required by their licence. Information about emissions is also publicly available through the National Pollutant Inventory.
<p>16. The level of detail and comparative data reported in facility operators' annual returns should be increased. Raw monitoring data is made publicly available to the community on the POEO Register, but the annual return should also include a report (provided by the licence holder) that interprets the results in a contextual and meaningful way for the community.</p>	<ul style="list-style-type: none"> • The new legislative provisions requiring publication of monitoring data make licensees more accountable, and facilitate greater interaction between the community and industry. • Guidance has been prepared to assist industry to comply with the new requirements and to ensure the data is presented in a meaningful and understandable way for the public.
<p>17. Ensure that the five-yearly review of pollution licences includes a commitment to implementing Best Available Technology.</p>	<ul style="list-style-type: none"> • Where appropriate the EPA reflects environmental performance targets achievable through implementation of Best Available Technology. For example, improvements in air pollution control technology are reflected in the Clean Air Regulations, and through Pollution Reduction Programs (PRPs) using or referencing Best Available Technology.
<p>18. Ensure that end of project licence revocation does not occur until an independent audit has ensured that all pollution (current and potential) has ceased.</p>	<ul style="list-style-type: none"> • Where appropriate the EPA will use pre-closure, independent examination of licensed activities to ensure legacy issues are identified and addressed.

RECOMMENDATION	EPA PRELIMINARY RESPONSE
Increasing community engagement	
19. Reinstate the role of community and local council representatives on the EPA Board.	<ul style="list-style-type: none"> • Government has established the EPA as a modern, strengthened and independent regulator. • The EPA Chair will be the community's advocate, and will actively engage with all sections of the community.
20. The EPA should work with local communities to ensure best practice transparency, and access to 'relevant and meaningful' information on pollution, in line with state goals and pollution law objectives.	<ul style="list-style-type: none"> • The Government's reforms provide more transparency and accountability from both industry and government, and provide the community with greater access to EPA's decision making and industry's environmental performance.
21. Legislation should provide that a formal community consultation process is required for pollution licence reviews, for decisions relating to the issue, transfer or surrender of pollution licenses, and for licence variations which do not improve environmental outcomes.	<ul style="list-style-type: none"> • The EPA is required by law to notify the public of licence reviews. • The EPA welcomes public submissions regarding specific licences at any time, not only during the formal licence review process. All information is considered when managing or reviewing licences. • Community consultation on proposed activities is undertaken through the planning framework. • The POEO Act requires that the EPA must consult the community where proposed changes to an existing activity have a potentially significant environmental impact.
22. Ensure that the quality and effectiveness of community engagement, including community consultation committees, is monitored and reported on.	<ul style="list-style-type: none"> • The Government places a high priority on community consultation by the EPA. Examples are the Minister's Industry and Community Roundtable, the Newcastle Community Consultative Committee on the Environment and the Rutherford Consultative Committee have been instigated. Investigations to establish an Environmental Monitoring Network in the Newcastle Region have commenced.
23. Ensure that such community consultative committees seek out the aims, needs and preferences of the community and the environment, and can effectively contribute to policy and decisions on pollution control.	<ul style="list-style-type: none"> • The Terms of Reference, minutes, agendas and actions from these committees are available on the EPA's website. • The EPA regularly requires community consultative committees to be established for key locations, industries or facilities. • The EPA Chair will ensure effective community engagement.

RECOMMENDATION	EPA PRELIMINARY RESPONSE
24. Third party appeal rights should be implemented in relation to pollution licensing decisions.	<ul style="list-style-type: none"> • Third party appeal rights exist in the planning system and the POEO Act allows for civil action.
25. The EPA's public register should be expanded to provide for publication of all relevant details of the licensing process. This includes: <ul style="list-style-type: none"> - licence variation applications - any public submissions received in relation to licensing decisions - reasons for all licensing decisions. 	<ul style="list-style-type: none"> • The Public Register currently includes details of licences, applications (for new licences, variations, transfers and surrenders) and notices. • The Government's reforms have delivered access to additional information in relation to environmental regulation including licensee's monitoring results, penalty notices issued and mandatory audits required. • The EPA is currently improving the Public Register to ensure that information is more readily accessible and meaningful.
Improving compliance and enforcement	
26. The EPA should be empowered to immediately suspend pollution licences where prescribed emissions levels are exceeded.	<ul style="list-style-type: none"> • The EPA has a range of tools, including the power to suspend a licence, in response to serious breaches. • The EPA considers a range of factors, including the seriousness of the breach and level and extent of environmental impact, in determining the appropriate action.
27. Penalty notices for pollution offences should be used more frequently, and higher maximum penalties introduced.	<ul style="list-style-type: none"> • The EPA uses a range of tools to respond to non-compliances, and these responses are proportionate to the significance of the non-compliance. Penalty notices are used where appropriate. • Maximum penalties for environmental offences are reviewed regularly to ensure they provide an appropriate deterrent, most recently the penalty for failing to notify the EPA of a pollution incident has been significantly increased.
28. Move civil enforcement of breaches of the POEO Act to an 'own costs' jurisdiction in the Land and Environment Court, to remove costs barriers and increase access to justice by the community.	<ul style="list-style-type: none"> • This is an issue for the NSW Attorney General.

RECOMMENDATION	EPA PRELIMINARY RESPONSE
<p>29. Upgrade the effectiveness of the EPA's response to industry audits and focus on benchmarking its methods and performance. This should align with the Audit Office's 2010 recommendations on improved internal analysis. The progress of these improvements should be publicly reported by the EPA or the Environment Minister.</p>	<ul style="list-style-type: none"> • The Government's reforms require a measurement of the effectiveness of all of the EPA's compliance and enforcement activities. • The EPA Board is required to provide the Minister with an annual regulatory assurance statement reporting on the EPA's success in achieving environmental and compliance improvements. The Minister must table the regulatory assurance statement in Parliament.
<p>30. Given the likelihood that pollution breaches are often unreported:</p> <ul style="list-style-type: none"> - risk-based compliance audits should be undertaken more regularly, - the findings for each facility should be published on the internet, and - compliance action should be taken in response to identified breaches. 	<ul style="list-style-type: none"> • The EPA routinely undertakes a range of compliance assurance activities, including compliance audits. • The Government's reforms have delivered access to additional information in relation to environmental regulation. • Individual compliance audit reports have always been publicly available via the EPA's library. The audit reports for the recent high risk facilities audit have been made available on the EPA's website. • The EPA is considering other ways to improve community access to information regarding regulatory activities including a revamped and improved web site. • The EPA takes action in response to all non-compliances identified through the compliance audit program.
<p>31. Consider imposing a duty on the EPA (accompanied by sufficient resources) to investigate pollution incidents for which local councils are the appropriate regulatory authority, in circumstances where all other mechanisms at council level have been exhausted.</p>	<ul style="list-style-type: none"> • The EPA and local Council are co-regulators and have a long history of working successfully in partnership when responding to pollution incidents. Therefore, there is no need to impose this duty on the EPA.
<p>32. Undertake a review of the EPA's compliance and enforcement approach and policy to ensure that it improves compliance and minimises harm to the environment.</p>	<ul style="list-style-type: none"> • The review of the EPA's compliance and enforcement approach and policy has already been identified as a priority by the EPA Chair and Board.

RECOMMENDATION	EPA PRELIMINARY RESPONSE
<p>33. The NSW Bureau of Crime Statistics and Research should be asked to undertake a comprehensive review of the enforcement of environmental offences. This review could include consideration of:</p> <ul style="list-style-type: none"> - the use of penalty notices and the appropriate financial penalty to be imposed by these notices; - how the EPA's prosecution policy could be improved to more effectively deter environmental pollution offences; - how alternatives to financial penalties could be better used to improve enforcement of lower level offences; <p>and</p>	<ul style="list-style-type: none"> • The EPA uses best practice regulatory principles and approaches in responding to environmental offences and improving industry attitudes towards environmental performance. • The EPA uses a range of strategies including education, economic incentives, compliance assurance and enforcement. The EPA's response to non-compliance is based on the seriousness and impact of the breach. • The EPA actively monitors emerging trends in regulation and compliance and enforcement in Australia and overseas. The EPA is an active member of Australasian Environmental Law Enforcement and Regulators neTwork (AELERT), with links to the International Network for Environmental Compliance and Enforcement (INECE) and regularly reviews environmental and compliance initiatives and innovations. • The EPA Board will monitor the EPA's performance through the annual regulatory assurance statement reporting on the EPA's success in achieving environmental and compliance improvements.
<p>34. Make alternative enforcement orders available, including:</p> <ul style="list-style-type: none"> - orders which allow the Court to insist that a corporate defendant undertake satisfactory internal disciplinary action; - equity fines, where shares from a convicted corporation go to a public interest trust fund. 	<ul style="list-style-type: none"> • The EPA takes regulatory action against corporate entities and individuals for environmental offences, depending on where culpability lies. Environmental Service Orders are often used to achieve non-punitive outcomes and redress environmental impacts.

Attachment B – EPA regulatory scope compared to other agencies

This table shows environmental regulation in NSW is spread across many agencies, not just the EPA.

Enviro. issue (or related)	EPA¹²⁸	OEH	Planning Dept	Local councils	Trade & Investment	Primary Industries
Pollution (e.g. air, water, land, noise, odour)	Yes (e.g. licensing scheduled premises) ¹²⁹			Yes (non-licensed)		
Waste	Yes (hazardous, major illegal dumping etc)			Yes (household, municipal, local illegal dumping)		
Contaminated Land	Yes (e.g. owner to notify, register, audits)					
Forestry	Yes (e.g. PNF & IFOA ¹³⁰ compliance)					
Pesticides	Yes (e.g. Act compliance) ¹³¹			If not EPA – e.g. consent conditions		
Coal seam gas (CSG)	Yes (pollution licences, conditions & compliance)		Yes (e.g. planning approvals, conditions & compliance)		Yes – OCSG (titles, conditions & compliance)	
Coal/Minerals	Yes (pollution licences if req'd – conditions & compliance)		Yes (e.g. planning approvals, conditions & compliance)		Yes – DMR (titles, conditions & compliance) ¹³²	
Native vegetation (land clearing)		Yes (e.g. PV Plans, compliance)				
Threatened species / Biodiversity		Yes (e.g. harm permits, concurrences, recovery plans)	Yes (e.g. major project approvals that impact)	Yes (local project approvals that impact)		Yes (fisheries management)

¹²⁸ EPA functions conferred by *environment protection legislation* and other legislation (POEA Act s 7)

¹²⁹ Air, water, noise etc. Including licence issuing, renewal, placing and varying conditions, compliance.

¹³⁰ NSW public forestry is governed by Integrated Forestry Operations Approvals (IFOAs). Private native forestry (PNF) in NSW is governed by Native Vegetation Act and PNF (self-assessable) codes.

¹³¹ *Pesticides Act 1999* (NSW).

¹³² NSW Department of Trade and Investment, Division of Resources and Energy.

Enviro. issue (or related)	EPA¹²⁸	OEH	Planning Dept	Local councils	Trade & Investment	Primary Industries
National parks and wildlife		Yes (e.g. protected area mgmt, offences)				
Biodiversity offsets		Yes (Biobanking agreements)	Yes (major projects – negotiated offsets)			
Aboriginal & other Heritage		Yes (impact permits etc) ¹³³		Yes (local heritage) ¹³⁴		
Environmental planning			Yes (state planning SEPPs, local env. plans)	Yes (e.g. local env. plans)		Yes (natural resource mgmt – Local Land Services)
Major projects (e.g. state significant – SSD, SSI)	Yes – if pollution licence req'd (limited conditions, compliance)		Yes (approvals, conditions, compliance)			
Water	Yes (pollution licences, conditions & compliance)				Yes ¹³⁵ (e.g. mining & CSG titles – issuing, monitoring & compliance)	Yes (e.g. Office of Water) – licences, aquifer interference
Coastal management		Yes (advice, planning and management)	Yes (state strategic planning)	Yes (local hazard planning)		
Climate change		Yes (e.g. Renewable Energy Action Plan, energy efficiency) ¹³⁶			Yes (e.g. investment, Renewable Energy Action Plan ¹³⁷)	

¹³³ NSW Heritage Council is responsible for state heritage listings and permits (*Heritage Act 1977*).

¹³⁴ NSW Heritage Council is responsible for state heritage listings and permits (*Heritage Act 1977*).

¹³⁵ See: http://www.resourcesandenergy.nsw.gov.au/__data/assets/pdf_file/0008/526634/Protecting-NSW-Water-Resources.pdf

¹³⁶ www.energy.nsw.gov.au/__data/assets/pdf_file/0010/475318/Renewable-Energy-Action-Plan.pdf.

¹³⁷ www.business.nsw.gov.au/invest-in-nsw/key-industries-and-industry-centres/renewable-energy.

Attachment C – Statewide targets for natural resource management

NSW Natural Resources Monitoring, Evaluation and Reporting Strategy 2010–2015, Appendix 1:

By 2015 there is an increase in native vegetation extent and an improvement in native vegetation condition.

By 2015 there is an increase in the number of sustainable populations of a range of native fauna species.

By 2015 there is an increase in the recovery of threatened species, populations and ecological communities.

By 2015 there is a reduction in the impact of invasive species.

By 2015 there is an improvement in the condition of riverine ecosystems.

By 2015 there is an improvement in the ability of groundwater systems to support groundwater dependent ecosystems and designated beneficial uses.

By 2015 there is no decline in the condition of marine waters and ecosystems.

By 2015 there is an improvement in the condition of important wetlands, and the extent of those wetlands is maintained.

By 2015 there is an improvement in the condition of estuaries and coastal lake ecosystems.

By 2015 there is an improvement in soil condition.

By 2015 there is an increase in the area of land that is managed within its capability.

Natural resource decisions contribute to improving or maintaining economic sustainability and social wellbeing.

There is an increase in the capacity of natural resources managers to contribute to regionally relevant natural resource management.

Source: NRC 2007 [Natural Resources Commission, State-wide Targets for Natural Resource Management Fact Sheet, Sydney]