

19 December 2014

Mr Percy Allan AM
Chair
Coal Exploration Steering Group
By email: cesg.secretariat@trade.nsw.gov.au

Dear Mr Allan

Discussion Paper – Improving NSW’s Process to Allocate Coal Exploration Licences

As a community legal centre specialising in public interest environmental law, EDO NSW welcomes the opportunity to comment on the Coal Exploration Steering Group’s (**Steering Group**) Discussion Paper. This submission highlights four points:

- 1) Expanding the Steering Group’s remit to coal seam gas (**CSG**) licensing;
- 2) Public consultation on coal and CSG licensing decisions;
- 3) Clarifying how ‘strategic preliminary issues assessment’ integrates with the planning system and principles of ecologically sustainable development; and
- 4) Climate change considerations.

1) Scope of Steering Group’s oversight

We note the Steering Group has been specifically tasked with corruption-proofing *coal licensing* procedures in response to ICAC’s 2013 recommendations.ⁱ Nevertheless, we submit that similar corruption risks could exist for CSG and other resource licences as for coal licences. ICAC itself draws comparisons to CSG, with reference to the Chief Scientist & Engineer’s (interim) review report.ⁱⁱ

The Government’s *NSW Gas Plan* (November 2014) commits to develop a new Strategic Release Framework for the ‘transparent, informed and strategic’ allocation of CSG exploration licences on ‘terms that meet community expectations’.ⁱⁱⁱ The Steering Group should canvas this Framework with the NSW Government, with a view to expanding the Steering Group’s remit to ensure adequate corruption-proofing and oversight of CSG licensing (along with coal and other resources where appropriate). This is particularly important given the likely increase in the potential value of CSG exploration licensing if this industry expands in NSW; and the comparable degree of decision-making discretion in the *Petroleum (Onshore) Act 1991* (for CSG) as in the *Mining Act 1992* (coal and minerals).

2) Public consultation on coal and CSG licensing decisions

EDO NSW notes the need for significant improvements to community engagement in strategic planning and mining licensing processes, as demonstrated by the ICAC report, Chief Scientist’s CSG review, recent CSIRO social research and our own experience.^{iv} As you would be aware, in October 2014 the NSW Chief Scientist & Engineer handed down her final report into CSG regulation. That review found the

need for a major regulatory overhaul, including in relation to petroleum title allocation (such as CSG exploration licences and production leases).

As with ICAC's concerns about coal licences (2013, p 29), the Chief Scientist's review noted the potential for the CSG licensing framework to create inappropriate expectations among exploration proponents that subsequent gas production leases will be issued almost automatically.^v EDO NSW notes that the legal framework for CSG (and indeed coal) sets up contradictory expectations for local communities. This is because the strongest opportunity for community engagement is generally the *development consent* stage, after *exploration licences* have already been granted. In some cases, no such consent is required, further limiting opportunities for public input.^{vi}

The Steering Group should consider these and other relevant aspects of the Chief Scientist's CSG review and ICAC's coal licence review, regarding shared lessons for NSW resources licensing (such as the need for better strategic planning, upfront assessment and consultation, and exclusion zones for important socio-economic, heritage and environmental areas). Noting the Steering Group has an important role to play, it remains important that resource licensing decisions do not become a purely inter-departmental or technocratic exercise. Consistent with State Plan goals 29-32 to restore trust in the planning system, public participation, and accountability in government, licensing decisions must receive far greater community input. The Steering Group should also consider the benefits of community 'merit appeal' rights regarding licensing decisions, as a further bulwark against corruption risks.

As a related matter, EDO NSW is concerned about recent rushed, piecemeal proposals to remove CSG exploration activities from the normal consultation process under NSW planning laws.^{vii} This puts CSG exploration back on par with coal exploration, which does not require development consent or mandatory public consultation under planning laws.^{viii} Despite calls for greater public input, these changes move in the opposite direction.

3) 'Strategic preliminary issues assessment' and integration with planning system and ESD principles

EDO NSW welcomes the inclusion of *cumulative impacts* as part of the Planning Department's 'Strategic Preliminary Issues Assessment' of coal resources, along with '*potential land use conflicts*' and '*biophysical, environmental and heritage*' matters. However, it should be clarified how such assessments will integrate with planning laws, and be underpinned by principles of ecologically sustainable development (**ESD**), a key object of NSW planning laws.^{ix} As ESD seeks to integrate environmental, social and economic factors in decision making, it is essentially a legal formulation of what ICAC (and the government) refer to as 'triple bottom line' assessment (ICAC 2013, recommendation 8). In the context of such assessments, EDO NSW remains concerned about 2013 amendments to the Mining SEPP which make the economic benefits of a mineral resource the 'principal consideration' for decision makers relative to other considerations and land uses listed in the SEPP.^x

4) Climate change considerations

Finally, we query why greenhouse gas (GHG) emissions (and related climate change risks) are excluded from 'triple bottom line' consideration in strategic assessments, either by the Department or Steering Group.^{xi} It is unclear how GHG emissions and climate change risks will otherwise be adequately considered elsewhere in the planning system, at the strategic planning, licensing or development assessment stages.^{xii} This failing is repeated in the Government's *Strategic Statement on NSW Coal* (August 2014), which 'aims to realise this economic value while protecting our environment and the health of our communities.' The Statement also includes a 'Sustainability' objective related to 'triple bottom line considerations to promote comprehensive and balanced decision making', but omits any reference to considering climate change risks and impacts (or ESD). This is despite climate change related goals (22-23) in the State Plan, *NSW 2021*.

One apparent reason for excluding GHG and climate change from strategic assessments of coal licence decisions is that these are not seen as 'local' issues. However, recent scientific opinion published in *Nature* points to the inefficiencies of separating local environmental issues like air pollution from global issues like climate change, noting the public health and climate mitigation benefits of addressing these challenges together.^{xiii}

Risks and impacts of continued emission of GHGs have most recently been made clear in Australia's *State of the Climate 2014*,^{xiv} and in the Intergovernmental Panel on Climate Change's *Synthesis Report*.^{xv} Similarly, under the International Energy Agency's (IEA) central forecast for fossil fuel demand, greenhouse emissions 'correspond to a long-term average global temperature increase of 3.6°C.'^{xvi} The IEA has made 4 key policy recommendations to limit warming to no more than 2°C.^{xvii} This internationally-agreed limit would in itself have profound economic, social and environmental implications, which Australia's regulatory frameworks must plan for.

EDO NSW submits that strategic assessment, licence allocation and planning processes should ensure the social costs of coal mining – such as public health impacts and environmental degradation – are properly accounted for and 'included in the valuation of assets and services'.^{xviii} We recommend that GHG emissions and other climate change mitigation and adaptation considerations apply at each stage of the planning process, beginning with strategic planning and licence allocation decisions.^{xix} For example, this could include estimating emissions from a potential coal resource in the context of a NSW, national or other relevant 'carbon budget'.

We hope this submission is of assistance in progressing the Steering Group's deliberations and recommendations to the NSW Government. If you have any further queries please contact me on (02) 9262 6989 or by return email.

Yours sincerely,
EDO NSW

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ⁱ See ICAC, *Reducing the Opportunities for Corruption in the State's Management of Coal Resources* (October 2013), <http://www.icac.nsw.gov.au/media-centre/media-releases/article/4436>.

ⁱⁱ ICAC (2013), pp 28-29.

ⁱⁱⁱ NSW Government, NSW Gas Plan, Nov. 2014, p 8.

^{iv} See for example, Moffat et al, *Australian attitudes toward mining: Citizen Survey – 2014 Results*, 14.

^v See *Petroleum (Onshore) Act 1991*, s 42(2). See also NSW Chief Scientist & Engineer, *Independent Review of Coal Seam Gas Activities in NSW – Study of regulatory compliance systems and processes for coal seam gas*, September 2014, Appendix 2, p. A-32:

- a. *the discretion to grant a PEL or PAL [for CSG exploration] needs to be exercised with care, as once it is awarded, it is very difficult to restrict the production phase; and*
- b. *there will necessarily be heavy reliance on the conditions of the PPL to control and regulate production activities.*

^{vi} That is, for projects assessed and approved under Part 5, *Environmental Planning and Assessment Act 1979* (EP&A Act). See further EDO NSW, *A review of NSW Coal Seam Gas Regulation and International Best Practice*, Nov. 2014, p 4 'Community engagement and landholder rights' - [Download PDF](#).

^{vii} That is, the Government recently exhibited changes to have CSG exploration activities assessed and approved by the Department of Trade and Investment, with no public consultation period or Environmental Impact Statement (EIS) (under Part 5 of the *Environmental Planning and Assessment Act 1979*). This replaces the current requirement for 30 days' public exhibition of a development application and an EIS, assessed and approved by the Department of Planning and Environment or Planning Assessment Commission (under Part 4 and Div. 4.1 of the EP&A Act). See EDO NSW, *Submission on SEPP Amendment (Gas Exploration and Mining) 2014*, Dec. 2014 - [Download PDF](#).

^{viii} *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)*, cl. 6.

^{ix} See *Environmental Planning and Assessment Act 1979* (NSW), s 5; which refers to encouraging ESD with reference to principles in the *Protection of the Environmental Administration Act 1991*, s 6. ESD principles include the precautionary principle; conservation of biodiversity and ecological integrity as a fundamental consideration; inter-generational and intra-generational equity; and proper valuation of environmental costs and benefits (including the 'polluter pays' principle).

^x *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, cl. 12AA.

^{xi} The Steering Group's Discussion Paper (p 3) states that 'The [strategic preliminary issues] assessment will not consider non-local issues such as the management of greenhouse gas emissions.'

^{xii} This remains a key failing of the planning system to reflect contemporary resource planning considerations: see for example EDO NSW, *Responses to CSG Inquiry – questions on notice* (2012) pp 10-14 - [Download PDF](#); EDO NSW *Submission on A New Planning System for New South Wales – White Paper*, June 2013, p 34 (and rec's 12, 21, 36, 44, 54, 66, 78 on climate change); see also T. Moore and R. Dyer, NSW Independent Planning Review Panel Report, Vol. 1, rec. 8 and pp 42-43.

^{xiii} J. Schmale et al., 'Air pollution: Clean up our skies', 19 Nov. 2014, *Nature*, at <http://www.nature.com/news/air-pollution-clean-up-our-skies-1.16352>.

^{xiv} Bureau of Meteorology & CSIRO, *State of the Climate 2014*, www.bom.gov.au/state-of-the-climate.

^{xv} UN Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report*, at <http://www.ipcc.ch/report/ar5/syr/>. For example, the IPCC notes (at p 17): *Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st century will lead to high to very high risk of severe, widespread, and irreversible impacts globally (high confidence).*

^{xvi} International Energy Agency, *World Energy Outlook 2013*, see:

<http://www.iea.org/newsroomandevents/pressreleases/2013/november/name-44368-en.html>.

^{xvii} IEA, *World Energy Outlook Special Report, Redrawing the Energy-Climate Map* (2013). In brief:

- *Targeted energy efficiency measures in buildings, industry and transport...*
- *Limiting the construction and use of the least-efficient coal-fired power plants...*
[significantly increasing the share of renewables (and gas) from 20% now to 27% by 2020]
- *Actions to halve expected methane (a potent greenhouse gas) releases into the atmosphere from the upstream oil and gas industry in 2020...*
- *Implementing a partial phase-out of fossil fuel consumption subsidies...*

The report also finds that the energy sector is not immune from the physical impacts of climate change and must adapt. (IEA, '[Four energy policies can keep the 2°C climate goal alive](#)', 10/6/13).

^{xviii} Consistent with the ESD principle on *improved valuation, pricing and incentive mechanisms* (see *Protection of the Environment Administration Act 1991*, s 6(2)(d)). For example, see the US EPA *Social Cost of Carbon* methodology, used to 'estimate the climate benefits of rulemakings', at www.epa.gov/climate/climatechange/EPAactivities/economics/scc.html; on health impact assessment see *Climate Council Briefing Paper: Health Effects Of Coal* (2014), www.climatecouncil.org.au/health-effects-of-coal.

^{xix} See summary of proposed regulatory measures and options in EDO NSW, *Responses to CSG Inquiry – questions on notice* (2012) pp 10-11 - [Download PDF](#). See also *Hunter Environment Lobby Inc v Minister for Planning and Ulan Coal Mines Ltd*, case summary at http://www.edonsw.org.au/mining_coal_seam_gas_cases.