EDO Qld.
Environmental Defenders Office
Using the law to protect our environment.

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Ms Jacqui Elliott
Manager, Energy Regulation and Implementation
Department of Environment and Heritage Protection
By email only: csgreg@ehp.qld.gov.au; jacqui.elliott@ehp.qld.gov.au

Dear Ms Elliott,

Submission to the Review of the Financial Assurance Guideline

Thank you for the opportunity to make a submission on the Review of the Financial Assurance Guideline under the Environmental Protection Act 1994 – Discussion Paper ('Discussion Paper').

Who we are

The Environmental Defenders Office, Qld ('EDO Qld') is a non-profit community legal centre which helps disadvantaged people in coastal, rural and urban areas understand and access their legal rights to protect the environment. EDO Qld has over 20 years of experience working with Local, State and Federal governments and our communities to improve planning and environmental laws in the public interest.

Submissions on the discussion paper

As DEHP is aware, there is an extraordinary number of abandoned mine sites in Queensland where the Environmental Authority ('EA') holder has not fulfilled its rehabilitation obligations. We note that the current audit by the Queensland Audit Office into environmental regulation of the resource and waste industries, indicates that Queensland has approximately 15,000 abandoned mine sites, with an estimated liability of Queensland of some $1 billion for rehabilitation costs.[1] It is therefore important to ensure that the regulation of mining and resource activities provides adequate protection for the State from accruing further financial liability.

In this context, it is unclear why DEHP is adopting an approach of seeking to reduce the short-term liability of companies when the State is potentially facing a liability of approximately $1 billion, due to proponents walking away from their rehabilitation obligations.

In the face of increasing costs to the State, a conservative approach to risk is warranted. Contrary to this is a policy of providing a discount on the expected liability. **EDO Qld does not support the concept of offering discounts on financial assurance ('FA') to mining**

and gas proponents. However we also note that this particular consultation does not address the broader issue of financial assurance or the policy of offering discounts, and is restricted to a narrow focus of the terms of the FA guideline. We understand that is a separate policy review and our comments are therefore limited to this specific consultation. We reserve our comments on the government policy of financial assurance and discounts for the broader policy review to be undertaken in 2014.

EDO Qld has three main concerns on the Discussion Paper and provides solutions to each of these concerns.

1. ***Keep the current requirement to demonstrate both financial viability and environmental performance to qualify for a discount***

Current guidelines require a proponent satisfy both financial requirements and environmental requirements to be eligible for a discount. This is appropriate as we need to avoid harm to the environment and also avoid a situation where a company folds and leaves the public purse to pick up the rehabilitation costs.

EDO Qld considers that ongoing financial viability reporting ought to be a precondition to the grant of any EA at all, irrespective of whether a discount is sought. The EA itself ought to require annual reporting to determine whether in fact the mining ought to continue.

EDO Qld has concerns about the proposal to remove financial criteria from the pre-condition to accessing any of the discounts. It is proposed that environmental criteria can be satisfied to achieve a discount but not financial criteria, and likewise that a proponent can satisfy financial criteria but not environmental criteria and obtain a discount. However proof of both environmental and financial criteria is the minimum expected by the community of mining companies.

It is clear that risk to government will increase with an introduction of financial viability as a standalone criterion, especially in light of the following factors:

1. If auditors could simply seek a statement from the directors of the company that the costs of rehabilitation have been provisioned, there is no obligation imposed on the directors of the company to ensure that funds are not to be accessed for another purpose;

2. If the provision of the rehabilitation costs appears in the financial statements, there is no security or comfort to government that those costs may not end up being used for another purpose if the company fails. For example, a liquidator or an external administrator appointed to a company in liquidation or administration is under no duty to allocate those funds to rehabilitation costs and it would be considered part of the collective funds available to creditors;

3. Less information is required under the proposed criteria than the current EM1010 criteria. EM1010 currently requires additional information where the funds provisioned for rehabilitation are dependent on third party or parent companies. EM1010 notes that joint ventures may dissolve after the mine ceases operating or is otherwise abandoned. In these circumstances, parties that are not holders of the EA – but who may have been contractually responsible for the rehabilitation costs – are under no statutory obligation to finance the rehabilitation. Under the proposed criteria, a statement now simply needs to be provided by an auditor that the costs have been provisioned. If this is to be the case, then the EA holder/s must demonstrate that it is

not reliant on a separate agreement with another entity responsible for the funds, that is, the EA holder/s themselves must show they have provisioned for the costs in their own accounts.

The obvious means by which to address the above issues (and to ensure government's risk does not increase), is to not allow discounts unless both financial and environmental criteria are met, plus impose personal liability of directors of the EA holders. EDO Qld considers that where the EA holder fails to fund the rehabilitation costs, there should be a statutory liability of directors for funding rehabilitation costs. Similar provisions exist in Commonwealth tax legislation that impose personal liability on directors who fail to pay employees their superannuation entitlements and PAYG withholding tax. If directors are personally liable for superannuation entitlements and PAYG tax, why should they not be personally liable for the costs of rehabilitating the mine, when they have profited from the serious environmental harm and the public is left to pay for the rehabilitation?

Whilst EDO Qld is not supportive of discounts on FA generally, we support EHP's moves to require annual reporting on the criteria in order for to continue qualifying for the discount.

Recommendation:
• The financial viability criteria outlined on page 9 of the Discussion Paper should be an automatic condition imposed on the EA, with annual financial viability reporting required in order to continue the mining or gas operations.
• At the very least, companies should satisfy the financial viability criteria as well as environmental criteria before qualifying for a FA discount.
• It should be clear that reliance on a third party for rehabilitation costs is not permitted and that the EA holder/s themselves will need to demonstrate the costs have been provisioned.
• Personal liability of the costs of rehabilitation for directors of the EA holders should be introduced, to be imposed in circumstances where the EA holder becomes insolvent or otherwise fails to fulfil its rehabilitation obligations.

2. New EA holders deemed as meeting the mandatory pre-condition

The new guideline provides a mandatory pre-condition, requiring the company to not have had a 'compliance action event' in the previous two years. The 'compliance action event' is only limited to conditions that set limits on significant disturbance, or conditions limiting the release of contaminants.

The changes to the mandatory pre-condition as currently drafted sets a very low standard for eligibility, for the following reasons:

1. EDO Qld is concerned that the limitation to these two types of conditions is too narrow. It would mean that breaches of other conditions, such as failure to provide monitoring data to DEHP on request, would not affect the pre-condition. Compliance with all conditions is reflective of a company's culture of compliance and must be a minimum pre-condition. We would encourage DEHP to release data on how a history of breaching other EA conditions does not make an operator a high risk for improper rehabilitation. Community expectations and standards do not allow a company that has had breached any of its conditions, to then be able to access a discount for its liability to rehabilitate.

2. 'Compliance action events' are limited to section 126 of the EP Regulation 2008, however this definition excludes complaints to, and investigations by, DEHP. This is

in context of DEHP having reduced capacity to investigate complaints due to significant staff and budget cuts to DEHP. A significant number of complaints or investigations by DEHP should also exclude the EA holder from a discount.

3. It is common practice in the industry for a new company to be incorporated for a specific mine or gas development, even though these companies may simply be subsidiaries of, or majority-owned by, existing operators. Companies establish corporate structures to minimise risk in the event of a specific project failing. Allowing new EA holders to automatically meet the pre-condition opens the door for new companies to be established that do not have a history of non-compliance. EDO Qld submits that in the face of the ever-increasing burden borne by the State in relation to abandoned mines, it is clear that a precautionary approach should be adopted.

4. The Discussion Paper proposes allowing the two year compliance requirement to apply only to the EA for which FA is given. This will allow companies who have non-compliance on other EAs (i.e., EAs not the subject of the FA application) to apply for a discount on the FA in question. This means a mining or gas company who has a long history of non-compliance, could be eligible for FA discounts on a new project. This I counter-intuitive as a company's history of non-compliance is relevant to the government assessing its risk of future non-compliance.

5. The two year period appears to be arbitrary timeframe. It suggests that an operator who has been free from compliance action events for, say, three years would pose a lower risk of default. We encourage DEHP to provide supporting evidence that two years free of compliance action events is determinative of rehabilitation compliance (as opposed to any other timeframe). Given the lack of information and that mining tenures can be upwards of 30 years, we suggest the period would be more appropriately referenced to the length of the tenure.

Recommendation:
• The pre-condition of not having any 'compliance action events' should not be limited to two types of conditions for the past two years. The EA holder should not have any history of any compliance action events, or breaches of other conditions. The history of non-compliance should be extended from a two year period and referrable to the life of the mine.
• All EAs held by the company should be looked at when assessing whether the EA holder is eligible for a discount.
• New EA holders should not automatically qualify for the pre-condition. If an EA holder cannot establish its environmental credentials through previous EAs, then it should be required to build up and establish this history. Otherwise, new companies will be established that do not have a history of non-compliance – this increases government risk.

3. Increasing enforcement and monitoring will reduce risk to government

It is essential that there is sufficient monitoring and enforcement of the FA guideline. Much of the information required in the discount guideline is self-reported to DEHP, without a third party assessment of compliance. This means DEHP has a significant responsibility to ensuring full compliance with FA requirements.

Enforcement and monitoring factors that increase risk to government include:

1. Since 2012, funding has been severely cut to key Queensland government agencies such as DEHP. As the agency responsible for monitoring and compliance for FA, we note that recently DEHP has considerably scaled back its operations, choosing to focus on education, industry partnerships and only regulating 'high risk' activities.[2]

2. Operators who submit false documentation to the regulator know that the commercial benefits from the crime will likely outweigh the risks of getting caught and/or any fine that might be imposed.

3. Severe public service staff cuts of approximately 15-20% across the Queensland State public service during 2012 are likely to hamper ongoing essential legislative implementation and enforcement.[3]

4. DEHP has drafted new 'enforcement guidelines' which reflect the new 'business friendly' approach to enforcement. The guidelines are supposed to indicate when DEHP will act to enforce the law, and what action they will take (fines, court action etc.). Those guidelines take a much weaker approach than the previous guidelines, and allow a great deal of discretion as to whether to take action at all.

Recommendation:
• DEHP must ensure sufficient resources are allocated to the monitoring and enforcement of the FA guideline.
• To ensure that monitoring information is made available to the public, DEHP should ensure all documented monitoring should be published on the DEHP website within one month of collection.

4. Environmental Performance Criteria should not be satisfied through R&D

Industry has an ongoing responsibility to the community to invest in R&D to improve rehabilitation for the damage it has caused to our environment. However it is unclear how internal investment in R&D actually reduces risk to government. R&D programs do not actually contribute to lowering government's risk, as the nature of R&D activities (e.g. innovative, experimental) does not necessarily offer assurance to government that R&D programs will be successful.

Research into difficult areas could lead to improved rehabilitation practices. However, this is speculative and R&D in a technical and difficult area would pose a higher risk of failure, and therefore should not be discounted.

Environmental Performance Criteria ('EPC') 1 provides a 5% discount for evidence of progress rehabilitation or investment in relevant research and development (R&D), where there is significant disturbance to areas of remnant or regrowth vegetation. EPC 3 offers a 10% discount for investment in a relevant R&D for managing waste rock dumps, tailings storage facilities, dams or solid waste. We note the Discussion Paper seeks feedback on what standards or criteria of an R&D program would be required.

The suggestion that companies could demonstrate investment in in-house R&D programs is inappropriate as it has the potential to be exploited by the EA holder. For example, the costs of existing compliance activities may be construed in a way to suggest such compliance is part of a research program. It is unlikely DEHP would actively regulate how the R&D investment is being used and would instead require subjective self-reporting by the company.

The outputs of in-house R&D are difficult to measure, susceptible to failing, and it is conceivable that companies would not be transparent with how the money is spent.

Recommendation:
• Investment in R&D should be a co-requirement with evidence of progressive rehabilitation and not qualify as a standalone criterion (either at EPC1 or EPC3) for a FA discount.
• In-house programs are an inappropriate means of investing in R&D.
• Real, measured, progressive rehabilitation with clear targets, is more appropriate than R&D investment.

We understand that there is a broader policy review about to be undertaken into financial assurance. We kindly request the opportunity for further participation in such a review in addition to the development of financial assurance guidelines.

Should you require any further information, please contact Rana Koroglu or Jo Bragg on (07) 3211 4466 or at edoqld@edo.org.au.

Yours faithfully

Environmental Defenders Office (Qld) Inc

Jo-Anne Bragg.

Jo-Anne Bragg
Principal Solicitor

[1] Queensland Audit Office, *Environmental regulation of the resources industry*, https://www.qao.qld.gov.au/audit-forms/view/99 (accessed 30 January 2014)
[2] See EHP's regulatory strategy (2013): http://www.ehp.qld.gov.au/management/planning-guidelines/policies/pdf/regulatory-strategy.pdf (accessed 30 January 2014)
[3] Many long term (expert) environmental staff 'voluntarily' left the Queensland Government to work for industry in 2012. A large portion of those 'took voluntary redundancies'. Figures at the time put total job losses close to 14,000 people across Queensland's public service. In the environmental arena, changes of departments make figures difficult to quantify but as at September 2012, approximately 220 staff were said to be cut from EHP, 130 from DNPRSR and 360 from the Department of Natural Resources and Mines. Brisbane Times, *Job Cuts by Portfolio* (11 September 2012) http://www.brisbanetimes.com.au/queensland/list-job-cuts-by-portfolio-20120911-25px8.html (accessed 31 January2014).