



## **Submission on the Review of the load-based licensing scheme**

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 30 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 law, EDO NSW welcomes the opportunity to comment on the Environment Protection Authority's (EPA) *Review of the Load-based Licensing Scheme Issues Paper (Issues Paper)* and associated documents.<sup>1</sup> EDO NSW has written numerous submissions on load-based licencing (LBL) and other pollution management techniques. We reference a number of these in this submission but also refer the EPA to our website for further information: [http://www.edonsw.org.au/pollution\\_policy](http://www.edonsw.org.au/pollution_policy).

This submission is structured around the questions asked in the Issues Paper. We focus on the role of an effective LBL scheme, pollutants covered by the LBL scheme, and ensuring LBL fees are set in a way that will drive pollution reduction.

We note that the Issues Paper emphasises that the LBL scheme is designed to, amongst other things, address cumulative impacts and move licensees beyond compliance. In this context it is important to acknowledge that there are currently a number of failings in the regulatory system that mean there are few policies or programs that adequately regulate cumulative impacts, and many industrial discharges are permitted at levels that are known to be above safe levels for human or environmental health. In consequence, the NSW pollution management system, including the LBL scheme, still falls significantly short of ensuring appropriate environmental protection. This review provides an opportunity to strengthen the LBL scheme and its contribution to ensuring all facility operators prevent or minimise environmental harm arising from their activities.

## Chapter 3 Focus Questions

### *How can the LBL scheme best complement other regulatory approaches?*

EDO NSW supports the use of a broad suite of regulatory tools to manage environmental pollutants. We agree that LBL has played a useful role in reducing pollutant discharges in NSW, and strongly support broadening and strengthening the scheme to ensure that it drives adoption of current best practice and continual improvement. In this regard, we recommend the outcome of the review should include an increase in the scope of pollutants captured by the scheme and ensure that LBL fees are sufficient to drive change.

We have previously expressed concern that many Environment Protection Licences (EPLs) allow discharge limits that are above environmentally acceptable levels, such as water discharges that exceed ANZECC Guidelines<sup>2</sup> and/or NSW Water Quality Objectives, and air emissions that are known to have health impacts, such as those arising from particulate matter (PM). It is important that management of pollutants in NSW is constantly striving to minimise the release of pollutants into the environment

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<sup>1</sup> These documents include the *Load-based licensing issues paper*, *Snapshot of the issues paper*, *Overview and facts about how load-based licensing works*, *Comparative review of load-based licensing systems* by BDA Group (**BDA Group Report**), *Load-based licence fee comparison* by ACIL Allen (**Allen Report**), and *Load-based licensing review timeline*, available at: <http://www.epa.nsw.gov.au/licensing/lbl/lblreview.htm>.

<sup>2</sup> Australian and New Zealand Environment Conservation Council (2000) *Revised Australian and New Zealand Guidelines for Fresh and Marine Water Quality*.

and ensuring that pollution levels in the environment meet the relevant environmental guidelines and standards (including as a result of the cumulative effects of discharges from multiple sources). In this sense, the EPA must start to set more environmentally appropriate discharge limits for new projects, and drive reductions of discharge limits for existing projects, including using financial incentives created by a strong LBL scheme. Pollution management must build in a need for continual improvement, but the starting point must be for all operators to achieve compliance with the relevant minimum standards for a healthy environment, both individually and cumulatively.

In 2012, we prepared a discussion paper for the Nature Conservation Council of NSW titled *Clearing the air: Opportunities for improved regulation of pollution in New South Wales (Clearing the Air)*<sup>3</sup> that examined how the existing regulatory tools could be better used to manage air pollution in NSW. We refer the Review team to that paper.

#### What should the role of LBL be?

The Issues Paper flags that the LBL is a market-based instrument designed to increase flexibility and obtain lowest cost pollution reduction. As a general principle, EDO NSW submits that if the EPA chooses to use market-based instruments in this way, it is important that the system is not undermined by exemptions and exclusions that limit market operation. In the case of the LBL this includes exemptions of certain industries or pollutants, particularly those which may contribute to cumulative impact, and rebates that reduce the financial incentive for industry to adopt new technology that will reduce pollutant discharges. To operate as an effective market instrument, the LBL scheme must ensure that polluters pay the true cost of discharging pollutants (pollution externalities) thus ensuring adequate incentive to reduce discharges. A consequence of the current load-based fee structure is that for many pollutants the fees do not reflect the true cost of the long term, cumulative impact of pollutants to the environment.

#### What shouldn't its role be?

LBL is an 'end-of-pipe' management tool. As such, it should not replace appropriate decision making around acceptable levels of discharge for new projects and upfront consideration and management of issues such as cumulative impacts.

#### Do you think the LBL scheme has been effective? Why or why not?

As stated above, we agree that LBL has played a useful role in reducing pollutant discharges in NSW. However, in *Clearing the Air*, we identified four key concerns with the LBL system that we expand on throughout this submission, namely:

- the fees are not set at the correct level;
- the licensing fee system covers an inadequate set of pollutants;
- greenhouse gases are not regulated as pollutants; and

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<sup>3</sup> Environmental Defender's Office (2012) *Clearing the air: Opportunities for improved regulation of pollution in New South Wales*, Environmental Defender's Office (NSW) Ltd, Sydney, Australia, available at: [http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/280/attachments/original/1380668034/120322pollution\\_discussion\\_paper.pdf?1380668034](http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/280/attachments/original/1380668034/120322pollution_discussion_paper.pdf?1380668034).

- the fees generated from the system could be better used to advance environment protection goals.

### What does an effective LBL scheme look like?

In our submission, an effective LBL scheme captures the full range and source of pollutants that are harmful to the environment and human health, and sets fees at a level that drives continual improvement. We agree with the observations from the BDA Group Report<sup>4</sup> that:

- *Real incentives require fee levels to exceed the cost of emission abatement*
- *The environmental effects of incentives are compromised by the existence of exemptions*
- *Be judicious and cautious with rebates*
- *Ensure incentives are complementary to broader regulatory settings*

Based on the licensee survey, the Issues Paper reports that the current LBL fees only act as an incentive for action for a small number of licensees. Clearly there is a need, at a minimum, to increase fees and broaden the range of pollutants covered by the scheme.

Given that the licensee survey also identified that a significant driver for improved performance by licensees is community perception, the LBL scheme should be accompanied by better reporting of pollutant discharges, LBL contributions, and actions to minimise discharges, amongst others things. In *Clearing the Air* we recommended that licensees should (through the LBL system and more broadly):

1. *Report the load and concentration of each of the pollutants in a meaningful way (per week, averages, minimum/maximums etc), and provide a comparison to ambient conditions;*
2. *Report any breaches of licence limits with regards to the discharge, with an explanation of why it occurred, how it was remedied and any environmental impact;*
3. *Compare the load and concentrations with the previous years' discharge with the purpose of demonstrating incremental reduction;*
4. *Report the state of the receiving environment (including load and concentration measurements as well as physical attributes);*
5. *Report any breaches of licence limits with regard to the state of the receiving environment, with an explanation of why it occurred, how it was remedied and any environmental impact and how it was remedied;*
6. *Contribute information that allows the EPA to compare the state of the receiving environment with the previous years' state with the purpose of demonstrating no negative impact and no increase in pollution; and*
7. *Report on any work done throughout the year that aimed to reduce pollution, and the success/failures and any future work that will be done and with what aims.*

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<sup>4</sup> BDA Group (2014) *Comparative review of load based licensing fee systems - Final report*. Prepared for the NSW Environment Protection Authority, available at: <http://www.epa.nsw.gov.au/resources/licensing/lbl/load-based-licensing-bda-group-comparative-review.pdf>.

## Chapter 4 Key Elements Focus Questions

### Are there particular issues with the current LBL pollutants, including the pollutants captured, definitions and weightings?

EDO NSW submits that the current list of assessable pollutants is too narrow. The list of pollutants and scheduled activities should be more comprehensive.

We also support the proposal to increase the EPA's focus on PM and agree that for management purposes it is appropriate to split PM<sub>2.5</sub> and PM<sub>10</sub>.<sup>5</sup> The Issues Paper suggests "*Relatively higher pollutant fees for PM<sub>2.5</sub> could be charged for licensees in areas located around highly populated areas and areas where the new AAQ NEPM Ambient Air Quality standards may not be met in the near future due to pressures from industrial activities*" (p 17). It is well established that there is no safe level of PM, with greater health impacts demonstrated from exposure to PM<sub>2.5</sub>. Therefore increasing the priority for managing PM is appropriate. However, the right to a healthy and safe environment should not be dependent on the number of people who live in an area. On average, people in rural, less populated areas already have poorer health outcomes, greater socio-economic disadvantage, and more difficulty in accessing appropriate health services. In consequence, there must be a significant financial incentive for reducing PM emissions in all areas, even if highly populated areas have an additional incentive due to the greater numbers of individuals likely to be affected.<sup>6</sup>

Another key priority for the LBL scheme should be the addition of greenhouse gases as pollutants, including coal seam gas (**CSG**) fugitive emissions. In the absence of a carbon price, LBL fees for greenhouse gas emissions are consistent with the polluter pays principle. We note that the survey of industry indicated that there was support for including greenhouse gas emissions in the LBL scheme.

### Do you consider any of the options described for assessable pollutants, critical zones, scheduled activities or load limits to be preferable? If so why?

#### Assessable Pollutants

EDO NSW does not support limiting the LBL scheme to only the 'highest priority pollutants'. In discussing water prioritisation, the Issues Paper (p 27) flags that any such limitations may be based on potential environmental harm and the EPA's own priorities and focus. While potential environmental harm is an objective measure, the EPA's priorities and focus may lag behind current scientific knowledge and community concern, and are not necessarily a reflection of greatest risk to people or the environment. A scheme with broad coverage would ensure that all pollutants, including those which create load issues or are a local priority, will be captured. Where companies are making commercial profits as a consequence of discharging pollutants to the environment, it is entirely appropriate that they should cover the true cost of that activity (including monitoring and compliance). Such costs do not justify

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<sup>5</sup> Although not proposed here, we note that we would not support any proposal for the EPA to reduce their focus on PM<sub>10</sub>.

<sup>6</sup> EDOA expanded on these issues in their *Submission on the Draft Variation to the National Environment Protection (Ambient Air Quality) Measure* (October 2014), available at: [https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/1713/attachments/original/1412836043/141009\\_ANEDO\\_Submission\\_on\\_Air\\_Quality\\_NEPM\\_.pdf?1412836043](https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/1713/attachments/original/1412836043/141009_ANEDO_Submission_on_Air_Quality_NEPM_.pdf?1412836043).

narrowing the scope of pollutants included in the scheme. Within this context, pollutant weightings that drive faster change for more high risk pollutants may be appropriate.

### Critical Zones

The Issues Paper notes (p 37):

*It is proposed to better complement the EPA's regulatory framework by driving emission reduction in critical zones (or priority areas) in particular, especially where a cumulative impact has developed or has a significant potential to develop... Elsewhere, it is proposed that the scheme will continue to provide an incentive for licensees to improve their performance, but fees may not necessarily reflect the cost of abatement/damage.*

EDO NSW supports using critical zones to focus EPA actions on management of cumulative impacts in pollution hotspots, however such focus should not undermine the effectiveness of the broader scheme by allowing licensees outside of these hotspots to avoid paying the true cost of discharged pollutants. The Allen Report<sup>7</sup> commissioned by the EPA identified that the most successful schemes are those where the fee levels were found to approach estimated externality damage impact values. The Allen Report also noted that estimates of externality cost are higher than the level of the corresponding LBL fee for many pollutants.

Given the relative success of critical zones in driving reductions in pollutant discharges, the principle of critical zones should be maintained, and adjusted as necessary, as a useful tool. In this regard, Option 2 of the Issues Paper appears to provide the best ability to target pollutants and areas.

EDO NSW is concerned that removing aspects of the scheme from the *Protection of the Environment Operations (General) Regulation 2009 (Regulation)* risks a reduction in transparency and accountability of how zone ratings are developed and applied. If aspects of the scheme are removed from the Regulation there must be clear processes, involving appropriate community consultation, for implementing any changes in the scheme and these consultation requirements should be specified in the Regulation.

### Scheduled Activities

EDO NSW strongly supports the expansion of the scheme to cover all EPA licensees and a comprehensive list of pollutants. This will ensure equity and help to address cumulative impact. However, if EPA continues to limit the operation of the scheme, there should be a focus on capturing all licensees that discharge priority pollutants.

In *Clearing the Air*, EDO NSW reported that in 2012 there were 30 assessable pollutants listed in the Load Calculation Protocol (**LCP**) when the National Pollutant Inventory (**NPI**) required industry to report emission concentrations of up to 93 pollutants. To enhance the effectiveness of the LBL system, it would be appropriate

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<sup>7</sup> ACIL Allen Consulting (2014) *Report to NSW Environment Protection Authority Load-Based Licence Fee Comparison: Comparison of Load-Based Licence Fees With Marginal Abatement Costs (MAC) and Marginal External Costs (MEC) for Selected Pollutants*, available at: <http://www.epa.nsw.gov.au/resources/licensing/lbl/load-based-licensing-acil-allen-fee-comparison.pdf>.

for the EPA to expand the list of assessable pollutants to at least include those listed by the NPI. While an emission load threshold may be useful in saving costs for very small emitters, it does mean that cumulative effects are not being costed and there would be an increased compliance burden on EPA to ensure that those claiming to be below the threshold actually are.

Regardless of the option pursued, we strongly support the inclusion of the mining sector (including CSG) into the LBL system. The Issues Paper confirms that the mining sector is a particularly large contributor to industrially-sourced air pollution in Australia. As noted in the EDOs of Australia (**EDOA**) submission to the Senate Inquiry into the impacts on health of air quality in Australia:<sup>8</sup>

*Coal can impact on air quality in a number of ways, during mining, extraction and transport as well as in coal-fired power generation. Open cut mining involves drilling and blasting, as well as the use of draglines to remove the overburden to reach coal deposits. These activities can result in the creation of atmospheric pollution, mainly in the form of particulate matter. Transport of the mined coal in uncovered trains can have similar pollution contributions. Coal combustion from local coal-fired power stations also results in atmospheric pollution that consists of fine particulate matter as well as other noxious substances including nitrogen and sulphate-containing gases. These gases can then react to form more particulate matter as well as ozone. These substances are in addition to carbon dioxide emissions, which can lead to other health impacts from climate change.*

EDO NSW has previously recommended removing limitations on railway infrastructure operations and rolling stock operations to those that occur on a continuous or connected length of track greater than 30km.<sup>9</sup>

### Load Limits

As the LBL scheme currently operates, load limits appear to be the key tool for limiting the total amount of a pollutant that can be released into a water catchment or air shed. Load limits should be retained, however for them to be effective, load limits must apply to all licensees discharging into the same catchment or air shed and there must be greater understanding of the total load that can be supported by that catchment or air shed without negative environmental or health consequences. This would allow limits to be set to ensure the cumulative effect of the discharges from multiple sources meet accepted environmental standards.

*Do you consider any of the options to be impractical or unworkable in some way? If so, why?*

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<sup>8</sup> Full submission available at:

[http://d3n8a8pro7vnm.cloudfront.net/edonsw/pages/253/attachments/original/1380614001/130308ANEDOhealth\\_impacts\\_of\\_air\\_pollution.pdf?1380614001](http://d3n8a8pro7vnm.cloudfront.net/edonsw/pages/253/attachments/original/1380614001/130308ANEDOhealth_impacts_of_air_pollution.pdf?1380614001)

<sup>9</sup> EDO NSW submission to *Draft Amendment to Protection of the Environment Operations Regulation (Scheduled Activities) 2016 - rail freight* (June 2016), available at:

[https://d3n8a8pro7vnm.cloudfront.net/edonsw/pages/2937/attachments/original/1466120900/amendment\\_to\\_protection\\_of\\_the\\_environment\\_operations\\_regulation\\_railway\\_coal\\_EDONSW\\_submission\\_June\\_2016.pdf?1466120900](https://d3n8a8pro7vnm.cloudfront.net/edonsw/pages/2937/attachments/original/1466120900/amendment_to_protection_of_the_environment_operations_regulation_railway_coal_EDONSW_submission_June_2016.pdf?1466120900)



There appears to be a tension in the Issues Paper between suggesting that LBL schemes are designed to, amongst other things, tackle cumulative impacts and the suggestion that some air pollutants for some activities could be removed from the LBL scheme with other mechanisms used to target pollution hotspots (p 33). We have previously submitted that the LBL scheme should be expanded rather than reduced in scope. While *Clearing the Air* identified a number of mechanisms that could be used more effectively to tackle cumulative impacts and pollution hotspots, given the limited uptake of many of the alternative mechanisms to date, the EPA should clarify how these mechanisms will function more effectively in the future before removing any pollutants from the LBL scheme.

#### **Chapter 4 LBL Fee Focus Questions**

As noted above, the Issues Paper (p 53) proposes targeting the LBL scheme, and the associated fee structure, on specific pollutants in specific areas thus reducing the financial incentive to reduce pollutants in other areas. EDO NSW supports risk based prioritisation of pollution reduction by significantly increasing incentives to reduce specific pollutants in specific areas, but does not support any proposal to remove a price signal for discharges that are not considered by the EPA to be priority pollutants or areas. We reiterate the recommendations made in *Clearing the Air*, that:

- *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.*

We strongly recommend that LBL pricing for all pollutants should be based on abatement **and** damage costs (where damage costs include both short-term and long-term costs to human health and the environment) in an expanded list of scheduled activities and assessable pollutants. We recognise that the implementation of an expanded list of assessable pollutants costed to reflect abatement and damage costs will require significant technical input and as such, implementation may need to be prioritised and staggered. However implementing a more comprehensive system should remain a goal of the LBL scheme.

*Do you consider any of the options described above for improving the pollutant fee unit, critical zone weightings, fee rate thresholds, weighted loads or the administrative/load fee discount to be preferable? If so why?*

#### Pollutant fee unit

As stated previously, we agree that the LBL scheme has made a contribution to the reduction of pollution in NSW. However, inadequate fee structures have meant that the scheme has not been as effective as it could have been. As an example, the Issues Paper identifies that “*Decreases in VOC emissions to air, and salt and nutrient emissions to water are more evident in areas where LBL fees are proportionately higher due to critical zone weightings, than in unweighted areas*” (p 13). This strongly suggests that for many pollutants and/or areas, current fees are

not sufficient to create market change but when set correctly LBL fees do drive change. We also note the consistent finding in the Allen Report that abatement measure cost and externality cost (or damage cost) are higher than the current LBL fee, which suggests that the current fees are unlikely to incentivise significant abatement activity.<sup>10</sup>

In the absence of a commitment to include an expanded list of scheduled activities and assessable pollutants in the LBL scheme, or if an extended timeline is required for implementation, as a minimum, there should be an immediate increase in all pollutant fee units, with further annual CPI increases.

#### Critical zone weightings

Critical zone weightings as described in the Issues Paper (pp 56-57) could be used to prioritise the development of LCPs in an expanded LBL system. However, weighting should not be used to reduce the financial incentive to reduce discharges of non-priority chemicals. Weighting should consider both abatement and damage costs and fees should maximise the incentive to reduce pollution.

#### Fee rate thresholds

The Issues Paper appears to suggest that fee rate thresholds could be removed or reduced on the basis that the EPA will implement Pollution Reduction Programs (PRP), pollution reduction studies or monitoring and reporting requirements where licensees are identified as being poor-performers. In our opinion, PRPs are a potentially powerful tool for reducing pollution, but they tend to have been under-utilised, or used inappropriately as a substitute for strong enforcement action in response to repeated pollution licence breaches. They are often used as a tool to require more monitoring and studies on pollution and environmental harm caused by an operator, rather than to require actual work to be done to stop or control pollution or to prevent harm to the environment occurring in the first place. Further, neither pollution reduction studies nor monitoring and reporting requirements actually act to reduce pollution, and requiring these studies where a problem has already been identified can significantly delay action to avoid or mitigate environmental harm or risks. The fee rate thresholds uniquely target known poor performers and as such we do not support the removal of the threshold unless it is replaced by an equivalent or stronger mechanism, such as tying discharge limits to current best practice and continual improvement requirements.

In fact, this review provides an opportunity to significantly improve the use of the fee rate threshold system. An additional consideration in setting the fee structure should be financial penalties for those activities that produce emissions that are higher than current best practice for that sector, rather than those that are '*reasonably achieved in the sector using modern technology*'. Such an approach would create greater incentive for less polluting technologies within a sector, including in situations where the sector may cross a number of scheduled activities. For example, penalties relating to the emission of greenhouse gasses in the electricity generation sector should be based on a comparison of emissions from coal fired power to those of best practice wind and solar power generation activities.

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<sup>10</sup> See for example the discussion of PM<sub>10</sub> on p 17.

### Weighted loads

EDO NSW supports appropriately assessed and managed re-use programs.

We have written extensively on the concept of offsets and our concerns with the current offset programs being delivered in NSW.<sup>11</sup> We do not support using the existing or proposed biodiversity offset schemes as a basis for designing an offset system for pollution management in NSW. If the reliance on offset schemes is to be increased, significantly more detail on any offsets proposals should be publicly available, including a strong environmental test or assessment criteria that will form the basis for any approval of an offsets proposal. EDO NSW has previously expressed our concern in relation to section 295N of the *Protection of the Environment Operations Act 1997* that licence conditions may be imposed even though the offset scheme or work does not relate to the licensed premises or the harm arising from the activity. The lack of required nexus between the activity and the offset remains a concern. We also remain concerned about the longevity of offset programs and whether offsets program will remain in perpetuity. Further, any such schemes should not be at the expense of a focus on pollution reduction at source.

### Administrative/load fee discount

The administrative fee and the load-based fee are clearly designed to cover different costs in the pollution management system. Given the polluter pays principle, licensees should be liable for both fees.

## **Chapter 4 Costs and Revenue Focus Questions**

*Do you consider any of the options described above for improving compliance costs, load reduction agreements or the use of revenue to be preferable? If so why?*

### Compliance Costs

Targeting of pollutants and activities by the EPA should not be done at the expense of managing the cumulative impact of pollutants. We are particularly that concerned some proposals in the Issues Paper related to reducing compliance cost could remove pollution reduction incentives for pollutants that are produced in small quantities by a large number of licenced facilities. Any changes to the LCP should not reduce the quality of data being collected on pollutants discharged to the environment.

EDO NSW strongly supports creating an online reporting portal that enhances public access to LBL data. Increased transparency will be particularly important if the EPA proceeds with the proposal to make emission estimation techniques (**EETs**) more flexible. Making this portal complementary to the NPI would also be beneficial.

We also support greater training and skills-building being provided by EPA. This is particularly required if new scheduled activities and pollutants are included in the scheme.

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<sup>11</sup> Information on our concerns with the most recent biodiversity offset proposals is available at: [http://www.edonsw.org.au/nsw\\_biodiversity\\_reform\\_package\\_2016](http://www.edonsw.org.au/nsw_biodiversity_reform_package_2016). See also EDO NSW's article *Fundamental Principles For Best Practice Biodiversity Offsets* (2014), available at: [https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1685/attachments/original/1413410934/IMPACT\\_ISSUE\\_96.pdf?1413410934](https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1685/attachments/original/1413410934/IMPACT_ISSUE_96.pdf?1413410934)

### Load Reduction Agreements

Load Reduction Agreements (**LRAs**) are a potentially useful tool to assist industry undertake high cost pollution reduction schemes, but there are a number of risks associated with the increased use of such agreements. Entering a LRA effectively allows a facility to continue high levels of pollution without an upfront cost. This deferred cost potentially creates a large financial benefit for the company while transferring the cost of the ongoing pollution to the broader community. As such, there should be strict guidelines about when using an LRA is appropriate and the terms of any LRA, and any company entering an LRA should be required to provide financial assurance for any waived LBL fees for the period of the LRA. We note the observation in the Issues Paper that *“It appears that fees payable need to more closely match the cost of abatement before more licensees consider applying for an LRA”* (p 74). If the EPA does increase the flexibility around LRAs there must be an associated increase in transparency around decision making and reporting of LRAs.

### Revenue Recycling

We reiterate the BDA Group Report findings that schemes such as LBL must avoid a situation where the environmental effects of incentives are compromised by the existence of exemptions, and that managers of such schemes must be judicious and cautious with rebates.

EDO NSW does support the revenue earned from load-based fees being used for environmental protection and remediation works. However we are concerned that returning LBL fees to industry risks undermining the intent of the LBL scheme. Rather, the EPA should retain LBL fees to be re-invested into dealing with pollution issues which are poorly understood or that are difficult to address at the source – this may include legacy pollution (such as derelict mines) or cumulative pollution where there are a large number of sources of pollutants. The EPA could manage a budget specifically for remediation and mitigation works or create an independent trust fund, from which money is allocated to the most appropriate organisation to undertake research, mitigation or remediation works.

## **Chapter 4 Governance and Administration Focus Questions**

*Do you consider any of the options described above for improving compliance assurance, administrative flexibility and the Technical Review Panel to be preferable? If so why?*

### Compliance Assurance

The current system whereby *“the EPA requires only the final load figures and subsequent fee calculations to be reported in the annual return”* (p 82), is inadequate. At a minimum, sufficient information to allow an independent third party to assess the reasonableness of the load figure should be required. While independent certification can increase accountability, if not designed well it could also lead to reduced transparency and reduced community confidence in scheme outcomes. In this regard, we refer the Review team to our comments on the use of private certifiers in the planning system.<sup>12</sup> If an independent certification system is

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<sup>12</sup> See for example our *Submission on Options for Low Rise Medium Density Housing as Complying Development* (February 2016), available at: [https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/2648/attachments/original/1456972057/sub\\_Expanding\\_C](https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/2648/attachments/original/1456972057/sub_Expanding_C)

adopted it would need it be supported by a strong EPA auditing function and clear transparency and reporting requirements. Regardless of the compliance mechanism adopted, EDO NSW supports a strong, adequately resourced, compliance audit program to ensure the scheme is being implemented appropriately.

#### Administrative flexibility

Again, while there may be some benefits to improving responsiveness of the scheme by placing some issues outside regulation, this comes at the risk of reduced transparency and accountability. Further justification needs to be provided on the need to amend the Regulation to remove elements of the scheme, rather than better utilising the various tools already available to the EPA. The Issues Paper highlights concerns in relation to the need for industry certainty but an equal concern should be the community's certainty that the LBL scheme is driving best practice pollution management. If recommendations to include a more comprehensive range of pollutants in the scheme are not adopted and if the list of assessable pollutants is removed from the Regulation, there is a risk that EPA priorities will not meet community expectations.

More information should be provided on how the scheme would be managed if components are removed from the Regulation and any amendments to the Regulation should specify the need for community consultation on any changes to assessable pollutants, pollutant weightings, fee rate thresholds, critical zones and associated pollutants, and pollutant-specific weightings.

#### Technical Review Panel

EDO NSW supports the need to ensure that members of the Technical Review Panel (**TRP**) have the appropriate skills, experience and qualifications, but submits that any change to the TRP should not remove the requirement to include a representative of environment groups. If recommendations to increase the range of assessable pollutants across a broader range of industries are adopted, arguable there would be a greater requirement for TRP input into the LBL scheme in the future.