

22 February 2012

Environment Protection Authority
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Dear Sir/Madam

The Australian Sustainable Business Group (ASBG) welcomes the opportunity to comment on the *Environmental Guidelines: Publication of Monitoring Data (the Guidelines)*. The Guidelines purpose is to provide further compliance information to the recent changes to NSW environmental legislation.

The Australian Sustainable Business Group (ASBG) is a leading environment and energy industry representative body that specializes in providing the latest information, including changes to environmental legislation, regulations and policy that may impact industry, business and other organisations. We operate in NSW and Queensland and have over 150 members comprising of Australia's largest manufacturing companies. Members were fully involved in the development of this submission and ASBG thanks them for their contribution.

ASBG strives to assist regulatory agencies to prepare more efficient regulatory process, with the outcome of achieving practical, efficient, low cost solutions to achieve high environmental outcomes.

ASBG welcomes a number of provisions in the Guidelines, especially those which increase flexibility and reduce compliance costs. This submission will focus on specific issues within the Guidelines and enabling legislation, which ASBG considers, requires further consideration, including:

1. Clarification of website meaning for publication
2. Provision of data without a website
3. Arrangement of monitoring data
4. Treatment of exceptions and errors
5. Other issues requiring clarification
6. Consultation
7. Summary of key points and recommendations

1. CLARIFICATION OF WEBSITE MEANING FOR PUBLICATION

S66(6) states:

(a) if the holder maintains a website that relates to the business or activity the subject of the licence-- make any of the monitoring data that relates to pollution, and the licensee's name, publicly and prominently available on that website..

This section appears to only capture websites that relate to the business or activity the subject of the licence. ASBG considers that many company websites exist that are of a sales or corporate nature and do not directly relate to the business of the licence.

ASBG has identified a number of issues relating to website use for monitoring data including:

- Corporate has a website but the EPL Site has no website

At the public information session in late January, the EPA indicated that captured websites would only include those, which directly related to the site holding the EPL. Hence corporate websites, which did not relate to a specific EPL sites and were largely there for marketing, stockholder or other corporate purposes should not be captured. Additionally, corporate websites are also considered inappropriate for the posting of monitoring data.

R1 ASBG recommends that a corporate website for sales, stockholder and other corporate issues is an unsuitable site to display monitoring data.

- EPL holder is not the owner of the site and has no website, but site owner runs a website.

A number of EPL holders are under contract to work and manage operational activities, either fully or in part, on a site, which triggers the need for an EPL. This is typical of construction sites where the owner is not the EPL holder, but has variable responsibilities on the financial side of the site. There is a grey area where the owner has varying degrees of operational control over the site, which may change over time. These changes may not result in a change to the EPL holders name.

For example, a railway development will be handled by a contractor or consortium. While NSW rail may own the site, it is not the EPL holder. Obviously, if the project has its own website and the EPL holder is identified on the website as a major partner, or as the EPL holder, then this would be a captured website for monitoring data. If, however, the EPL holder is not listed under any website then it does not have to publish on any of the websites.

For contractual reasons, a website not operated or controlled by the EPL holder, may be required to host the EPL monitoring data. The legal question becomes, is this a voluntary display of website data, or is it subject to the penalties under s66? Here the EPL holder may also provide data to the public on request, and comply with s66(6)(b). As such, the monitoring data, which is on another's website, is there for voluntary additional information reasons only. From a community right to know perspective the EPA should encourage such voluntary display of monitoring data, otherwise the easier choice, s66(6)(b) will be the option of choice under this example.

R2 ASBG recommends the EPA permits the option of the voluntary display of monitoring data on non-EPL websites, subject to the EPL holder also providing data on request as per s66(6)(b).

Further to this issue is the question of operational control. For example, a website operator is considered to have operational control of the site, but is not the EPL holder¹. Then operational controlling party is responsible, but is then reliant on the EPL holder to supply the data accurately and in time. A reverse of this is where the EPL holder is responsible for preparing the data for up loading on the operational controlling parties website, but then it is reliant on that party to upload and maintain the website properly.

¹ This raises the question of whether the operational controlling party should have the EPL transferred to it?

Like continuous monitoring, websites have to go down for maintenance from time to time. ASBG expects the EPA will apply a common sense approach to such outages. If there is any issue in formalising the permitted off-line time of website then a similar approach to that used for continuous monitoring should be used.

2. PROVISION OF DATA WITHOUT A WEBSITE

Under section 3.1 of the Guidelines, where EPLs that have no website, there is a requirement to supply to anyone asking for it 'hard copies' of their monitoring data. What is meant by 'hard copies'? ASBG considers this should be more flexible and include any suitable form of data that the requester can access and use, subject to their approval. This may include: CD ROMs or DVDs, memory sticks, paper of course or even an email, as long as the receiver willingly accepts it. EPL holders using the hard copies option (rather than website posting) should be in a position to assist the person asking, and provide the appropriate set of data asked for, where practical. It is obviously not environmentally advantageous to supply large monitoring data in printed form, when other far more efficient and compact means exist.

ASBG notes that when using the website option, up to 3 years of data has to be made available. However, for individual requests, if the person asking only wants last months, and only for air emissions, this option should be noted in the Guidelines as acceptable. Providing a more focused supply of monitoring data would be considered a better option than insisting on the all the data required as per a website to be sent to that individual.

R3 ASBG recommends that where no website is available, monitoring data to be supplied in a useful and meaningful form subject to the requesters requirements and acceptance, not limited to in hard copy form.

In this ASBG also would consider such requests should, be in writing from the person seeking the data or the EPL holder can generate a formal request note from a verbal conversation. Discussing the person's requirements will provide a more focused outcome of the data required.

3. ARRANGEMENT OF MONITORING DATA

ASBG argues the need to display 'underlying data' is redundant, and an unnecessary cost on our members. Further arguments for the display of exception reports rather than full underlying data is discussed in section 6 Consultation.

The Guidelines require that the data be provided in a rather strict tabular form, even for continuous monitoring. ASBG assumes this is required so that hard numbers can be compared. Use of such tables is seen as onerous and costly where exception reports can suffice and summarize far more briefly. They can also lead to misunderstandings and misinterpretation of the data, which is further discussed in section 5 of this submission.

For continuous monitoring the use of graphs with an exception report should be also permitted as a replacement to the tables. Though with this option such an exception report must provide some details regarding the exceedences.

R4 ASBG recommends that:

- ***The enabling legislation be amended to require the display of exception reports on a monthly basis***
- ***If full data sets are required to be displayed, the EPA permit the use of graphs for continuous monitoring under the condition that detailed exception reports are also required, rather than the supply of full tabular data sets.***

4. TREATMENT OF EXCEPTIONS AND ERRORS

The treatment of limit exceedences, when they have appropriate reasons, is also an issue. Under an EPL there are many examples of when monitoring data legally exceeds the licence numerical limits.

Examples, including those in covered in the Guidelines are:

- The logging of noise data. In many cases the measured total noise is recorded, and noise contribution from the EPL cannot be assessed, usually due to background noise being so high and extensive.
- Use of percentiles in the measurement data
- Calibration errors in continuous monitoring equipment
- Continuous monitoring equipment down time
- Continuous monitoring equipment off scale measurements
- Handling of minimum detection limits (MDLs)
- Special event sampling
- Permitted exceedences – where the EPA agrees to production continuing with some pollution equipment offline
- Weather related exceedences, such as wind rain or insects for noise, flooding, fires etc
- Off-site interferences such as a neighbour triggering an exceedence of a monitoring device.

While the Guidelines require that an explanation be provided, will the public and the media understand such technicalities given the raw data? Calls for the EPA to prosecute on legally groundless limit exceedences are potentially imminent. This will frustrate the EPA by having to explain reasons for its inaction. Explaining such details to the media has been a difficult process.

ASBG is concerned that while explanations will be provided on EPL websites, they will be ignored or considered unbelievable. As a consequence, the EPA will need to further explain to the public on the details because it should provide a higher credibility. To better address this issue the EPA may consider producing some factsheets explaining that many exceedences are legal and are not a breach of the EPLs.

R5 ASBG recommends the EPA publish fact sheets to assist in explaining exceptions and technicalities associated with monitoring data, especially covering that certain types of limit exceedences are acceptable and are not breaches of the EPLs.

ASBG finds the requirement that where EPL's require continuous monitoring to be posted in graphical form the tabulated data must also be shown. Again there appears to be no reason to publish both, unless there is concern the graphs may hide exceedences. This seems to indicate that some of the public have considerable credibility issues with EPL holders. If this is the case then regardless of what is published by an EPL holder, it will not be believed by some.

5. OTHER ISSUES

The Guidelines state the EPL holders have to collect monitoring data obtained from 31 March 2012 onwards for publication by 1 July 2012. ASBG is confused as it is not clear if this date refers to the sampling date or the information receipt date? The word 'obtained' implies the data received. Some received data may relate to sampling dates months ago and makes this requirement somewhat retrospective to the proclamation date. Additionally, the date of receipt of the data is not as well measured or established as the date of sampling. ASBG considers it would be easier for all to use 31 March 2012 as the sampling date.

R6 ASBG recommends The start date for collecting monitoring data, be applied as the sampling date, rather than monitoring data received for prior sampling dates.

As the requirement of publishing monitoring data matures, ASBG considers there should be at least one review of these Guidelines in the first 2 years at least. There are many unforeseen issues which will require amendments to the Guidelines to ensure they efficiently reflect the legislative requirements and minimise costs to EPL holders in its actions.

6. CONSULTATION

ASBG is concerned that the *Protection of the Environment Legislation Amendment Act 2011* (POELAA) passed through parliament with no consultation, discussion or consideration for the costs to be imposed on EPL holders and other affected activities. While Parliament has powers to make legislation it considers is necessary, ASBG is concerned the costs associated with the POELAA, if assessed were not publically released. Lack of cost impact assessment was also the case with the proposed amendments to the *Protection of the Environment (General) Regulation 2009*, as no cost benefit analysis was released. This contrasts with the amendments to the same regulation in 2008², which included a cost benefit analysis. Two members have reported the costs in preparing the monitoring data in the forms required under the guidelines is of the order of \$150,000 per annum.

ASBG also notes the publication of monitoring data is in part redundant as s320 of the *Protection of the Environment Operations Act 1997* (POEO Act), also requires the EPA to supply such monitoring data to anyone who requests it. The change therefore is not of one of supply of data, but to one of who supplies the data. The new inclusions in s66 appear to switch the supply of any monitoring data away from the regulator and onto the EPL holder. However, in practice if such data was requested, the EPA could merely forward on the requirement to the EPL holder, backed if necessary, by reason of its powers under *Part 7.3 Powers To Require Information Or Records* under the POEO Act. In conclusion, adding the publication of monitoring data as a statutory requirement will result in no material commercial or community benefit.

The POELAA's requirement for publication of complete data sets is also considered questionable in its purpose. The Guidelines go to considerable length to require the listing of the data and the limit, which it should be under. ASBG considers this is to enable easy identification of exceedences of limits. But if limit exceedence is the main reason to list the data why not simply list such exceptions? It is difficult to understand what benefit the public will derive from seeing the full underlying data set.

Use of exception reports, rather than full data sets, would have been a lower cost outcome for EPL holders. Such an approach would generally meet the concerns of the community and public. The Government now risks being accused of requiring excess information, which may bury important details.

7. SUMMARY OF KEY POINTS AND RECOMMENDATIONS

ASBG considers the enabling legislation should be modified to only require the need to publish exception reports rather than full data sets.

ASBG recommends that:

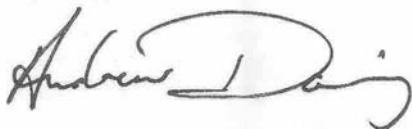
- 1 A corporate website for sales, stockholder and other corporate issues is an unsuitable site to display monitoring data.

² Regulatory Impact Statement: Protection of the Environment Operations (General) Regulation 2008

- 2 EPA permits the option of the voluntary display of monitoring data on non-EPL websites, subject to the EPL holder also providing data on request as per s66(6)(b).
- 3 Where no website is available, monitoring data to be supplied in a useful and meaningful form subject to the requester's requirements and acceptance, not limited to in hard copy form.
- 4 The enabling legislation be amended to require the display of exception reports on a monthly basis.
- 5 If full data set require to be displayed the EPA permit the use of graphs for continuous monitoring under the condition that detailed exception reports are also required, rather than the supply of full tabular data sets.
- 6 The EPA publish fact sheets to assist in explaining exceptions and technicalities associated with monitoring data, especially covering that certain types of limit exceedences are acceptable and are not breaches of the EPLs.
- 7 The start date for collecting monitoring data, be applied as the sampling date, rather than monitoring data received for prior sampling dates.

Should you require ASBG to clarify or elaborate on the above matter please contact me.

Yours Sincerely



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