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RE: ASBG's Submission on draft Powers and Notices Guideline for Authorised Officers and Enforcement Officers:

The Australian Sustainable Business Group (ASBG) welcomes the opportunity to comment on the draft [Powers and Notices Guideline for Authorised Officers and Enforcement Officers](#) (the Guidelines).

ASBG is a leading environment and energy business 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 110 members comprising of Australia's largest manufacturing companies and other related businesses.

Overall the Guidelines are a considerable improvement on the current set with a much clearer set of guidance notes for Authorised Officers and Enforcement Officers (Officers). ASBG particularly welcomes the inclusions of case law where clarification from the courts has been included. Overall there are only a few and minor areas of changes to the actual document. ASBG's main issue is with the consistency of enforcement across the EPA and other agencies enforcing environmental laws. Here the Guidelines are a good start, but to improve on consistency and effectiveness by Officers requires careful attention by the EPA. ASBG has identified key areas where inconsistency and poor behaviour and understanding of environmental laws occur which are discussed in Section 2 of this submission.

1 AREAS FOR GUIDELINES IMPROVEMENT

ASBG member feedback has raised the following areas which could result in better clarification in the Guidelines:

- Following on-site safety requirements
- A clearer differentiation between informal and formal questions
- A methodology to keep up with case laws

1.1 On-site Safety

The Guidelines are not clear on compliance with a site's safety requirements by Officers.

Box 1 states:

Is it safe for you and for others? Work health and safety (WHS) always comes first.

Box 2.1 covers whether health and safety can stop an officer from entering premises. It also requires the officer to follow your organisations WHS policies and exercise care and wear appropriate PPE etc.

ASBG considers it should also more clearly describe the WHS requirements that a site is fully responsible for any visitor's safety. In normal circumstances Officers should comply with a site's WHS requirements as usually identified by their WHS Policy. This can include

- Being signed in
- Being inducted if necessary, depending on the site or areas within the site
- Accompanied on the site by a representative
- Wearing PPE
- Following safety instructions

Only in emergency situations would WHS site requirement have a legal basis to be by-passed where the officer makes their own WHS decisions.

While each organisation behind an officer can refer to their own WHS policies, ASBG notes the EPA's webpage [Health and safety hazards for site inspectors](#) states:

The officer should contact the occupier of the site to find out any local OH&S requirements (for example, hard hats, hearing protection and safety footwear). The officer should carry these items in the car at all times and wear them if necessary.

Officers are expected to comply with all the safety requirements established by the site occupier or manager. An officer should not enter an operating premises on which hazards exist without being accompanied by a representative of the occupier.

Officers should be aware that under the Occupational Health and Safety Act the occupier of the site can require anyone intending to enter the site to comply with the OH&S requirements relevant to the site. This may include induction training, or the use of appropriate protection equipment.

ASBG is concerned the page is out of date and referring to the repealed Occupational Health and Safety legislation.

While the above advice for the EPA covers this, other agencies are left to their own policies.

ASBG considers given the history of safety breaches by Officers, the details covered in the webpage should also be reflected briefly in the new Guidelines and ensure this is part of the training program.

ASBG Recommends the Guidelines clearly indicate that all Officers are expected to comply with the safety requirements established by the site occupier or manager in addition to the agencies own WHS policy.

1.2 Clearer On Question Types

ASBG members cite cases where Officers have not been clear if they are asking questions in an informal or formal way. Generally, interviews and formal questions have the Officer using a writing pad to record such conversations, which provides some indication of the importance and legal nature of the answers provided. However, there have been cases where there have been informal chats only later to find the conversation was used as evidence against the company. ASBG considers there are a number of levels of formal questions and answers, which are covered in the draft Guidelines. However, using informal chats to gain information for direct legal application is inappropriate and would likely be frond upon by the Court.

To ensure there is effective communications and to avoid legal issues, ASBG considers the Guidelines should advise Officers to make it clear when the answers provided will be used as evidence or in a direct legal manner. ASBG wishes to avoid a legalistic approach between Officers and sites where all dealings and communications are treated as being potential evidence.

1.3 Keeping up with Case Law

ASBG considers the inclusion of case law in the Guidelines is a marked improvement over the old Guideline set. Case law is very important for Officers to understand to avoid similar issues in the future. New case law affecting Officers can occur in an ongoing basis. While the EPA has indicated the Guidelines will be updated every five years or so in a published form, this means relevant case law between publications will not be included.

To address this issue a webpage listing relevant cases which affect officer behavior in a significant way could be used. Selection of relevant case law, with explanations of how this affects officer behavior, will likely fall on the legal section of the EPA. As case law and its impact affects everyone subject to environmental laws, this webpage should be made public and referred to in the Guidelines.

2 CONSISTENCY OF ENFORCEMENT

ASBG members have many examples of behavioral issues with Officers where the Guidelines and training programs should cover and consider addressing. In the vast majority of cases the officers have behaved in a professional manner and this example represents a very small number of incidents. Please consider this section as a collection of past issues and feedback, which can be used by the EPA to improve its performance of Officers. The key areas are identified along with examples of cases which are put in general terms to avoid identification of all individual parties involved:

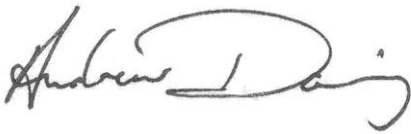
- **Unprofessional behaviour** – A few members report that EPA Officers treated professional environmental managers with contempt in accusatorial manner with hostile approaches in dealing with the site and its staff. Most businesses do not wish to challenge poor behaviour as they are concerned with reprisals where the officer then digs deeper looking for more issues, repeat visits and requirement for additional information and explanations. ASBG notes the EPA has internal processes in which to independently deal with such issues.
- **Difficulty accessing subject matter experts within EPA where scientific differences arise** – Site environmental officers may need to dispute the science behind a position direction or instruction from an Officer. Similarly to complaining about unprofessional behaviour, there is a real concern from business and organisations to do so will result in reprisals and or a more intense hostile relationship. There are many cases where Officers make claims and or require extreme controls because they do not understand the science. ASBG considers the Officers in their training need to be aware of their organisations policies on complaints such as the EPA Complaint Handling Policy.
- **Differences in enforcement between EPL sites and non-EPL sites** – ASBG members with EPLs are regularly inspected and the environmental performance reviewed. However, this is not the case for most non-EPL sites. A few members reported the creek next to their premises was in poor condition and they had to prove their EPL was not a contributor, yet no action was taken on the upstream non-EPL sites. Also members cite examples where they attract officer attention for what they consider is relatively minor issues where neighbours are blatantly operating in an environmentally illegal manner. There is a sense that the larger organisations are easier for Officers to deal with as they are more professional. In contrast there is a perception that criminal sites appears to generate an avoidance approach due to the personal risks to officers.
- **Differences between regions in enforcement approaches** – The enforcement of EPLs is undertaken in regional areas, where silos of management within the EPA appear drive the level of enforcement. ASBG members want a fair but firm approach which is common for most of NSW, but the Newcastle branch often cited as displaying a very heavy hand in managing EPLs and enforcement of environmental law. Consistency of enforcement should be a major target of environmental law enforcement to ensuring the branches are operating at a similar level.
- **Enforcing limits outside their jurisdiction** – Members report that Officers make comments on the performance levels of which they have no direct control over. For example, Officers have cited that the local sewer system must not accept XYZ substance. However, the sewer acceptance criteria are governed

by the agency controlling the sewer system is not asked or involved in such positions. While such limits are not placed into EPL conditions there is a threat that if a detect is recorded the officer may issue a warning or Penalty Notice for failing to operate in a competent manner. This seems outside the Officers jurisdiction on environmental matters.

- **Complying with onsite safety requirements** - There have been numerous examples where EPA Officers have refused or been reluctant to sign in and wandered around EPL sites when there was no emergency or obvious suspect pollution occurring. As discussed in section 1.1 inclusion of this issue should be part of the training program.

Should you require further information, clarification or details on the submission please contact me on 02 9453 3348.

Yours Sincerely



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