

**INQUIRY INTO PERFORMANCE OF THE NSW
ENVIRONMENT PROTECTION AUTHORITY**

Organisation: Nature Conservation Council of NSW
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Nature Conservation Council

The voice for nature in NSW

The Director
General Purpose Standing Committee No. 5
Parliament House
Macquarie St
Sydney NSW 2000

29 August 2014

Dear Sir/Madam,

Performance of the NSW Environment Protection Authority

The Nature Conservation Council of NSW (NCC) is the peak environment organisation for New South Wales, representing 130 member societies across the state. Together we are committed to protecting and conserving the wildlife, landscapes and natural resources of NSW.

We welcome the opportunity to make a submission to the inquiry into the performance of the NSW Environment Protection Authority.

Following the leak of hexavalent chromium from the Orica facility at Kooragang Island on 8 August 2011 (the Orica Incident) NCC commissioned a report on the opportunities for improved regulation of pollution in New South Wales. The report, ***Clearing the Air - Opportunities for improved regulation of pollution in New South Wales (enclosed)***, prepared by EDO NSW at the request of the Nature Conservation Council of NSW, sets out a clear agenda for legislative and operational reform aimed at restoring public faith in NSW's pollution control system.

In 2011, the Nature Conservation Council of NSW commissioned EDO NSW to look at the state of NSW's public-owned native forests and the flora and fauna species that inhabit them. The report ***'If a tree falls: Compliance failures in the public forests of New South Wales' (enclosed)***, outlines the regulatory framework for managing those forests, and numerous breaches of forestry regulations.

The overview and recommendations in both of these reports remain relevant several years later and I strongly recommend these reports to the upper house committee looking into the performance of the NSW Environment Protection Authority.

Since that time, NCC members and supporters have continued to express concern with the performance of the EPA across a wide range of issues:

- NCC member group, the Hunter Community Environment Centre (HCEC), gained access under freedom of information laws to correspondence between the EPA and other government agencies on coal dust pollution studies conducted in the Hunter Valley rail corridor in 2012-2013. The documents reveal a

systematic public relations effort by the EPA to conceal the extent and impact of pollution caused by uncovered coal trains passing through residential areas.

- NCC member group, The Wilderness Society, obtained documents that revealed that groundwater in the Pilliga has been contaminated by Santos CSG operations. An EPA press release revealed a “spill” which included “salts and other elements” but failed to mention that those other elements included such cancer-causing nasties as uranium, arsenic, lead, barium, boron, aluminium and nickel all in unsafe concentrations. Eventually, the NSW EPA confirmed the contamination event, but failed to act with any proper legal force, choosing to fine Santos only \$1,500 dollars.
- The North East Forest Alliance (NEFA), a participant in NCC’s internal forest working group, complained to the EPA about their misrepresentation of NEFA’s complaints regarding illegal logging practices at Royal Camp, near Casino in North NSW. NEFA’s complaint encompassed misrepresentation of evidence, refusal to investigate key complaints, failure to report findings on key complaints, claims that the EPA never found breaches that were clearly documented and shown to them in the field, failure to duly consider evidence available to them, inadequate expertise, and unprofessionalism.

In preparing our submission to the upper house inquiry, we asked our members and supporters to provide feedback on their experience with the EPA and its performance against its objectives. We found that, amongst our members, there was general disappointment and concern with the EPA’s performance, and that many of our members were unaware that the EPA’s objectives were as broad as we highlighted. Some specific responses and concerns are outlined in more detail in our submission.

New South Wales needs a fearless and independent environmental watchdog that puts the interests of the community and natural environment first. Most importantly, it must be adequately resourced so that it can effectively meet its objectives and enforce compliance with conditions of licence or approval, defend regulatory policies and actions through law when required, or prosecute offenders.

We look forward to the outcomes of the inquiry.

Yours Sincerely,

Kate Smolski
Chief Executive Officer
Nature Conservation Council

SUBMISSION TO THE UPPER HOUSE INQUIRY INTO THE PERFORMANCE OF THE NSW ENVIRONMENT PROTECTION AUTHORITY

INTRODUCTION

NSW needs an effective environmental regulator. Increased growth and industrial development are placing enormous pressure on the air we breathe, the water we drink and the ecosystems which support our well-being and survival. The Environment Protection Authority has an important role to play in protecting, restoring and enhancing the quality of the environment in New South Wales.

The EPA was first established in 1992 as a statutory body representing the NSW Crown, replacing the State Pollution Control Commission and the Ministry for the Environment. Following the leak of hexavalent chromium from the Orica facility at Kooragang Island on 8 August 2011 (the Orica Incident) the NSW Government announced a number of reforms to the State's pollution regulation system. This included the re-establishment of an independent EPA, headed by a Chief Environmental Regulator. Under the changes, the Board of the EPA is not subject to the control and direction of the Minister in any of its functions.

There is a general view amongst NCC's member and supporters that recently the EPA has not been meeting its objectives, and is not an effective environmental regulator. From our various discussions with members and supporters, the key reasons for the underperformance of the EPA appear to be:

- Lack of sufficient resources and capacity to effectively carry out its duties,
- A strong perception that the EPA has been captured by industry, and does not act in the public interest,
- Reduction in community involvement in or access to the EPA,
- Failure to effectively monitor and enforce environmental breaches.

This submission will consider each of these issues, as well as highlight recent reports that examine the performance of the EPA and would assist this committee with its inquiries. Key recommendations for the inquiry are summarised in the text box below.

This inquiry was set up because the EPA is no longer trusted by communities in NSW. We look to this inquiry to address the specific concerns raised by the community through this inquiry and to create an EPA capable of putting the environment and healthy communities ahead of polluters. We suggest that any proposals for major new and expended polluting developments should be put on hold until the inquiry runs its course.

KEY RECOMMENDATIONS

Recommendation 1: Adopt the recommendations set out in *Clearing the Air - Opportunities for improved regulation of pollution in New South Wales*, prepared by EDO NSW for the Nature Conservation Council of NSW (**enclosed**).

Recommendation 2: Adopt, where relevant, the recommendations in *'If a tree falls: Compliance failures in the public forests of New South Wales'* prepared by EDO NSW for the Nature Conservation Council of NSW (**enclosed**).

Recommendation 3: Make the following specific finding and recommendations relating to dust pollution in the Hunter:

- Confirm that the handling of the coal dust pollution studies by EPA staff, including the CEO, constitutes a breach of public trust.
- Confirm that the coal dust pollution studies have demonstrated uncovered coal wagons are significant sources of particulate pollution in the rail corridor with environmental and public health impacts.

- Confirm that the current regulatory arrangements for the management of particulate pollution for coal trains are inadequate to meet the performance objectives of the EPA under the Act.
- Recommend that the EPA direct all coal rail operators to urgently implement appropriate dust mitigation strategies, including the covering and washing of coal wagons.
- Recommend that the EPA initiate action against ARTC for failure to adhere to the conditions of their licence relating to their required pollution reduction program.
- Recommend to the Planning Minister that no major developments of coal haulage and export coal facilities in Newcastle and the Hunter Valley be approved until an independent and accurate assessment of existing ambient air quality is obtained.

Recommendation 4: Make recommendations to support the following outcomes with respect to the regulation of forestry practices in royal camp state forest:

- A transparent and repeatable process and criteria for identifying and protecting core and potential Koala habitat across all tenures;
- An independent process for assessing forests well in advance of logging to identify Koala habitat, with an aim to complete the delineation of Koala habitat on public lands within 3 years;
- A requirement that habitat trees required to be retained for fauna habitat have their GPS localities recorded when marking to better facilitate implementation, auditing and ongoing protection;
- The mapping of areas affected by, and vulnerable to, Bell Miner Associated Dieback in harvest plans and the exclusion of logging from affected and vulnerable stands;
- The enforcement of appropriate restoration requirements to rehabilitate areas of forests severely impacted by Bell Miner Associated Dieback following logging disturbance;
- Penalties that reflect the seriousness of the offence and that are progressively increased for repeat offences;
- Removal of a cap on the issuing of Penalty Notices, and their issuing for all significant offences and repeat offences, according to explicit criteria;
- Requirements for rehabilitation of illegally logged sites and the provision of compensatory habitat;
- A requirement for the EPA to prepare professional and comprehensive reports documenting their investigations and justifying their conclusions from significant investigations, rather than just sending letters to complainants;
- A requirement for EPA auditors to have appropriate training and environmental expertise in what they investigate;
- A requirement that all investigation reports be completed within 3 months and made publicly available on the web;
- An independent mechanism to investigate complaints against the EPA.

Recommendation 5: Adopt the recommendations set out in the NSW Auditor General's recent *Performance Audit on Managing Contaminated Sites* (Download full report [here](#)).

EPA'S PERFORMANCE AGAINST ITS OBJECTIVES

The inquiry has been asked to consider the EPA's performance against its objectives, which are set out in section 6 of the *Protection of the Environment Administration Act 1991*.

In preparing our submission we asked our members and supporters to provide feedback on how effective the EPA's performance had been across each of its specific objectives. The most common response we received was that the EPA was not very effective at meeting its objectives. In fact, many respondents did not realise that the EPA was responsible for the broad range of activities set out in its objects:

Respondent #8: *I have not seen any promotion or media of any pollution prevention [with respect to promoting pollution prevention].*

Respondent #21: *"Didn't even know they did" [with respect to regulating the transportation, collection, treatment, storage and disposal of waste].*

Respondent #22: *"ive never seen any education material from the epa on this" (sic) [with respect to encouraging the reduction of the use of materials, encouraging the re-use and recycling of materials and encouraging material recovery].*

As outlined in our introduction, we recognise the important role the EPA has in protecting, restoring and enhancing the quality of the environment in New South Wales. It has a broad mandate for doing this, as reflected in the wide range of objectives set out in section 6 of the *Protection of the Environment Administration Act 1991*. In contributing to this inquiry, we see the following key challenges and impediments to the EPA effectively performing and meeting all of its objectives:

LACK OF SUFFICIENT RESOURCES AND CAPACITY TO EFFECTIVELY CARRY OUT ITS DUTIES

In order to be effective and meet its objectives the EPA must be sufficiently resourced. Without adequate resourcing the EPA has been unable to enforce compliance with conditions of licence or approval, defend regulatory policies and actions through law when required, or prosecute offenders.

Feedback from our members in regional NSW is that EPA staff are too thin on the ground, and are unable to properly carrying out monitoring of environmental breaches or follow up complaints made by the community. For example, we were told that the EPA has provided useful assistance to communities in the Upper Hunter with respect to taking dust samples from individual homes. Unfortunately, the local EPA branch in Muswellbrook has since been closed. This, once again, highlights the broad concern that the EPA is not sufficiently resourced to effectively do its job.

Respondent #29: *"I rang the EPA about dealing with a neighbouring grape grower spraying during very windy conditions requesting they deal with the situation on my behalf, as earlier dealings had degenerated into negativity and non-co-operation by him. EPA's response left me with the feeling that they were seriously understaffed and unable to help. More recently EPA appears to be under-resourced to deal with pollution emanating from a local caravan park on the Nambucca River. Similar lack of resources at EPA seems to be allowing a local Saw Mill to continue burning waste from their operations despite this being in contravention of operating conditions"*

While the decision to make the EPA independent was broadly welcomed, it had subsequent consequences for the general operational ability of the authority. When the EPA sat within the former Department of Environment and Conservation it had access to the legal, technical and policy advice within that Department. Once it became independent it is unclear to what extent the EPA has the capacity to seek this expert support from the Department or from other sources.

Respondent #30: *"The EPA used to have quite extensive programs of economic instruments designed to drive down pollution where multiple polluters were involved. The Hunter Salinity Trading Scheme and the Hawkesbury Nutrient Trading Scheme are two quite well known successful examples of these. However there is little if any capacity in the EPA to develop and implement programs such as these today. This area is one casualty of the major contraction in resources and political motivation".*

The EPA is responsible for regulating pollution from thousands of licensed facilities across the state and monitoring compliance with environmental licences across a wide range of operators. It is essential that the

authority has the legal tools, financial resources, organisational culture and political support necessary to crack down on breaches and drive sustained reductions in air, water and soil pollution.

A STRONG PERCEPTION THAT THE EPA HAS BEEN CAPTURED BY INDUSTRY, AND DOES NOT ACT IN THE PUBLIC INTEREST

NCC members feel strongly that the EPA has been captured by industry and does not act in the public interest. A number of the specific cases identified in the inquiry's terms of reference have been identified due to the hard work of NCC members and the community to bring attention to alleged breaches and poor conduct of the EPA.

In preparing our submission to the upper house inquiry, NCC asked our members and supporters to provide feedback on their experience with the EPA and its performance against its objectives. We found that there was general disappointment and concern with the EPA's performance, and that many of our members were unaware that the EPA's objects were as broad as set out in section 6 of the *Protection of the Environment Administration Act 1991*.

Respondent #23: *"Yes, have had previous experience with the EPA, who's primary agenda is not the protection of the environment, but protection of the interests of big business" (sic).*

Respondent #22: *"I have reported many observations of what is felt to be breaches of licence conditions. never have I received any follow up by the EPA unless I have initiated it . I have had to at many times seek media intervention to try and ensure EPA action. Learning that toolbox talks, or recommendations for offenders to improve their actions seem very unreasonable when these breaches are so large and no other mops would receive such leniency. public accountability transparency action and audits that actually consult community as stakeholders are vital" (sic).*

Respondent #19: *"It would appear that EPA is now under the control of the state government and is not an independent body whose role is to protect the environment".*

Although the EPA has been established as an independent authority, it works very much within the policy framework of the Government. NCC has broad concerns with this Government's prioritisation of economic interests over social and environment interests and considers this broad Government position to influence the EPA and its operating culture.¹

NCC also has broad concerns with the undue influence of industry on Government and independent agencies operating within the Government framework. NCC members are concerned that the EPA is too close to industry and puts industry interests ahead of the public interest.

CASE STUDY: EPA INVESTIGATION INTO GROUND WATER CONTAMINATION IN THE PILLIGA BY SANTOS' COAL SEAM GAS EXPLORATION [Information provided by The Wilderness Society, Newcastle]

Background

Documents obtained by The Wilderness Society revealed that that groundwater in the Pilliga has been contaminated by Santos CSG operations. An EPA press release revealed a "spill" which included "salts and other elements" but failed to mention that those other elements included such cancer-causing nasties as uranium,

¹For example, changes to *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries)* 2007 in 2013 (see specifically clause 12 AA which requires decision makers to consider the significance of the resource, having regards to its economic benefits) reflect a broader Government priority of economic considerations above social and environmental considerations.

arsenic, lead, barium, boron, aluminium and nickel all in unsafe concentrations.

Eventually, the NSW EPA confirmed the contamination event, but failed to act with any proper legal force, choosing to fine Santos only \$1,500 dollars.

Concerns arising from the incident

Documents obtained by The Wilderness Society suggest that:

- The EPA ignored its own internal advice to go public on the leaking coal seam gas ponds in the Pilliga so they could be seen to be active and on the front foot. Instead, they followed Office of Coal Seam Gas (OCSG) advice stating it didn't want to single Santos out, and therefore instead decided to keep the NSW public in the dark.
- The EPA did not pass on critical information and documents regarding the contamination to the NSW Department of Health, instead asking Santos for permission to share the information, which was not granted.
- The EPA allowed Santos to run the investigation into their leaking ponds. Had the EPA have taken the lead and got the documents, they would have seen that Santos had already had confirmed in independent reports that their ponds were leaking into the surrounding soil. Instead of taking the reins, the EPA ran a vague 'investigation' in relation to a 'suspected leak', losing months before knowing contamination and leaks had occurred.
- The EPA chose not to talk to surrounding landholders around the groundwater contamination zone, even though for months they knew that uranium contamination had taken place, and did not know if locals were drinking that water.
- The EPA sat on a detailed 'holding statement' about the contamination event for months, which was watered down and then never released, all on the advice of the Office of Coal Seam Gas (OCSG). OCSG work closely with Santos, even though it regulates aspects of CSG (petroleum titles) alongside the EPA.
- The EPA wrote a vague media statement about the pollution incident and \$1500 fine after the investigation was closed, and uploaded the media release to their website, only actually emailing the news to one media outlet, a newspaper in Narrabri that receives money from Santos, who chose not to publish the pollution incident or fine.

Further information

See Lock the Gate's summary of the events:

www.lockthegate.org.au/revealed_epa_investigation_report_shows_extent_of_pilliga_contamination

Read the EPA's Santos Bibblewindi Investigation Report, available at:

www.nature.org.au/campaigns/upper-house-inquiry-into-the-epa/

REDUCTION IN COMMUNITY INVOLVEMENT IN OR ACCESS TO THE EPA

Community engagement with the EPA is an essential component for effective environmental regulation, and is recognised in the EPA's objectives, in particular:

- Promoting community involvement in decisions about environmental matters, and
- Conducting public education and awareness programs about environmental matters.²

It is also in line with broader Government goals to:

- Improve government transparency by increasing access to government information; and
- Involve the community in decision making on government policy, services and projects.³

² Section 6, *Protection of the Environment Administration Act 1991*

Despite this, we have significant concern that the EPA is sidelining the community.

Respondent #22: *“in my view the epa makes community members feel as if they are trouble makers- I decided some time ago to cease dealing with local officers but to deal with the hotline instead “(sic).*

Respondent #23: *The EPA make it difficult and time-consuming to report matters that may negatively impact the environment. Even to report something small, such as a litterer, requires you to register an online account before you can report (cannot even do it over the phone!). It's as though the EPA doesn't really want you to report actions that may degrade our environment.*

NCC and community representation on the EPA Board

Of particular concern to NCC, is the removal of community representatives from the EPA board. Previously, NCC was able to nominate a representative to sit on the EPA board. This change to the structure of the EPA Board is contradictory to the recommendations of the O'Reilly Report, which recommended that the membership of the EPA Board include representatives from community interests.⁴ It is also inconsistent with the government's pledge to accept all of the O'Reilly Report's recommendations.⁵

We also note that in previous years the EPA had a specific program of meeting peak environment groups several times a year. While the Forestry Section of the EPA has attended quarterly meetings with NCC's forest working group in the past two years, we recognise the need to reinstate a broader program between the EPA as a whole and peak environment groups.

Following the Orica incident and the restructure of the EPA, the EPA established the Newcastle Community Consultative Committee on the Environment as a trial for improving community engagement and liaison with the EPA. General feedback provided to NCC is that this group has been ineffective at improving relations between the community and EPA. We note that there has yet to be an independent review of this or other community engagement programs and their effectiveness.

We strongly recommend that:

- The role of community and local council representatives are reinstated on the EPA Board.
- The EPA reinstates a program for regular meetings with peak environment groups.
- The quality and effectiveness of community engagement, including community consultation committees, is monitored and reported on.
- Community consultative committees seek out the aims, needs and preferences of the community and the environment, and can effectively contribute to policy and decisions on pollution control.

³ See Goals 31 and 32 of the State Plan NSW 2021, www.2021.nsw.gov.au/

⁴ See Recommendation 7 of the O'Reilly report: *A review into the response to the serious pollution incident at Orica Australia Pty. Ltd. ammonium nitrate plant at Walsh Point, Kooragang Island on August 8, 2011*, Brendan O'Reilly 30 September 2011, available at www.nsw.gov.au/sites/default/files/Orica-review.pdf

⁵ On 5 October 2011 former Premier, Barry O'Farrell, and former Minister for the Environment, Robyn Parker, said the NSW Government would accept all the recommendations of the O'Reilly report into the incident at the Orica plant at Kooragang Island on 8 August 2011. See [www.dpc.nsw.gov.au/ data/assets/pdf file/0013/131161/Orica OReilly Report Accepted in Full 5.10.11bb.pdf](http://www.dpc.nsw.gov.au/data/assets/pdf_file/0013/131161/Orica_OReilly_Report_Accepted_in_Full_5.10.11bb.pdf)

CASE STUDY: COAL DUST POLLUTION IN THE HUNTER

(Information provided by the Hunter Community Environment Centre)

The Hunter Community Environment Centre (HCEC) gained access under freedom of information laws to correspondence between the EPA and other government agencies on coal dust pollution studies conducted in the Hunter Valley rail corridor in 2012-2013. The documents reveal a systematic public relations effort by the EPA to conceal the extent and impact of pollution caused by uncovered coal trains passing through residential areas.

Background

The Australian Rail Track Corporation (ARTC), a Commonwealth-owned corporation, is licenced by the NSW EPA for pollution caused by trains hauling coal from Hunter Valley mines to the Newcastle Port along the rail corridor for which ARTC holds a lease.

Under the terms of this licence, the EPA required ARTC to install monitoring stations along the Hunter Valley line to monitor dust generated by different train movements, and to report back to the NSW EPA and the public. The aim of this activity was investigate the levels of dust generated by coal train movements in the Hunter. The company was to monitor particle pollution adjacent to the rail corridor during February and March 2012.

Technical reviews of the company's report on this monitoring were critical of the methodology, data analysis and conclusions. A requirement for an additional monitoring program was issued, requiring air quality monitoring from November 2012 through to January 2013.

One week after the release of ARTC's second report, the Hunter Community Environment Centre (HCEC) was emailed another, earlier version of the report from an anonymous source. The leaked version (dated 24th May) contained conclusions that fundamentally contradicted those in the publicly released version (dated 30th May). In the six days between the 24/5 and 30/5, fifteen of the report's eighteen conclusions were changed. In three instances, the conclusions were inverted to delete or insert the word 'no' or 'not' to reverse the report's finding. Five conclusions were modified to significantly reduce the pollution levels associated with coal trains. Three new conclusions were added to the 30/5 version, minor changes were made to three and one conclusion was deleted.

Based on the inconsistencies between these two reports, HCEC launched a freedom of information inquiry to obtain "all documents relating to the Australian Rail and Track Corporation Pollution Reduction Program from September 2012 to June 2013". In November 2013, HCEC received access to over 3,000 pages of correspondence.

The correspondence between officials in the EPA, the Office of Environment and Heritage (OEH), the Environment Minister's office, NSW Health and the ARTC demonstrates that pollution monitoring studies were released despite internal criticism by technical reviewers, that the EPA had pre-determined how to communicate the findings before receiving the reports, and that public assurances made by the Environment Minister and EPA Chief Executive directly contradicted the findings of the technical reviews.

The correspondence reveals that:

1. The EPA systematically misrepresented the findings of pollution monitoring studies and has acted to obscure the conclusion of the reports that coal trains cause a significant amount of particle pollution, with directly attributable impacts on community health.
2. ARTC appear to have been operating in breach of their licence conditions throughout 2012 and 2013. The objectives of their operating licence have not been addressed; their monitoring studies have been criticised, discredited and rejected by the NSW Government as inadequate.

Recommendations

In undertaking this inquiry, we call on the Committee to:

- Confirm that the handling of the coal dust pollution studies by EPA staff, including the CEO, constitutes a breach of public trust.
- Confirm that the coal dust pollution studies have demonstrated uncovered coal wagons are significant sources of particulate pollution in the rail corridor with environmental and public health impacts.
- Confirm that the current regulatory arrangements for the management of particulate pollution for coal trains are inadequate to meet the performance objectives of the EPA under the Act.
- Recommend that the EPA direct all coal rail operators to urgently implement appropriate dust mitigation strategies, including the covering and washing of coal wagons.
- Recommend that the EPA initiate action against ARTC for failure to adhere to the conditions of their licence relating to their required pollution reduction program.
- Recommend to the Planning Minister that no major developments of coal haulage and export coal facilities in Newcastle and the Hunter Valley be approved until an independent and accurate assessment of existing ambient air quality is obtained.

Further Information

- A comprehensive briefing package on the ARTC coal pollution reports is available from <http://tinyurl.com/dustgate> including a comparison of the conclusions in the two versions of the report; independent expert reviews of the 30 May report; a background briefing on ARTC and the community campaign to reduce coal dust pollution, links to the ARTC report and online videos of coal trains passing through Newcastle suburbs.
- The correspondence between several government departments relating to the coal pollution licence conditions held by the Australian Rail Track Corporation can be downloaded here: <http://miningleaks.com.au/hunter-coal-dust-cover-up>. The documents, obtained by the Hunter Community Environment Centre (HCEC) under freedom of information laws, demonstrate a systematic public relations effort by the EPA to conceal the extent and nature of pollution caused by coal trains in residential areas.

FAILURE TO EFFECTIVELY MONITOR AND ENFORCE ENVIRONMENTAL BREACHES

The EPA has responsibility for investigating and reporting on alleged non-compliance with the environmental protection legislation for the purpose of prosecution under the *Protection of the Environment Administration Act* 1991. The EPA Board is required to determine whether the EPA should instigate proceedings for serious environmental protection offences, provided there is evidence capable of establishing the committing an offence.

In our view, the EPA does not effectively monitor, investigate and enforce non-compliance with the environmental protection legislation. We recognise that lack of resources contributes to the EPA's failure in this area, but we are also concerned that the EPA chooses not to use its broad powers to prosecute people in breach of environment protection legislation. We have been told that the EPA often prefers to 'work with industry' to resolve matters, rather than make use of enforcement measures. While there is benefit in maintaining good relations between the EPA and industry, there is a risk that the EPA will be seen as 'lacking teeth'. The outcome is that breaches continue to occur, as there is no real threat of enforcement action.

Respondent #15: *"There appears to be little policing of conditions and no consequences for companies who breach conditions"*

Respondent #3 *"A couple of years ago I reported to EPA and Blacktown Council illegal clearing of Critically Endangered Cumberland Plain Woodland. I provided photographs of people, vehicles and registration numbers. After about twelve months I was told they couldn't do anything about it."*

Respondent #21: *"I know many people that know the EPA is not tough and exploit that".*

Respondent #15: *"There is much illegal dumping at Mangrove Mountain. It has been reported several times but nothing is done. Now there is a rouge operator applying for an additional million tonnes into a dump which was approved originally for 240000 tonnes. There have been serval breaches etc but this entity is able to remain in the industry and prosper. Why?"(sic)*

Respondent #8: *"This is a specific example of there ineffectiveness. In notifying them of breeches to a sand Quarry only 1 month after the conditions were granted, I was told that there would be no penalty and that he would just ring them instead. He also said that by not accessing the site before the time set in their conditions would cause a problem for neighbours when trucks queuing up outside the Quarry. Personally I don't think the EPA should be making excuses for the proponent when there job is to enforce the conditions set out in the approval by there own agency. They also refused to investigate the lack of water licences which has led to deficiencies in there water allocation and grounds for immediate halting of the operations. They said that they looked into it and the problem was solved. However they would not give any evidence to back up there statements."(sic)*

The EPA should be trusted to perform as an effective environmental regulator acting in the public interest. When the EPA fails then the community is left to take action. For example, the failure of the EPA to take enforcement action against Delta Electricity in relation to pollution of the Coxs River forced NCC member group, the Blue Mountains Conservation Society, to commence civil enforcement proceedings in the Land and Environment Court. It is entirely unacceptable that a community organisation was forced to take legal action against an electricity utility to ensure compliance with national water quality standards.

Of significant concern to NCC members is the EPA's continuous failure to properly monitor, regulate and enforce breaches by the Forestry Corporation of NSW.

Respondent #25: *"the epa claims that is trying to change the culture within forstrycorpnsw by essentially not issuing penalty infringement notices. it's a failed strategy. forestrycorp is a law unto itself and will only respond to firm regulation. the problem is that the forestry section of the epa doesn't have a policing culture and most of the staff do not have the requisite skills to do the job. for example the staff do not have the skills to identify lowland rainforest eec. the staff do not have the skill to identify glider feed trees. this skillset is essential to do the job well. it's quite scandalous" (sic).*

Respondent #18: *"I believe that there needs to be more supervision when logging sensitive areas such as this to ensure that the company's logging the area are doing the right thing".*

Respondent #25: *"took 6 months to decide on whether to engage a qualified independent botanist to evaluate a complaint that fnsw had logged an endangered ecological community (eec's) at wedding bells state forest. (@ july 2011) if the epa took stronger action in relation to logging eec's then fnsw would get the message that logging eec's is against the law and is unacceptable. as it stands logging of eec's is ongoing" (sic).*

The case study of Royal Camp State Forest (below) encapsulates community concerns, which continue to escalate with recent reports that the Forestry Corporation of NSW has buried wombats alive in their burrows despite a deal with wildlife groups to protect the animals during logging.⁶

Respondent #28: *"The EPA has badly handled the case of Glenbog State Forest regarding the protection of wombats. The response to date has been completely inadequate. The EPA should investigate this barbaric act*

⁶ See www.smh.com.au/environment/animals/wombats-buried-alive-by-logging-company-20140809-10251m.html

under the PREVENTION OF CRUELTY TO ANIMALS ACT (NSW) 1979, and bring to justice the alleged purposeful killing of wombats and other animals in Glenbog State Forest, NSW” (sic).

CASE STUDY: ROYAL CAMP STATE FOREST
(Information provided by North East Forest Alliance (NEFA))

A weekend audit by NEFA of logging operations underway in Royal Camp State Forest on 4 and 5 August 2012 located 4 Koala High Use Areas in compartment 15, with one actively being logged, one about to be logged and two scheduled for logging in the near future. A potential Koala High Use Area was also identified in a logging area in compartment 16.

On 6 August NEFA publicly called on the Forestry Corporation, the EPA and the responsible Ministers to immediately stop the illegal logging of the Koala High Use Areas, and logging was suspended that afternoon. The EPA began investigating compartment 15. Logging resumed days later in compartment 16.

NEFA considered that they had found a good breeding Koala population. The Forestry Corporation was not undertaking the thorough searches required for Koala scats ahead of logging and were thus not identifying and protecting Koala High Use Areas. NEFA also complained of logging of a Yellow-bellied Glider sap-feed tree, logging of hollow-bearing and recruitment trees, failing to mark habitat trees, and logging of a dieback area in compartment 14. See http://nefa.org.au/audit/RoyalCamp/NEFA_Audit_Royal_Camp_SF.pdf

While the EPA was in the field auditing, the Forestry Corporation burnt off part of the logged area in compartment 15, destroying any Koala scats and thus evidence of Koala high use areas present, and illegally bulldozed 2 tracks across creeks in riparian exclusion areas close to the EPA auditors. The EPA refused to take any action. In the area of compartment 16 that the Forestry Corporation resumed logging in, NEFA subsequently found that the Forestry Corporation were still not searching for Koala scats and had logged 2 Koala high use areas, supposedly under the supervision of the EPA.

On the 9 August NEFA attended an arranged meeting with the EPA outside the forest on the understanding that we would be going on a site inspection to show the EPA a variety of breaches we had identified, but not yet provided GPS localities for. Having made us drive to the site the EPA refused to allow us to show them the breaches, notably those around log dump 22 and the Yellow-bellied Glider sap-feed tree in compartment 14. Following our complaints to Barry Buffier the EPA agreed to another site inspection on 24 August where they were shown a variety of breaches, including those in compartment 14, with the Yellow-bellied feed tree confirmed by a reputable expert on site (GPS localities for all breaches, along with photos, were provided to the EPA on 20 August). In an apparent act of spite, the EPA later complained they *“could not locate the alleged location”* of the breaches we showed them around log dump 22. For the Yellow-bellied Glider breach they also ignored the expert evidence to claim they *“could not determine beyond reasonable doubt whether the incisions had been made by a yellow bellied glider”*. The fact that the EPA investigators were unable to identify such distinctive Yellow-bellied Glider feed marks make it apparent that they do not have sufficient expertise to do their job.

On 4 July 2013 NEFA inspected compartment 13 where logging was scheduled to begin and located 2 Koala high use areas. NEFA called for logging to be suspended and a moratorium was agreed. It has become apparent to NEFA that, even where faithfully and fully applied, the current criteria only protect fragments of a Koala’s home range and thus provide inadequate protection.

On 15 August 2013 the EPA finally responded to our complaints over compartments 14, 15 and 16. They had issued the Forestry Corporation 3 Penalty Notices (a \$900 fine) for failing to look for and protect Koala High Use areas, and a warning letter for failing to retain and mark the required habitat trees. In a sample area where the Forestry Corporation were required to mark and retain 42 hollow-bearing Trees, 42 Recruitment Trees, 42

Eucalypt Feed Trees and 42 Koala Feed Trees they had only marked 2 Hollow-bearing Trees and 3 Recruitment Trees.

On 19 August 2013 NEFA complained to the EPA about their misrepresentation of NEFA's complaints, misrepresentation of evidence, refusal to investigate key complaints, failure to report findings on key complaints, claims that they never found breaches that were clearly documented and shown to them in the field, failure to duly consider evidence available to them, inadequate expertise, and unprofessionalism. See : [EPA Royal Camp NEFA Review](#)

The EPA's response was clearly ineffective. The Forestry Corporation showed no remorse, dismissing the need for better Koala surveys, and denying they had done anything wrong, commenting in the media *"The reality is that the fines reflect the environmental outcome ...they're administrative, they're like staying in a parking lot for a little bit too long, ... there has been no environmental harm to koalas in that area."* The Forestry Corporation continue to log without looking, protecting required habitat or retaining needed habitat trees.

NEFA would like to see as an outcome of the Inquiry:

1. A transparent and repeatable process and criteria for identifying and protecting core and potential Koala habitat across all tenures;
2. An independent process for assessing forests well in advance of logging to identify Koala habitat, with an aim to complete the delineation of Koala habitat on public lands within 3 years;
3. A requirement that habitat trees required to be retained for fauna habitat have their GPS localities recorded when marking to better facilitate implementation, auditing and ongoing protection;
4. The mapping of areas affected by, and vulnerable to, Bell Miner Associated Dieback in harvest plans and the exclusion of logging from affected and vulnerable stands;
5. Penalties that reflect the seriousness of the offence and that are progressively increased for repeat offences;
6. Removal of a cap on the issuing of Penalty Notices, and their issuing for all significant offences and repeat offences, according to explicit criteria;
7. Requirements for rehabilitation of illegally logged sites and the provision of compensatory habitat;
8. A requirement for the EPA to prepare professional and comprehensive reports documenting their investigations and justifying their conclusions from significant investigations, rather than just sending letters to complainants;
9. A requirement for EPA auditors to have appropriate training and environmental expertise in what they investigate;
10. A requirement that all investigation reports be completed within 3 months and made publicly available on the web;
11. An independent mechanism to investigate complaints against the EPA.

ANALYSIS AND RECOMMENDATIONS - ENVIRONMENT REGULATION IN NSW

A number of relatively recent reports will assist the inquiry to understand some of the specific issues of environmental regulation in NSW and outline key recommendations for improvement of the regulatory system.

- Following the leak of hexavalent chromium from the Orica facility at Kooragang Island on 8 August 2011 (the Orica Incident) NCC commissioned a report on the opportunities for improved regulation of pollution in New South Wales. The report, ***Clearing the Air - Opportunities for improved regulation of pollution in New South Wales*** (Download the full report [here](#)) prepared by EDO NSW at the request of the Nature

Conservation Council of NSW, sets out a clear agenda for legislative and operational reform aimed at restoring public faith in NSW's pollution control system.

- In 2011, the Nature Conservation Council of NSW commissioned EDO NSW to prepare '***If a tree falls: Compliance failures in the public forests of New South Wales***' (Download the full report [here](#)) which looks at the state of NSW's public-owned native forests and the flora and fauna species that inhabit them, the regulatory framework for managing those forests, and numerous breaches of forestry regulations.
- In June 2014 the NSW Auditor General's reported on the EPA's ***Performance Audit on Managing Contaminated Sites*** (Download the full report [here](#)). The audit assessed how well the risks of harm to human health and to the environment from contaminated sites are being managed and made a number of key recommendations.

OUTCOMES FOR THE INQUIRY

New South Wales needs a fearless and independent environmental watchdog that puts the interests of the community and natural environment first. Most importantly, it must be adequately resourced so that it can effectively meet its objectives and enforce compliance with conditions of licence or approval, defend regulatory policies and actions through law when required, or prosecute offenders.

This inquiry was set up because the EPA is no longer trusted by communities in NSW. We look to this inquiry to address the specific concerns raised by the community through this inquiry and to create an EPA capable of putting the environment and healthy communities ahead of polluters.