



# Environmental Defenders Office

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Tony Chappel  
Chief Executive Officer  
NSW Environment Protection Authority

By email only: [tony.chappel@epa.nsw.gov.au](mailto:tony.chappel@epa.nsw.gov.au)

Dear Mr Chappel

## **Cadia Valley Operations EPL 5590 applicable air pollution concentration limits**

1. We refer to our previous correspondence on behalf of Cadia Community Sustainability Environment Network (**CCSN**) with respect to Cadia Valley Operations (**CVO**) and ongoing air and water pollution and impacts on public health.
2. In particular, we refer to the EPA's letter of 25 September 2023 with respect to applicable air pollution concentration limits for CVO and specifically with respect to the operation of the exhaust fans attaching to Ventilation Rise 8 (VR8).
3. Having had regard to the EPA's reasoning as set out in its 25 September letter, we maintain that the applicable group for VR8 is Group 6, and that the relevant activity is crushing, grinding, separating or materials handling. Therefore, pursuant to Schedule 2 of the *Protection of the Environment Operations (Clean Air) Regulation 2022* (**2022 Clean Air Regulation**), the applicable limit is 20mg/m<sup>3</sup>. There are several material errors or omissions in the EPA's reasoning for its conclusion that the applicable limit is 100mg/m<sup>3</sup>, which are summarised below and expanded on in the **Appendix**.
4. In any event, however, the EPA is empowered to apply more stringent conditions to EPLs than prescribed by the 2022 Clean Air Regulation. In the circumstances, the EPA must exercise this power and specify, as a condition of the EPL, strict numeric emission limits.

## **The applicable group is Group 6**

5. The applicable group for plant and activities carried out at the specified premises covered by EPL 5590, and specifically, the activities and plant generating emissions at VR8, is Group 6. This is the only interpretation of the relevant provision that considers the relevant definition of "licence application" in the *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**), that gives effect to all parts of the relevant provisions of the 2022 Clean Air Regulation and *Protection of the Environment Operations (Clean Air) Regulation 2021* (**2021 Clean Air Regulation**), and that is consistent with the objects of the POEO Act. The limit was explicitly accepted by Newcrest in its response to the Zephyr Report.

6. The EPA's interpretation of this provision, as set out in its 25 September letter, is in error. Crucially, in its interpretation, the EPA appears not to have considered the definition of "licence application" in the POEO Act, which makes clear that "application" in respect of a licence refers to the issue, transfer, variation or surrender of a licence. The EPA's interpretation assumes that "application" refers only to an application for the issue of a licence. It also does not give effect to the first limb of the test set out at cl 33(1) of the 2021 Clean Air Regulation for determining the applicable Group of plant or activities. Further details are set out in the **Appendix**.
7. Further, even if our contention with respect to cl 33 was incorrect, cl 34 of the 2021 Clean Air Regulation would apply with respect to the December 2020 replacement of the underground fans at VR8, and they would nevertheless be taken to belong to Group 6. This is because the fans are an emissions unit altered as a result of a variation of the EPL for the plant or activities, which alteration increased the emission of air impurities.

### **Relevant air pollution limits must be specified in the EPL itself**

8. The EPA's lack of clarity as to the applicable air pollution limits that apply to activities and plant under any particular EPL pre-dating 1 September 2005 is a significant weakness in the legislative scheme. Fortunately, there is a solution already available to the EPA.
9. Section 323(5) and(5A) of the POEO Act provide that conditions attached to licences may impose more stringent requirements than those provided for by regulation. That is, the EPA is empowered to impose a condition on CVO's licence to impose stricter licence limits on air pollution than is set out in the 2022 Clean Air Regulation. This would have the additional benefit of removing any uncertainty as to applicable limits, and would therefore simplify the EPA's compliance and enforcement work and provide clarity to both the community and CVO.
10. In the circumstances, where there is evident uncertainty and contention as to the applicable emissions standards for point sources, where there is significant local community and broader public concern about the pollution and its impact on public health, the EPA should impose as a condition of EPL 5590 a strict numeric limit on point source<sup>1</sup> air pollution not exceeding (in total) 20mg/m<sup>3</sup> total solid particles.

Thank you for your urgent consideration of the above. We respectfully request a response by **COB, Thursday 26 October 2023**.

Yours faithfully  
Environmental Defenders Office



**Rachael Chick**  
Senior Solicitor

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<sup>1</sup> Noting s 128(2)(b) of the POEO Act requires an occupier of premises to take such practical means as necessary to prevent or minimise air pollution for emissions not from point sources.

## APPENDIX

1. The EPA has erroneously concluded that the applicable group for activities and plant carried out at the CVO premises is Group 5 and that the air pollution concentration limit (total solid particles) for VR8 is 100mg/m<sup>3</sup>.
2. The reasoning for this conclusion provided by the EPA in its 25 September 2023 letter is:

By way of context, as you are aware, the concentration limits for TSP for specified plant or activities at premises that hold an environment protection licence is prescribed by the Clean Air Regulation. The prescribed standard of concentration for TSP is dependent on two key factors, namely what the relevant plant or activity is that causes the emission of TSP and secondly what is the appropriate 'Group' for that specific plant or activity – as provided for in section 43 of the Clean Air Regulation.

Relevantly, for Cadia, to determine the appropriate 'Group' for a specified plant or activity there are two key considerations, firstly the date the plant or activity commenced and secondly, the date on which the application for the environment protection licence that applies to the relevant premises was made. Cadia applied for Environment Protection Licence No. 5590 (the Licence) on 16 May 2000. Accordingly, the relevant ventilation rises at the Premises are classified as 'Group 5' and the Clean Air Regulation prescribes the relevant concentration limit for the emission of TSP is 100mg/m<sup>3</sup> (see Division 3, Part 2 of Schedule 2 of the Clean Air Regulation).

3. We contend that this reasoning is in error for the reasons set out below, and that the applicable group for plant and activities carried out at the specified premises covered by EPL 5590, and specifically, the activities and plant generating emissions at VR8, is Group 6, and the relevant standard of concentration is 20mg/m<sup>3</sup>.

### Relevant test is at cl 33 of the 2021 Clean Air Regulation

4. The EPA refers to cl 43 of the *Protection of the Environment Operations (Clean Air) Regulation 2022 (2022 Clean Air Regulation)* as providing for the allocation of plant or activity to a Group, however does not then refer to cl 33 of the *Protection of the Environment Operations (Clean Air) Regulation 2021 (2021 Clean Air Regulation)*, which is the operative provision classifying plant and activities into Groups for activities and plant commencing before 16 December 2022.
5. Clause 43 of the 2022 Clean Air Regulation provides (relevantly and emphasis added):
  - (1) An activity carried out, or plant operated, on scheduled premises belongs to—
    - (a) if the carrying on of the activity, or the operation of the plant, commences after the commencement of this Regulation—Group 6, or
    - (b) otherwise—the Group in which the activity or plant belonged **immediately before the commencement of this Regulation**, except as otherwise provided by this Subdivision.
6. The 2022 Clean Air Regulation commenced on 16 December 2022.<sup>2</sup> Activities carried out or plant operating prior to that date are therefore categorised by reference to the 2021 Clean Air Regulation, which was in effect immediately before 16 December 2022.
7. The relevant provision of the 2021 Clean Air Regulation providing for the grouping of activities and plant is cl 33, which states (for Groups 5 and 6) that (relevantly):

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<sup>2</sup> 2022 Clean Air Regulation, cl 2.

- (1) Subject to this Division, an activity carried out, or plant operated, on scheduled premises—  
...  
(e) belongs to Group 5 if it commenced to be carried on, or to operate, on or after 1 August 1997 as a result of—  
...  
(ii) an environment protection licence granted under the Protection of the Environment Operations Act 1997 pursuant to an application made on or after 1 July 1999 and before 1 September 2005, or  
(f) belongs to Group 6 if it commenced to be carried on, or to operate, on or after 1 September 2005, as a result of an environment protection licence granted under the Protection of the Environment Operations Act 1997 pursuant to an application made on or after 1 September 2005.

8. This is material because the note at cl 43 does not reproduce cl 33 verbatim. It states:

The groups in which activity or plant belonged originally was as follows—

- ...  
(e) Group 5—if it commenced on or after 1 August 1997 under—  
...  
(ii) an environment protection licence if the application for the licence was made before 1 September 2005,  
(f) Group 6—if it commenced on or after 1 September 2005 under an environment protection licence, if the application for the licence was made on or after 1 September 2005.

9. That is, the relevant test for Group 6 is:

“an activity carried out, or plant operated, on scheduled premises belongs to Group 6 if it commenced to be carried on, or to operate, on or after 1 September 2005, **as a result of an environment protection licence granted** under the Protection of the Environment Operations Act 1997 **pursuant to an application made on or after 1 September 2005.**”

10. This requires regard to be had to:

- a. The date the activity carried out, or plant operated, on scheduled premises commenced; and
- b. The date the application was made for the EPL as a result of which the activity or plant commenced.

11. The relevant test is **not** “[t]he groups in which activity or plant belonged **originally** was ... Group 6—if it commenced on or after 1 September 2005 **under an environment protection licence, if the application for the licence was made on or after 1 September 2005.**”

12. The EPA appears to have relied on the latter in its interpretation that “the date on which the application for the environment protection licence that applies to the relevant premises was made”. To the extent the EPA has considered the phrase “application for the licence” indicative that the application in question must be the application for the first *issue* of the licence, this is in error.

### **Definition of licence application includes application to vary licence**

13. Crucially, the *Protection of the Environment Operations Act 1997* (**POEO Act**) provides in its Dictionary that:

**licence application** means an application for the issue, transfer, variation or surrender of a licence.

14. The EPA has interpreted the second limb of the test as only capable of referring to the date of the application for the issue of the original licence. This is not supported by the definition of licence application, which provides that application, in relation to a licence, means an application for the issue, transfer, variation or surrender of a licence.
15. It is clear from the terms of cl 33(1) on their face, with reference to the Dictionary of the POEO Act, and legislative context of cl 33, that the correct interpretation is to any application made with respect to the licence (including applications to vary).
16. Although we consider the Dictionary definition of “licence application” determinative on its own, this interpretation is supported by examining the operation of the relevant clause and applying accepted principles of statutory interpretation.
17. If the intent of cl 33 (or cl 43 of the 2022 Clean Air Regulation), was for the “application” in question to refer only to the original application for the issue of the licence over the whole of the scheduled premises, there would be no need to refer to the date of the commencement of activities or plant, as the only relevant date would be that of the original application for the issue of the licence.
18. This is demonstrated by the EPA’s reasoning in its 25 September 2023 letter. Despite noting the existence of two key considerations for determining the appropriate Group, it does not in fact consider the first- the date the activity commenced to be carried out or the plant commenced to operate at the scheduled premises. With respect to VR 8, CVO has stated that the high velocity fans were installed in December 2020.
19. The EPA’s interpretation of cl 33 in this manner deprives the first part of the sub-clause any effect, contrary to the established principle of statutory interpretation that every word in a provision has work to do, so that each word should be given effect as far as possible.<sup>3</sup>
20. The better interpretation is that the “application” referred to is an application for the issue, transfer, variation, or surrender of a licence, and that the relevant application is that which, as granted, is that in force at the commencement of the relevant plant or activity. For VR8, this application was made on 1 June 2020.<sup>4</sup> This interpretation gives effect to the definition of “licence application” and both “limbs” or “key considerations” of cl 33 of the 2021 Clean Air Regulation.
21. It also better serves to achieve the objects of the POEO Act than does the EPA’s interpretation, which has the result of freezing in time standards of air pollution for every premises that was licenced prior to 1 September 2005, regardless of how the plant and activities at the premises have changed and intensified. In particular, the interpretation set out above better serves the POEO Act object to reduce risks to human health and prevent the degradation of the environment by the use of mechanisms that promote the making of progressive environmental improvements, including the reduction of pollution at source.<sup>5</sup>

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<sup>3</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [71]; *Plaintiff M70/2011 v Minister of Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144 at [97].

<sup>4</sup> <https://apps.epa.nsw.gov.au/prpoeoapp/ViewPOEONotice.aspx?DOCID=-1&SYSUID=1&LICID=1595668>

<sup>5</sup> POEO Act, s 3(d)(iv).