

Submission
No 22

**INQUIRY INTO INQUIRY INTO PFAS CONTAMINATION
IN WATERWAYS AND DRINKING WATER SUPPLIES
THROUGHOUT NEW SOUTH WALES**

Organisation: Environmental Defenders Office (EDO)

Date Received: 27 November 2024



Environmental
Defenders Office

Submission: Inquiry into PFAS contamination in waterways and drinking water supplies throughout New South Wales

November 2024

About Environmental Defenders Office (EDO)

EDO 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 has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO 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.

www.edo.org.au

Submitted to:

Select Committee on PFAS Contamination in Waterways and Drinking Water Supplies Throughout New South Wales, Legislative Council, NSW Parliament

By email: pfas@parliament.nsw.gov.au and lodged at: [Select Committee on PFAS Contamination in Waterways and Drinking Water Supplies Throughout New South Wales](#)

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Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

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Introduction

The Environmental Defenders Office (**EDO**) welcomes the opportunity to make a submission to the Select Committee on the Inquiry into PFAS contamination in waterways and drinking water supplies throughout New South Wales.

The interdependence between the environment and human health has been recognised extensively, including by the UN High Commissioner for Human Rights who described the triple planetary crises of climate change, biodiversity loss, and pollution as the ‘single greatest challenge to human rights in our era’.¹ Indeed, the former Special Rapporteur on Human Rights and the Environment defined the right to a healthy environment to include, among other things:

- access to safe drinking water;²
- healthy biodiversity and ecosystems;³ and
- toxic free environments in which to live, work, study and play.⁴

In NSW, there are currently a variety of laws, systems, and processes that protect components of the environment and human rights, to some extent. Yet people in NSW are nevertheless witnessing unacceptable levels of harm to the natural environment and human health from pollution, including from PFAS.⁵ While further studies are required to fully understand the long-term impacts of PFAS on both human health and the environment, contemporary research indicates that exposure to PFAS may lead to adverse health outcomes.⁶

While the current legislative and policy framework offers a foundation from which to manage impacts from PFAS contamination, it is EDO’s view that some components of this framework could be strengthened to achieve better health and environmental outcomes.

EDO makes this submission noting that there are currently various review processes underway in relation to the management of PFAS in Australia.⁷ In particular, we understand that the National Health and Medical Research Council (**NHMRC**) have recently undertaken a review of international scientific evidence and public health advice for PFAS in drinking water. The NHMRC’s findings have resulted in proposed changes to the health-based guideline values. The *Australian Drinking Water Guidelines* (**ADW Guidelines**), which are part of the National Water Quality Management Strategy,⁸ are scheduled to receive a new PFAS Fact Sheet that includes revised and newly established

¹ UN Office of the High Commissioner on Human Rights, ‘Environmental Crisis: High Commissioner Calls for Leadership by Human Rights Council Member States’ (Web Page, 13 September 2021)

² David R Boyd, Special Rapporteur on Human Rights and the Environment, Human rights and the global water crisis: water pollution, water scarcity and water-related disasters, UN Doc A/HRC/46/28 (19 January 2021)

³ David R Boyd, Special Rapporteur on Human Rights and the Environment, Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc A/75/161 (15 July 2020)

⁴ David R Boyd, Special Rapporteur on Human Rights and the Environment, The right to a clean, healthy and sustainable environment: non-toxic environment, UN Doc A/HRC/49/53 (12 January 2022)

⁵ See, for example, NSW Government, PFAS and drinking water – information and updates, <https://www.nsw.gov.au/environment-land-and-water/pfas-and-drinking-water-information-and-updates>.

⁶ United States Environmental Protection Agency, Our Current Understanding of the Human Health and Environmental Risks of PFAS, <https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas>.

⁷ For example, on 22 August 2024, the Senate appointed the Select Committee on PFAS to inquire into the extent, regulation and management of PFAS at a national level.

⁸ Water Quality Australia, About, <https://www.waterquality.gov.au/about>.

health-based guideline values. EDO notes that this process is ongoing, and the outcome of the community consultation may affect the current drafting of the proposed PFAS Fact Sheet. EDO strongly supports the periodic review of the ADW Guidelines to bring them in line with the current best scientific advice.

As a community legal centre specialising in public interest environmental and planning law, this submission addresses the terms of reference (**ToRs**) primarily through a legal lens, rather than commenting on the adequacy of scientific guidance. This submission draws from existing work that the EDO has undertaken in recent years and makes key recommendations about how the existing legislation could be amended to strengthen existing processes to protect the environment from the impacts of PFAS, and advocates for the inclusion of the right to a healthy environment in NSW legislation. The focus of our analysis and recommendations is ToR (i), as EDO's views on this term of reference also forms part of our response to each of the other ToRs referred to, being ToR (b), (h), (j) and (m).

Summary of Recommendations

- 1. Recommendation 1: NSW must reform the legislative framework to introduce mandatory proactive testing/monitoring requirements for PFAS**
- 2. Recommendation 2: NSW must strengthen legislative obligations on the relevant entities to publicly report on testing/monitoring results**
- 3. Recommendation 3: the Public Health Regulation 2022 should be amended to require periodic review of quality assurance programs currently in force and to consider the ADW Guidelines as minimum requirements**
- 4. Recommendation 4: strengthen existing mechanisms in NSW legislation that can efficiently prohibit the manufacture, use and distribution of PFAS chemicals**
- 5. Recommendation 5: NSW must incorporate the right to a healthy environment in existing environmental legislation or in a dedicated Human Rights Act.**

ToR (i) the adequacy and effectiveness of New South Wales's legislative and regulatory framework in testing for, monitoring, mitigating and responding to PFAS contamination, including the adequacy of health-based guidance values, as compared to the standards and practices of other Australian and international jurisdictions

It is beyond the EDO's expertise to comment on the adequacy of health-based guidance values vis a vis the standards and practices of other Australian and international jurisdictions. However:

- (i) we strongly support clear communication about how and why the relevant guidance was chosen, and how and why international standards have or have not been observed;⁹ and
- (ii) we strongly recommend applying the precautionary principle where there is any conjecture about the relative risks of PFAS and whether there is a need to adopt more stringent guidelines.

We focus our commentary and recommendations on the adequacy of the legislative and regulatory framework in testing for, monitoring, mitigating and responding to PFAS contamination.

Current Legislative and Regulatory Framework

In theory, the current legislative framework could facilitate effective testing, monitoring, mitigation and response mechanisms to PFAS contamination. The relevant laws confer various powers on various authorities to undertake a wide range of activities that may assist with testing, monitoring, mitigation and response. We briefly outline of some of the key instruments, below and note that this list is not exhaustive.

Public Health Act 2010

The *Public Health Act 2010* (NSW) (**PH Act**) confers broad powers on the Minister for Health to address a variety of issues. For example:

- a. Part 2 of the PH Act grants powers to deal with risks affecting the general public health (including, for example the power to close public premises on public health grounds).
- b. Part 3 of the PH Act deals with environmental health. More specifically, Division 1 of Part 3 of the PH Act confers powers on the Minister to implement safety measures for drinking water. These powers enable the Minister to take any action they consider necessary to restrict or prevent the use of unsafe water and to bring unsafe water to such a condition that it is no longer considered unsafe water.¹⁰

Relevantly, these powers are enforceable.¹¹

⁹ EDO notes the NHMRC provide some guidance as to the relevant Australian guidelines compared to overseas advice (NHMRC, NHMRC Statement: Per- and polyfluoroalkyl substances (PFAS) in drinking water,).

¹⁰ PH Act, s 16(1).

¹¹ Section 11(3) of the PH Act makes it an offence to not comply with a direction made under s 11. Section 17(2) of the PH Act provides that if a direction under s 16 is not complied with, the Minister may take the action referred to in that direction.

The PH Act also provides a mechanism to monitor for, and respond to, PFAS contamination in drinking water. Section 25 of the PH Act requires that supplier of drinking water have a “quality assurance program” in place.

Importantly, the PH Act also contains some reporting requirements when managing incidents and emergencies in relation to the quality of drinking water.¹²

Public Health Regulation 2022

Clauses 45-48 of the *Public Health Regulation 2022* (NSW) (**PH Regulation**) outline the information and processes that must be included in a quality assurance program.

Notably, clause 45 of the PH Regulation requires that quality assurance programs include, among other things, the identification of potential health risks associated with the supply of drinking water, and a process for controlling the potential health risks in accordance with the Framework for Management of Drinking Water Quality, as set out in the *Australian Drinking Water Guidelines (ADW Guidelines)* published by the National Health and Medical Research Council (**NHMRC**).

Protection of the Environment Administration Act 1991

The *Protection of the Environment Administration Act 1991* (NSW) (**POEA Act**) establishes the NSW Environment Protection Authority (**EPA**). It confers broad powers onto the EPA under ss 8 and 9 to undertake various activities aimed at environmental protection.

Relevantly, these powers allow both reactive and proactive protection measures that could be used to address PFAS-related issues. For example, the EPA has developed the “PFAS Investigation Program”, which investigates areas where it is likely that PFAS has been used and provides “impacted residents with tailored, precautionary dietary advice to help them reduce any exposure to PFAS”.¹³

Protection of the Environment Operations Act 1997

The *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**) creates various powers to address environmental issues that can be exercised by the EPA or an “appropriate regulatory authority”.

Chapter 4 of the POEO Act provides the power to issue various notices that can require the investigation and remediation of particular issues, including responding to concerns around PFAS. These powers are enforceable.¹⁴

Part 9.3D of the POEO Act provides some powers with respect to the analysis of risk to both human health and to the environment.

Schedule 2, clause 15 of the POEO Act provides the EPA with the ability to make regulations for the prevention, control, abatement or mitigation of pollution.

¹² PH Act, ss 47(c)(iii) and 48(c), which require a Quality Assurance Program include communication processes when dealing with a drinking water incident or emergency.

¹³ NSW EPA. The NSW Government PFAS Investigation Program, <https://www.epa.nsw.gov.au/your-environment/contaminated-land/pfas-investigation-program>

¹⁴ See, for example, POEO Act, ss 90B(4) and 91B.

National framework

The National Water Quality Management Strategy is a national strategy designed to protect Australia's water resources by maintaining and improving water quality and to guide the work of the relevant state-based agencies.¹⁵ This strategy underpins a range of non-mandatory guidelines, including the ADW Guidelines.¹⁶

The Industrial Chemicals Environmental Management Standard (**ICHEMS**) is a national standard for managing the import, manufacture, export, use and disposal of industrial chemicals, including PFAS.

Where the Legislative and Regulatory Framework Falls Short

The current NSW framework enables a range of possible activities that would assist with testing for, monitoring, mitigating and responding to PFAS contamination. However, it falls short of adequacy in key areas. **Our key concern is that the available processes and powers are either underutilised or too slow/reactive in their application to be effective.**

Lack of mandatory testing/monitoring requirements

The legislative framework enables some testing and monitoring of water quality in certain circumstances, but does not require it, conferring discretion on various agencies. For example:

1. Section 18 of the PH Act gives the Secretary the power to direct a supplier of drinking water to carry out testing;
2. Section 25(2) of the PH Act states that the regulations may make provisions for the testing of water and other substances to be carried out by the supplier of drinking water;
3. Clauses 45-48 of the PH Regulation outlines the information and processes required to be included in a Quality Assurance Program for certain water suppliers (such as Sydney Water Corporation);
4. Section 90B of the POEO Act provides that the EPA may issue a person with a written notice to facilitate the EPA carrying out a preliminary investigation to determine whether circumstances exist that may pose a potential risk of harm to human health or the environment;
5. Section 295ZC of the POEO Act provides that if the EPA suspects that a pollution incident has occurred or is occurring, the EPA may request that the Chief Health Officer of the Ministry of Health undertake an analysis of the risk to the health of any person or group of persons; and
6. Section 295ZD of the POEO Act provides that the EPA may undertake an analysis of a pollution incident (or suspected pollution incident) and that incident's actual or likely harm to the environment.

However, **there is no mandatory legislative requirement that proactive monitoring or testing for PFAS be carried out. Neither is there a requirement that any testing be carried out**

¹⁵ Water Quality Australia, About, <https://www.waterquality.gov.au/about>.

¹⁶ NHMRC, Australian Drinking Water Guidelines 6, 2011, <https://www.nhmrc.gov.au/file/18462/download?token=nthI3esn>

periodically nor that the testing methodology adopt current best practices (or any particular type of testing, for that matter).

Additionally, each of the above mechanisms involve a significant level of discretion with respect to both how any monitoring or testing processes are formulated and how those processes are then utilised. For example, clause 45(b) requires a quality assurance program to include processes for controlling potential health risks in accordance with the Framework for Management of Drinking Water Quality (contained in the ADW Guidelines) (**Framework**). The Framework contains a series of non-prescriptive and discretionary recommendations and guidance with respect to the monitoring of drinking water sources,¹⁷ such as that sampling “should be frequent enough to enable the monitoring to provide meaningful information”.¹⁸

We understand that in practice, some water utilities carry out regular PFAS monitoring due to the proximity of their raw water to PFAS contamination sites (and others may even test where there is no identified source of contamination),¹⁹ but the frequency, type and whether these utilities test at all is a matter of discretion.

In relation to the POEO Act provisions, there is nothing prescribing what kind of testing/monitoring needs to be undertaken in any preliminary investigation under s 90B (or even whether any testing/monitoring needs to be undertaken). Further, in addition to the health (s 295ZC) and environmental (s 295ZD) risk analyses provisions of the POEO Act lacking any prescriptive requirements for an analysis, they are only reactive in their operation. They require the EPA to suspect that a pollution incident has occurred or is occurring before those risk analyses can be undertaken. We understand that the EPA is currently collecting samples of soils and waters at 51 sites for analysis for PFAS with a view to undertaking a more detailed assessment if significant levels of PFAS are detected.²⁰

Given the wide range of possible sources of PFAS,²¹ the difficulty in knowing where and when PFAS has been used (and thus where might be contaminated), and the evolving understanding of the health issues associated with exposure to PFAS exposure,²² EDO recognises that some level of discretion in the legislative framework that manages PFAS may be necessary. Nevertheless, EDO is concerned that the provisions listed above are insufficiently prescriptive and may result in unfavourable environmental outcomes.

A tangible example of this concern can be seen in the recent PFAS contamination in the Blue Mountains in NSW, wherein the source of the recent Medlow and Greaves Dams PFAS contamination, we understand, is unknown. Further, the current line of inquiry dates back to an incident in 1992 when firefighting foam potentially containing PFAS was used in a petrol tanker

¹⁷ See, for example, ADW Guidelines, Part 3.5 (pp 41-45).

¹⁸ ADW Guidelines, p 42.

¹⁹ NHMRC, Draft fact sheet on Per- and poly-fluoroalkyl substances (PFAS), <https://www.nhmrc.gov.au/health-advice/environmental-health/water/PFAS-review/draft-fact-sheet>

²⁰ EPA, The NSW Government PFAS Investigation Program, <https://www.epa.nsw.gov.au/your-environment/contaminated-land/pfas-investigation-program>

²¹ Health Canada, Objective for Canadian Drinking Water Quality, <https://www.canada.ca/content/dam/hc-sc/documents/publications/healthy-living/objective-drinking-water-quality-per-polyfluoroalkyl-substances/objective-for-canadian-drinking-water-quality-en-final.pdf>.

²² Health Canada, Objective for Canadian Drinking Water Quality, <https://www.canada.ca/content/dam/hc-sc/documents/services/publications/healthy-living/objective-drinking-water-quality-per-polyfluoroalkyl-substances/objective-for-canadian-drinking-water-quality-en-final.pdf>, p 12.

accident on the Great Western Highway.²³ EDO does not suggest that this necessarily means the PFAS contamination of this area has gone unnoticed since 1992, but we consider this to be a compelling argument for mandatory proactive, prescriptive and periodic testing/monitoring for PFAS in all drinking water supplies.

Lack of mandatory reporting requirements

Effective reporting mechanisms that provide relevant and timely information are likely to promote confidence in the water supply system and its management. Indeed, this is specifically contemplated in the ADW Guidelines as a rationale for including reporting requirements in a draft drinking water quality policy.²⁴ However, similar to testing/monitoring requirements, the legislative framework contains scant water quality reporting requirements.

Section 19 of the PH Act gives the Secretary the power to direct that a supplier of drinking water produces the results of any tests that were required to be conducted under s 18 of the PH Act. While enforceable,²⁵ there is no automatic requirement for a supplier of water to report any water testing or monitoring results. Further, there is no requirement that the Secretary release to the public any information that it compels a supplier of drinking water to produce.

Clause 47(c)(iii) of the PH Regulation contains a requirement for communication procedures in the event of an emergency or incident. However, neither “emergency” nor “incident” are defined terms, and the required “communication procedures” are similarly discretionary in their formulation. It is EDO’s view that mandatory and prescriptive provisions are critical to ensuring the necessary certainty and transparency in legislative procedures that nurtures public confidence in that system.

Additionally, in circumstances where the EPA is involved in an investigation of PFAS contamination (whether under ss 90B, 295ZC, 295ZD or otherwise), there is nothing in the POEO Act that then directs the EPA to report on that information.

In light of the recent news of PFAS contamination in the Blue Mountains in NSW, EDO is concerned about the lack of an effective requirement for clear public communication. This is particularly so in circumstances where there are reports that independent testing in Adams Creek and Greaves Creek are showing PFAS levels at well above ADW Guidelines values,²⁶ respectively. While EDO acknowledges the potential for sample contamination when testing for PFAS and the need for trained personnel to carry out appropriate tests,²⁷ these reports are a timely example of the importance of introducing mandatory reporting requirements in the legislative framework.

We note that this feedback can also be appropriately categorised under **ToR (b)**.

²³ Sydney Morning Herald 17 September 2024 “White hot’: Cancer-linked chemicals flowing into dam at 50 times safe level” <https://www.smh.com.au/national/nsw/white-hot-cancer-linked-chemicals-flowing-intodam-at-50-times-safe-level-20240916-p5kay1.html>

²⁴ ADW Guidelines, p 24.

²⁵ Section 20 of the PH Act makes it an offence not to comply with a direction from the Secretary.

²⁶ We note that the PFAS limits in the ADW Guidelines apply to water treated for human consumption, not raw water sources such as the dams wherein the testing took place.

²⁷ NHMRC, Draft PFAS Fact Sheet, <https://www.nhmrc.gov.au/health-advice/environmental-health/water/PFAS-review/draft-fact-sheet>

Inefficiencies between relevant framework instruments

As noted above, there is an important interaction between NSW legislation (clause 45(b) of the NSW PH Regulation) and national policy guidelines (the ADW Guidelines). EDO is concerned that the interaction between these two instruments may be misaligned and may result in the delayed introduction of drinking water programs that conform to the current best scientific advice.

Based on a review of the latest available scientific evidence, the NHMRC undertook a review of the existing PFAS guidance and have drafted new guidance with lower allowable PFAS concentration limits. The new guidance will replace the existing Fact Sheet in the ADW Guidelines and EDO understands that Fact Sheet is scheduled to be finalised and published in April 2025.²⁸ While the proposed PFAS guidance is still in its consultation phase and is susceptible to change, EDO notes the revised concentration limits for PFOA and PFHxS are more than 50% lower than the previous limits, and the revised limit for PFOS is more than an order of magnitude lower (from 0.07 µg/L to 0.004 µg/L).

EDO is concerned that as these are significant revisions, a delay of approximately six (6) months is forecast between the introduction of the draft PFAS guidance and its anticipated adoption in the ADW Guidelines. This is particularly concerning in circumstances where:

1. quality assurance programs required under s 25 of the PH Act are likely developed having regard to the information contained in the ADW Guidelines;
2. there is no requirement that quality assurance programs be updated if and when new scientific advice outpaces the ADW Guidelines (or any other relevant guiding information); and,
3. recent testing of waterbodies in the Blue Mountains, which ultimately service the Upper Blue Mountains drinking water supply, showed PFAS concentrations in excess of the new proposed guidance limits that will be inserted into the ADW Guidelines.²⁹

EDO submits that having an important component of the safety measures for drinking water beholden to an obsolescent ADW Guideline may put communities at risk of outdated health advice and unacceptably high levels of PFAS contamination in drinking water sources.

In relation to the power in s 295ZC of the POEO Act, EDO notes that the EPA can merely “request” that the Chief Health Officer of the Ministry of Health undertake an analysis of the risk created by a pollution incident to the health of any person or group of persons. This may lead to the health impacts of a pollution incident being improperly investigated (or not investigated at all) in circumstances where the Ministry of Health has insufficient resources to respond to that incident.

Underutilisation of reactive measures in the NSW framework

EDO notes the *Industrial Chemicals Environmental Management (Register) Act 2021* (Cth) allows the Commonwealth Minister for the Environment and Water to make decisions regulating the import, manufacture or use of industrial chemicals (which are registered in the *Industrial Chemicals Environmental Management (Register) Instrument 2022*) (**Register**). Recently, three PFAS

²⁸ NHMRC, Public Consultation on Draft Guidance for PFAS, <https://consultations.nhmrc.gov.au/environmental-health/australian-drinking-water-guidelines-2024-pfas/>.

²⁹ NSW Government, PFAS and drinking water - information and updates, <https://www.nsw.gov.au/environment-land-and-water/pfas-and-drinking-water-information-and-updates>

compounds were included in the Register for regulation, though we note that their regulation does not commence until 2025.

There are thousands³⁰ of different PFAS compounds and we understand there are new compounds coming online continually. As a result, there is a need for a mechanism (or mechanisms) that allows swift regulatory intervention in the event of the discovery of new PFAS or when scientific advice is updated about existing/known PFAS.

Chapter 4 of the POEO Act provides the EPA with the ability to issue various notices that can regulate specific activities. Relevantly, the EPA may (among other things) issue a:

- (i) recall notice (s 94B) to cease the production, sale or distribution of a particular substance (where substance is broadly defined as any matter or thing); or a
- (ii) prohibition notice (s 101A) to prevent the discharge of pollutants from or within a premises.

These notices can be issued immediately and with immediate effect and have been used by the EPA previously for PFAS-related incidents.³¹ However, the more substantial power of the EPA to permanently ban the manufacture, use and distribution of PFAS under Schedule 2, cl 15 of the POEO Act has only been used once: to ban the use of PFAS firefighting foam under Chapter 9, Part 5 of the *Protection of the Environment Operations (General) Regulation 2022* (**POEO Regulation**).

We also note that cl 14(1) of the NHMRC Act provides that interim ADW Guidelines can be made without the Council of the NHMRC in urgent circumstances. Although there is an ongoing PFAS incident in the Blue Mountains in NSW and the new PFAS Fact Sheet is not scheduled to be implemented into the ADW Guidelines until April 2025, cl 14(1) has not been utilised by the NHMRC.

Recommendation 1: NSW must reform the legislative framework to introduce mandatory proactive testing/monitoring requirements for PFAS

Proactive environmental monitoring powers are essential to identify and manage risks early (rather than relying on reactive measures to address and control environmental harm). This monitoring must be done regularly, on a legislated basis and with clear benchmarks.³²

EDO expects that the current regulatory framework affords a level of discretion to the relevant entities because the scientific understanding of pollutants and their health implications is susceptible to change over time as additional studies are completed. This is likely the reason why any testing and monitoring methodologies are left to be included in policy documents (such as a quality assurance program), because there is a greater flexibility in amending guidance materials than legislation.

However, EDO is of the view that the implementation of mandatory, robust, proactive and prescriptive testing/monitoring requirements in the PH Act, PH Regulation, POEO Act or elsewhere

³⁰ US EPA, Our Current Understanding of the Human Health and Environmental Risks of PFAS, <https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas>

³¹ See, for example, *Environment Protection Authority v Pullinger* [2021] NSWLEC 144.

³² EDO has long advocated for strong environmental monitoring requirements – see for example EDO, Submission on the Right to a Healthy Environment, 31 August 2022, <https://www.edo.org.au/wp-content/uploads/2022/09/220831-Submission-from-EDO-on-right-to-healthy-environment.docx-1.pdf>.

in the regulatory framework can be done in a way that imports the necessary discretionary flexibility to keep pace with evolving scientific understanding. For instance, the framework could require proactive testing methodologies that conform to “current best practices” and to require proactive testing at specified intervals at a minimum (to allow for more frequent testing at certain times, such as an incident or emergency).

Recommendation 2: NSW must strengthen legislative obligations on the relevant entities to publicly report on testing/monitoring results

While the current legislative framework contains various powers for the Secretary of the Ministry of Health and the EPA that may lead to the testing/monitoring for PFAS, there are no requirements that the results of any such tests be reported or made publicly available.

That reporting data is important to view trends and understand current, prior and future impacts of PFAS contamination – this is especially so given that PFAS are colloquially known as “forever chemicals” and do not break down. Indeed, the Framework specifically contemplates that a system of regular public reporting is important to:

- (i) ensure that drinking water quality management is open and transparent;
- (ii) improve preparedness and planning for future incidents; and
- (iii) ensure the relevant people receive the information needed to make informed decisions about the management of regulation of drinking water quality.³³

EDO strongly agrees with the need for a system of regular public reporting recommends the implementation of such a system in the form of a mandatory legislative requirement. Insofar as is possible, EDO suggests the real-time publication of data – particularly in areas proximate to a known PFAS contamination incident or industry that historically used PFAS. These legislative requirements should be implemented in both the NSW public health legislation and the pollution legislation.

Recommendation 3: the PH Regulation should be amended to require periodic review of quality assurance programs currently in force and to consider the ADW Guidelines as minimum requirements

While EDO advocates for more prescriptive measures above, we are conscious of the need to avoid shackling any relevant entity (such as a supplier of drinking water who is required to develop and comply with a quality assurance program) to a benchmark that is susceptible to obsolescence, whether that be a quality assurance program or the ADW Guidelines. While both the ADW Guidelines and quality assurance programs play an important role in the formulation of the processes that underpin the management of drinking water quality, the process to amend either of these can be slow.

In circumstances where the best scientific advice outpaces the evolution of key guiding documents, the relevant entities (such as a supplier of drinking water) ought to be able to augment their processes in line with that current advice where it will result in better environmental outcomes.

³³ ADW Guidelines, pp 47, 55 and 57.

We also note that the ADW Guidelines are minimum standards and should be viewed as such. Wherever there is evidence to show that water quality should exceed the quality foreshadowed in those guidelines, NSW should adopt that evidence.

EDO is therefore supportive of more frequent updates to the ADW Guidelines and recommends that the PH Regulation:

- (i) reflects that the ADW Guidelines are minimum standards; and
- (ii) requires a periodic review and update of quality assurance programs that are currently in force.

Recommendation 4: Strengthen existing mechanisms in NSW legislation that can efficiently prohibit the manufacture, use and distribution of PFAS chemicals

Given our understanding of PFAS and its impacts to human health is evolving, and the fact there are thousands of different PFAS compounds (and that there are likely often new compounds being created), there is a strong need for mechanisms that enable rapid action in response to new information, such as the implementation of interim guidelines and restrictions or bans on the manufacture, use or distribution of new chemicals.

EDO is aware that the current public health framework provides some ability to restrict the use and distribution of chemicals such as PFAS. However, it is our view that these abilities need to be strengthened to allow mandatory directions,³⁴ and to encourage the use of the power to more rapidly respond to new information.

We note that the EPA possesses the relevant powers to effectively and efficiently prohibit the manufacture, use and distribution of PFAS, but that these powers are seldom utilised. EDO is strongly supportive of the use of this power to permanently and swiftly ban new and existing PFAS compounds that are causing environmental and health problems. This is consistent with the precautionary principle, a key objective of the EPA under s 6 of the POEA Act.

ToR (m) areas for reform, including legislative, regulatory, public health and other policy measures to prevent, control and manage the risks of PFAS in water supplies

We refer broadly to our suggested key areas for reform, above, and urge the NSW government to consider how they intend to give effect to both the precautionary principle and the polluter pays principle³⁵ with regard to PFAS in drinking water. We also add to those suggested reforms by strongly recommending that the NSW legislative framework be amended to include the right to a healthy environment, whether in existing legislation or in a standalone Human Rights Act.

We note that a first step has been taken by the NSW government in recognising the “right to a clean, healthy and sustainable environment” in s 8(5) of the *Climate Change (Net Zero Future Act) 2023*.

³⁴ For example, clause 14(1) of the NHMRC Act provides that interim ADW Guidelines can be made without the Council of the NHMRC in urgent circumstances. However, these guidelines provide non-binding recommendations, rather than mandatory legislative requirements.

³⁵ Both principles are components of ecologically sustainable development, which is a key objective of the NSW EPA pursuant to s 6 of the POEA Act.

Right to a Healthy Environment

EDO has long advocated for the inclusion of the right to a healthy environment in key environmental legislation throughout Australia.³⁶ EDO published a national report on the right to a healthy environment, “[A Healthy Environment is a Human Right](#)”, and worked to establish the right in ACT legislation. That report advocates for the recognition of the right in Australian laws at both the federal and state/territory levels of government, including in NSW.

Broadly, the right to a healthy environment recognises that all humans have the human right to live in a clean, healthy and sustainable environment. The Special Rapporteur defines the right to a healthy environment as being comprised of six substantive elements including the right to access to safe drinking water and sanitation and the right to toxic free environments in which to live, work, study and play. Procedural elements of the right to a healthy environment include the right to access environmental information, the right to participate in environmental decision-making, and access to justice for environmental harms.

NSW does not currently have human rights legislation. The lack of a human right to a healthy environment has led to there being no redress to human rights for affected communities in NSW, resulting in a poor system of community protection when it comes to, among other things, access to clean drinking water. Currently, the only avenue for redress is a complaint to the Human Rights Commission or an international human rights body but the remedies available through these complaints are generally limited to recommendations. Enacting a human right to the environment would provide access to remedies and redress under NSW legislation for non-compliance with human rights. It will also ensure that new and amended legislation will be assessed for its compatibility with the right to a healthy environment.

A more detailed look into the Right to a Healthy Environment can be found [here](#).

Recommendation 5: NSW must incorporate the right to a healthy environment in existing environmental legislation or in a dedicated Human Rights Act.

The right to a healthy environment should be expressly included as a standalone right in the NSW legislative framework. Importantly, it should be enshrined in a way that it is enforceable and justiciable if infringed.

Implementing the right to a healthy environment is important to bring Australia in line with the international community, and its international obligations. EDO also strongly recommends amending the existing NSW legislation to impose obligations on the relevant decisionmakers to act consistently with a right to a healthy environment when exercising functions under those laws.

A right to a healthy environment:

- (i) provides comprehensive protection of all components of the environment, which are not adequately protected under current environmental or human rights laws;

³⁶ See, for example, EDO, Submission on the Right to a Healthy Environment, 31 August 2022, <<https://www.edo.org.au/wp-content/uploads/2022/09/220831-Submission-from-EDO-on-right-to-healthy-environment.docx-1.pdf>>/

- (ii) places people and communities at the heart of environmental protection, empowering citizens to pursue environmental justice and achieve better outcomes for the environment; and
- (iii) is consistent with, and a logical extension of, partial protections that people in Australia already have under current laws, including the POEO Act, POEO Regulation, PH Act and PH Regulation.

We recommend the right to a healthy environment is defined to include the right to a clean, healthy and sustainable environment, consistent with the UN General Assembly’s July 2022 resolution.³⁷ We note that by adopting such a definition, the right to a healthy environment will facilitate the prevention of environmentally degrading issues such as PFAS and allow access to remedies and redress for affected communities.

Noting that EDO has written extensively on the right to a healthy environment, we refer to our report: [A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia](#).

ToR (h) the structure, capacity, capability and resourcing of New South Wales Government agencies and water utilities to detect, monitor, report on, respond to and mitigate against PFAS contamination of water supplies, including the adequacy of infrastructure and resources; and

(j) public sector resourcing and coordination amongst relevant agencies in preventing controlling and managing the risks of PFAS to human health and the environment

EDO has, on behalf of our clients, written to multiple public agencies outlining our clients’ concerns with respect to the recently reported PFAS contamination in the Blue Mountains area. The response so far has highlighted some challenges with respect to managing PFAS contamination.

For instance, given the source of the contamination in the Blue Mountains is unknown, and the fact there was no proactive monitoring regime in place prior to the discovery of the PFAS contamination, it is not clear which agency or entity is taking responsibility for the management of this issue – certainly it appears at this stage that it crosses into the jurisdiction of multiple agencies. EDO expects that these circumstances are not unique to this situation, especially as we learn more about PFAS and the fact that PFAS are “forever chemicals” that do not break down. Further, as previously mentioned, there are so many sources of many kinds of PFAS that EDO expects this would be a challenging issue to adequately resource.

Based on the responses we have seen from the relevant agencies, the fact that some powers at their disposal have been unutilised or underutilised, and that there has been little ongoing proactive PFAS testing/monitoring prior to the recent discovery of PFAS in the Blue Mountains, we do not consider the relevant NSW government agencies are currently properly resourced. EDO is supportive of stronger resourcing of these agencies.

³⁷ UNGA Resolution 76/300.