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DEFENDING THE ENVIRONMENT
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Brendan Nelson
Deputy Secretary
Department of Planning & Energy
GPO Box 39, Sydney NSW 2001

Online submission:
http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=8713

Dear Deputy Secretary,

Draft Technical Notes supporting the Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals

Thank you for the opportunity to comment on the Department of Planning and Environment's (**DPEs**) draft *Technical Notes supporting the Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals* (**Technical Notes**).

EDO NSW is an independent community legal centre specialising in public interest environmental and planning law. As environmental lawyers we have many years' experience helping local communities understand the environmental, social and economic impacts of mining and coal seam gas (**CSG**) projects in their area. This includes through community workshops, guides to mining and gas laws, law reform work and public interest court proceedings.

We have previously commented on the draft *Economic Assessment Guidelines for Mining and Coal Seam Gas Projects* (**Guidelines**).[1] That submission included detailed comments on important technical areas such as biodiversity impacts, greenhouse gas emissions and Aboriginal cultural heritage. A brief summary of those comments is **attached**. It is not clear how, or if, those comments have been addressed. EDO NSW also attended an all-day workshop on the Technical Notes in July 2016, where we emphasised many of the points now made in this submission.

In our view, the Technical Notes are too vague, discretionary (for proponents) and unenforceable. It is difficult to see how the current draft will improve transparency or consistency of cost benefit analysis for NSW mining and coal seam gas projects – in relation to either public interest considerations or environmental impacts. The Technical Notes fail to meet the expectation set by the Guidelines that "(t)he Guidelines will be supported by Technical Notes, which set out default

[1] In that submission we commented on a number of factors that we stated should be addressed in these Technical Notes when they were available. The concerns expressed in that submission apply equally to the current draft Technical Notes. That submission is available at: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2458/attachments/original/1448511408/151125_Mining_Econ_Assessment_Glines_sub_EDONSW_FINAL.pdf?1448511408

methodologies, parameters and assumptions to be used as part of the economic assessment." Further, a number of the fundamental assumptions underpinning the Technical Notes are fatally flawed (as discussed in our previous submission and at the July 2016 workshop). This means that any attempt to apply the Technical Notes is likely to significantly under-estimate the costs of the projects to the community and the environment.

EDO NSW does not support the implementation of these Technical Notes as drafted. We believe they are inconsistent with DPE's obligation to ensure adequate consideration of ecologically sustainable development in the NSW planning system.[2]

Flawed Assumptions

The Technical Notes make the assumption throughout that applying relevant Government policy, including mitigation measures, means there is no economic cost arising from those aspects of a project covered by the policy. This is demonstrably false. The following three key examples – regarding biodiversity, noise and greenhouse gas emission impacts - demonstrate this.

Biodiversity and related impacts

The *Technical Note 7 – Biodiversity* is based on an incorrect assumption that the economic costs of impacts on biodiversity are accurately and adequately incorporated through the application of either the biodiversity offsetting regime under the *Biodiversity Conservation Act 2016* and the *Biodiversity Conservation Regulation 2017* or the *NSW Biodiversity Offsets Policy for Major Projects*. EDO NSW has previously expressed significant concerns about how environmental costs were incorporated into the cost of biodiversity offsets.[3] We also expressed serious concern that mine rehabilitation, post-use, could be given upfront biodiversity 'credits', despite a lack of any scientific evidence presented that equivalent gains will be achieved.[4]

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[2] See *Environmental Planning and Assessment Act 1979* (NSW), s. 5 (objects) and s. 79C(1)(e), evaluation and the 'public interest'. The Act's objects refer to the principles of ESD set out in NSW pollution law. For example, see *Protection of the Environment Administration Act 1991*, s.6(2)(d):

> *improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:*
> *(i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,*
> *(ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,*
> *(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.*

[3] Our submission on the draft Offsets Calculator under the Biodiversity Conservation Act is available at: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/3974/attachments/original/1497580552/Offsets_Payment_Calculator_-_EDO_NSW.pdf?1497580552. Peer reviews of the draft Biodiversity Assessment Method by Eyre and Gibbons (2015) expressed concerns that policy settings (such as 'offset variation rules') would undermine the market signal necessary to protect endangered species.

[4] See for example EDO NSW, Submission on the draft Biodiversity Assessment Method (2016) p 8 at: http://www.edonsw.org.au/nsw_biodiversity_and_land_management_reforms_draft_regulations_and_products

These concerns were unresolved and the final legislation fails to adequately account for the true environmental cost of offsets. For example, the draft Technical Note on Biodiversity does not engage with the following gaps in the new Biodiversity Offsets Scheme:

- How should economic assessments deal with 'serious and irreversible impacts' to biodiversity (which may be approved for state significant projects)?
- If a consent authority 'discounts' the required biodiversity credits described in the Biodiversity Development Assessment Report, is the economic assessment required to value the 'missing' credits that represent the impact?
- If local koala habitat is destroyed and offsets are located 100km away, how is the effect on the local community's enjoyment, heritage and tourism valued?
- How will the method avoid recognised flaws of non-market valuation?[5]
- How do the Technical Notes deal with concerns raised in the NSW Auditor General's 2017 report, which found existing mine rehabilitation bonds are already insufficient, liability estimates are not properly verified, and conditions for mine rehabilitation outcomes are unclear; and that these liabilities must be fully and transparently valued with the cost borne by the proponent, not the public?[6]
- How are related environmental values not covered by the Biodiversity Offsets Scheme accounted for – such as soil erosion, salinity and carbon storage?

Of equal concern is the fact that the system completely fails to account for key features such as ecosystem services, which are in no way valued and costed either by current "biodiversity conservation" legislation or the Technical Notes. The Aichi Targets to the Convention on Biological Diversity require planning systems to integrate biodiversity values and ecosystem services.[7]

Noise impacts

Similarly, *Technical Note 3 - Noise* assumes economic costs to surrounding communities are only incurred if noise impacts above the criteria in the *Industrial Noise Policy* (**INP**) are experienced. This ignores issues such as the fact that the INP fails to protect quiet environments by allowing proponents to assume noise levels of 30dB in all environments, regardless of the actual noise levels. This means that local communities experience significantly greater costs that the application of the INP suggests, an impact which is also not considered in the Technical Note.[8]

[5] See for example, Preston CJ in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited [2013] NSWLEC 48, paras [446-496],* available at https://www.caselaw.nsw.gov.au/decision/54a639943004de94513da836

[6] NSW Audit Office, *Mine rehabilitation security deposits* (May 2017), available at http://www.audit.nsw.gov.au/news/mine-rehabilitation-security-deposits

[7] See Aichi Targets, Strategic Goals A, D and E, for example targets 2, 14 and 18. Available at: https://www.cbd.int/sp/targets/

[8] This issue is explored further in the EDO NSW submission on Draft Industrial Noise Guideline: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2432/attachments/original/1447644082/151116_Draft_Industrial_Noise_Guideline_-_EDONSW_submission.pdf?1447644082

Greenhouse gas impacts

The *Technical Note 9 – Greenhouse Gas Emissions* only requires the quantification of Scope 1 and 2 emissions, and then only for a 30-year projection (presumably discounted to net present value, when the costs of climate change are actually predicted to increase over time). Scope 3 emissions are optional, and the Technical Notes downgrade their importance by conflating environmental impacts with accounting rules. This is inconsistent with the Department's Integrated Mining Policy (**IMP**). Under the IMP approach, the Standard Secretary's Environmental Assessment Requirements require scope 3 downstream emissions to be comprehensively addressed. As per our 2015 submission, so should the Economic Guidelines and Technical Notes. We are also concerned the draft Notes no longer refer to leading-practice methods like the US EPA's *Social Cost of Carbon* and equivalent UK guidance, nor the need for domestic-based equivalents.[9]

As we noted in 2015, the NSW Government states that 'Three-quarters of NSW emissions are from the extraction, processing and burning of fossil fuels (primarily coal).'[10] Even if the primary focus of economic cost-benefit analysis relates to NSW,[11] this does not justify an economic assessment that makes scope 3 greenhouse pollution invisible, or downplays its impact on climate change. Scope 3 emissions are often the majority of emissions that are a foreseeable and in many cases inevitable consequence of carrying out a coal or gas mining project. Excluding scope 3 emissions would undermine public confidence in the Guidelines at a critical time for Australian decision-makers, and in a context where NSW has committed to net-zero emissions within the next 33 years, by 2050.

Our 2016 report *Planning for Climate Change* recommended all major projects submit a Climate Impact Statement highlighting their scope 1, 2 and 3 emissions and the project's consistency with state, national and global climate change commitments, emissions reduction targets and the best-available science.[12]

Failure to Improve Consistency and Transparency

The Technical Notes do not provide any specific binding guidance for undertaking economic assessment and leave the final choice of how to conduct assessments in the hands of project proponents. This is no different to the current situation which has been heavily criticised by independent economists and the community.

In particular, the consistent statement throughout the Technical Notes that costs only need to be assessed when they are "likely to materially influence the cost-benefit analysis" should be removed. Rather than setting any form of standardised assessment, this statement allows proponents to not conduct any assessment at all and to do so with no quantitative justification.

[9] See for example, Carbon Brief (UK), *Q&A: The social cost of carbon* at https://www.carbonbrief.org/qa-social-cost-carbon. For an Australian perspective see The Climate Institute, *Counting all the costs* (2014) at http://www.climateinstitute.org.au/verve/_resources/TCI_SocialCostOfCarbon_PolicyBrief_September2014.pdf

[10] Office of Environment & Heritage, 2015.

[11] See draft Technical Note 9, Greenhouse Gas Emissions, pp 5-6. For example: 'Estimate the economic impact of GHG emission output to NSW only'.

[12] *Planning for Climate Change* (2016) at http://www.edonsw.org.au/planning_for_climate_change

Further, the methods suggested in *Introduction to the Technical Notes* for when assessments are conducted are in many cases highly subjective. Their adequate implementation is entirely dependent on the assumptions used in the research. For example, these methods assume a perfect market where participants (including consent authorities and the public) are fully informed prior to decision making, a situation which does not exist in reality; and fail to incorporate the impacts and distortions in local economics caused by the behaviour of project proponents.

The Technical Notes also limit consideration of health to those associated with air quality (*Technical Note 5 – Air Quality*). There is no guidance for consistently and transparently considering broader health impacts associated with mining and coal seam gas projects.

It is not clear that appropriate consultation (if any) has occurred with indigenous stakeholders in relation to the Aboriginal Culture Heritage (*Technical Note 1*) and there is no recognition of the need for the principle of full, prior and informed consent.[13] Further the definition of cultural heritage is very narrow, fails to adequately incorporate cultural landscapes and fails to recognise the current process of legislative reform in relation to cultural heritage, and its diverse values to Aboriginal people.

Conclusion

The draft Technical Notes should be amended to provide more binding direction that raises the minimum standards required for transparent and accurate information, qualitative and quantitative valuation (including environmental impacts that exist despite, or in addition to, Government policies applying) and arms-length economic assessment.

We also recommend greater collaboration between ecological and economic experts to inform the final technical notes, properly integrate the assessment process, and make environmental costs more visible in accordance with ESD principles, as referred to in the Planning Act's objects.

If there are any matters that you would like to discuss please do not hesitate to contact us on (02) 9262 6989 or rachel.walmsley[a]edonsw.org.au.

Yours sincerely,
EDO NSW

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Policy & Law Reform Director

[13] As required by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) to which Australia adheres. There is a brief reference in the draft Technical Notes suggesting UNDRIP be considered.

Attachment: Extract from 'Summary of key comments and recommendations' from EDO NSW *Submission on the draft Guidelines for Economic Assessment of mining and coal seam gas proposals* (2015)

Please see our full 2015 submission for detailed comments and recommendations.[14]

Environmental and Social Impacts

*22. The Guidelines should not be finalised without **further independent peer-review** of specific components relating to environmental and social impacts, including:*

- *Aboriginal cultural heritage (to be agreed by Indigenous stakeholders);*
- *air quality and public health;*
- *noise impacts;*
- *biodiversity (including ecosystem services*);*
- *greenhouse gas emissions and climate change;*
- *groundwater;*
- *non-Aboriginal heritage:*
- *surface water;*
- *social impact assessment (equity and fairness, lifestyle and wellbeing);**
- *mine rehabilitation;**
- *cumulative impacts.**

** not dealt with in detail in the draft Guidelines.*

*23. The approach to **Aboriginal cultural heritage** requires detailed consultation with indigenous stakeholders, broader interpretation of cultural heritage, and integration with any forthcoming state-wide law reforms;*

*24. Further expert input is needed on **air quality and public health**, including from local health professionals in areas experiencing impacts, and the NSW Ministry of Health.*

*25. Consideration of **noise impacts** must fully account for on-ground experience. For example, the Guidelines should assess noise impacts from mining in the same way as air quality, where a cost is associated with every increase in noise, instead of being limited to how noise levels relate to the Industrial Noise Policy.*

*26. Full valuation of **biodiversity impacts** can't rely solely on **biodiversity offset policies**. There are a range of benefits and values that existing policies do not address.*

*27. Costs and impacts of **greenhouse gas emissions** should quantify **'Scope 3'** emissions, and the cost of climate change responses should be considered.*

*28. More work is needed to quantify and consider **groundwater impacts**, including considerations beyond water quality.*

*29. **Heritage impacts and risks** beyond the project site should be identified and considered.*

*30. The Guidelines need additional mechanisms to address and account for **other social impacts** that are not captured by visual amenity, including health and wellbeing; quality of life and sense of place; community cohesion; and adjustment, legal and negotiating costs.*

[14] 2015 Submission available at: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2458/attachments/original/1448511408/151125_Mining_Econ_Assessment_Glines_sub_EDONSW_FINAL.pdf?1448511408