Ms Carolyn McNally
The Secretary
Department of Planning & Environment
GPO Box 39
Sydney NSW 2001
Email: EIAproject@planning.nsw.gov.au

16th February 2018

Dear Ms McNally,

Re: Feedback on VLAMP Policy & Consideration of Noise & Dust Impacts from Mining & Gas Developments

OzEnvironmental Pty Ltd assists farmers and rural Councils in NSW respond to major mining and energy projects. This has involved dealing with the workings of the NSW Government's policy for voluntary land acquisition and mitigation actions that can be undertaken to address noise and dust impacts from mining and gas projects.

I offer the following comments in regard to the proposed revision the VLAMP Policy in association with changes to the noise and dust provisions.

A. General Comments: Mine Related Dust, Noise and Other Impacts on Adjacent Landholders

Having carefully reviewed the draft Policy, I invite the NSW Government to strengthen it to better address the rights of landholders to have a fair and reasonable say in the future destiny for their property.

My general comments below are separated according to two elements; the VLAMP process as to how negotiations between a landholder and a miner/gas producer might occur and secondly commentary around the new Noise Policy for Industry changes.

A.1 VLAMP

- The first message I would like to convey is that the Policy is currently written in quite a clinical, technical, matter-of-fact manner which belies the impact it has on the people, the real human beings, who actually live on the farms affected. I recommend the Policy be amended to add some humanity to the messaging.

  The 'landholdings' impacted are more than just a physical asset. They are actually **homes**. Places – both indoors and outdoors - that provide comfort, refuge, stability, security and wellbeing to those who reside there. People have strong emotional connections to these places. The Policy

would be enhanced if greater respect and acknowledgement was given to this reality. The imposition of noise, dust, water losses, visual impacts, night lighting, biodiversity changes, etc all adversely impact one's relationship with one's **home** – inside and out.

- Another important point is that where the impacts of a mine actually make a property unliveable, then land acquisition and mitigation actions are not in reality 'voluntary' at all, and there is a fundamental problem in saying that the proposed agreements and actions are an acceptable way to deal with impacts.

  As it is therefore akin to compulsory acquisition, at the very least landholders should be entitled to heads of compensation that are the same as the *Land Acquisition (Just Terms Compensation) Act 1991* and express reference should be made to that in relevant instruments and policies. Affected landholders should also be entitled to similar valuation and dispute resolution mechanisms, including rights of appeal to an independent arbiter.

- OzEnvironmental also submits that the time proposed to give community members to respond in relation to voluntary land acquisition process disputes is unreasonably short. For example the Policy proposes to only give a landowner 14 days after receiving a valuation report to refer the matter to the Secretary with a detailed report on the objection. In a situation where a community member is likely to have significantly fewer resources at their disposal to respond to a significant and life changing process, 14 days is grossly insufficient. Further, the Policy (p 14) appears to only give the landowner a single opportunity to decide whether they wish to engage in the voluntary land acquisition process. This is highly inappropriate for major resource extraction projects that occur over 20 years (plus time for rehabilitation and any extensions granted).

Below is a list of recommended fundamentals that should under pin the Policy:

1) The Crown controls the mineral resources which are exploited, in accordance with government permission and the economic opportunities seen by mining and gas companies, to deliver economic benefits to the public treasury and company shareholders. However, generating this public advantage or benefit should not, in my view, be obtained at the cost of arbitrarily allocating private loss, cost, damage or detriment to adjoining landholders, many of whom are highly productive farmers who also provide valuable economic contributions to the welfare of regions and Australia generally;

2) Landholders are generally unlikely to welcome an adjacent mine or gas field. To the contrary, the disruption and nuisance – whether personal, environmental, economic or social - can be very considerable;

3) There are substantial power imbalances between mining and gas companies and local landholders. The current playing field is unequivocally in favour of the companies because landholders do not have the time, the technical knowledge or the economic or political influence to match that of the developers. This power imbalance is often used to advantage by the developers;

4) Following on from the above, it is recommended VLAMP be made more equitable by incorporating mechanisms and processes that acknowledge the power imbalances and protect a landholder's right to natural justice;

5) Any interference by mining or gas developments to a landholder's right to quiet enjoyment must be fairly and adequately compensated. This should include the funding of costs such as legal, technical, valuation and other experts' opinions as required, as well as the landholder's time

spent on such matters;

6) Noise and dust impacts are not the only issues of concern to landholders. Often of equal concern are surface water and groundwater impacts, blast fumes, visual impacts including night lighting, ecosystem disruption and the loss of social amenity. VLAMP should be broadened accordingly;

7) Mining and gas companies should automatically provide the landholder with the provision of the capacity for independent third-party assessment of noise, dust and water impacts;

8) Mining and gas project approvals feature modelling of various environmental parameters that predict the likely impacts. Such modelling is founded on various assumptions and estimates that are challenging for experts to interpret and evaluate, let alone non-experts like landholders.

   The Policy should make allowances for this by providing procedural safeguards to landholders so they are provided with a fair and reasonable opportunity to understand and consider the potential impacts. To make this happen the industry proponent should be required to provide the financial resources necessary for the engagement of independent specialists to assist the landholder;

9) Once a project is approved and it is found that the actual impacts are different (often worse) compared to those predicted in the models, the models should be recalibrated and re-run, with the consent conditions revised accordingly;

10) The current consenting process provides few consequences for proponents if they underestimate and thus lessen the predicted impact footprint in order to limit more demanding consent conditions and additional land buffer costs. It is recommended Government policy in general and this Policy in particular articulate punitive consequences for underestimating impacts;

11) Noise and dust consent conditions need to be more outcomes-focussed. It is recommended the DPE should have the right to change/tighten conditions based on the first 5-10 years of actual operational experience; and

12) Regarding compliance management, the track record would suggest that both the EPA and the DPE have insufficient resources to be able to assess noise and dust compliance to a sufficiently high level of confidence such that the evidence can withstand scrutiny in a court of law. The outcome of this situation is that the mining and gas companies, in effect, are granted more leeway in the generation of noise and dust impacts without the risk of prosecution.

A.2 Mining SEPP changes re noise and dust

OzEnvironmental recommends the Mining SEPP regarding noise and dust aspects be revamped to accommodate the key principles of equity, fairness, Ecologically Sustainable Development (ESD), user pays, intergenerational equity and the precautionary principle, as well as no net loss due to environmental impacts. At present there appears to be a bias towards facilitating development and adjusting the rules to allow this to occur more easily, generating less impost on the developer, with the landholder's impacts deemed as 'collateral damage' to be carried for the greater good.

I recommend the revised approach to noise be predicated on determining what is acceptable noise impacts on the community, not on what might be achievable noise limits for planning approvals and/or licensing purposes.

OzEnvironmental does not support the raising of the minimum daytime background noise from 30 to 35 decibels (A-weighted (dBA). This increase will have a disproportionately negative impact on some

rural communities which are already being subjected to significant increases in noise from mining developments.

On many rural properties the night-time background noise levels are typically very quiet at approximately 20 dBA. From a mine project assessment perspective, for reasons unknown, our night-time background is deemed to be 30dBA. Then, the allowable mine-related noise of 5+ dBA is added, totalling 35 dBA. Hence, landholders could be the receptors of night-time noise approximately 15 + dBA above the actual background noise level. OzEnvironmental is strongly opposed to this imposition.

Please note the sounds of birds, frogs, crickets, cicadas, sheep, cows, etc are not 'noise' to a farmer; they are part and parcel of 'home'. They actually love these sounds. So please don't classify it as 'noise'

B. Specific Comments on Elements of the Policy

Below are specific comments made in relation to various parts of the Policy; hence are best read in conjunction with the document at hand.

B.1 VLAMP

Background (page 5)

Introductory first three paragraphs:

Suggest the commentary be more even-handed to acknowledge the impacts on adjoining landholders, given that is the real reason for the existence of VLAMP. Same comment applies to the FAQ document.

Noise Impacts on the community:

Suggest expanding the reference to sleep impacts to address both *disturbance* and *awakenings* as they are different elements - see World Health Organisation provisions.

Policy rationale:

Phrases like 'reasonable and feasible', 'consider all alternatives', 'in the public interest', 'net benefit' frequently occur throughout the document, including in the various figures. They are nebulous and subjective terms and have proven problematic when industry, Government and external experts disagree. It is recommended the phrases above should be clearly defined with a prescribed outcome stipulated.

2nd bullet page 6: add that if the project is approved because it is deemed to be 'in the public interest' then the Government acknowledges the transfer of personal costs to adjoining landholders will be compensated by either the proponent or the State Government.

Policy - General (page 8)

On pages 8 and 9 and elsewhere the following phrases occur:

- applicants must ensure that 'landowners are properly informed';
- applicants are to ensure landholders 'have a good understanding of the scale and nature of the predicted impacts through the provision of relevant air quality and noise impact predictions';

- ‘the health risks’; and
- that applicants ‘should bear all reasonable costs associated with (the landholder) entering into the agreement’ including costs for providing expert advice to landholders to enable them to make informed choices’.

They terms are quite nebulous and subjective and have proven problematic when industry, Government and independent experts disagree. Again, it is recommended the phrases should be clearly defined with a prescribed outcome stipulated.

I recommend the DPE have a leading role in arbitrating any impasses in negotiations, with costs to be borne by the applicant. For the provision of natural justice there needs to be some mechanism whereby there is an independent third party that the landholder can turn to for arbitration.

Voluntary acquisition (page 12)

Grant of voluntary acquisition rights
First bullet: To provide for natural justice it is recommended the Policy stipulate that the applicant will fund the provision of independent third parties as required by the landholder to evaluate the robustness of predicted noise and dust impacts (and also water).

Voluntary land acquisition process
2nd para: any offer of acquisition by an applicant ought to be able to be independently assessed as to whether it is fair and reasonable given land valuations, market strength and compensation for disturbance and disruption. Just because an applicant makes an offer does not necessarily mean it is fair and reasonable.

Figure 3 (page 15): Suggest 2nd box read ‘valuations by applicant and landholder; paid for by applicant’

Policy - Noise (page 16)

Figure 4 - 2nd box ‘Compliant?’: Based the track record of the VLAMP implementations to date, it appears the vagaries of noise and dust measurement, when coupled with the EPA and the DPE having insufficient resources to be able to assess compliance on noise and dust matters to a sufficiently high level of confidence, means that it is very difficult to secure evidence that can withstand scrutiny in a court of law.

The consequence of this is that the mining and gas companies, in effect, have greater leeway to the generate excessive noise and dust without the risk of prosecution. OzEnvironmental recommends the NSW Government better resource these two regulatory arms and make noise and dust consent conditions more robust and transparent to help build community confidence in the integrity of the compliance management system.

Policy – Particulate Matter (page 21)

Voluntary mitigation rights (page 22): Suggest add another bullet; namely ‘provision of annual funding to cover the additional electricity expenses for powering air conditioners and clothes dryers (note: funding was provided to residents in a village adjoining a mine when it responded to noise and dust issues).

Definitions (page 25)

Consistent with comments above I recommend that the following phrases be defined to help provide clarity and transparency regarding what is expected. At present there is a wide range of interpretations being promulgated, depending on which side of the argument you wish to defend:

- 'properly informed'
- 'good understanding'
- 'informed choices'
- 'all reasonable costs'
- 'in the public interest'
- 'net benefit'

C. Conclusion

In summary, based on first hand experience OzEnvironmental strongly opposes many aspects of both the current Policy and the one mooted to replace it.

In effect, there is nothing 'voluntary' about the Policy given a farmer has to respond to the unfair imposition of unacceptable noise and dust, ostensibly because a project is considered by the Government and bureaucrats to be 'in the public interest'. The purpose of the Policy is to create non-discretionary standards, and so the policy is effectively creating compulsory acquisition because it prevents the decision-making from responding to local knowledge by applying appropriate standards to make surrounding residences livable.

Effectively, the Policy is creating a situation whereby communities could be exposed to 15-20 dB more noise without consequence - by adopting the new industrial noise policy and reducing the level at which mitigation is required. The significance of the relative changes needs to be more fully explained, particularly to mine-effected communities.

I thank you very much for the opportunity to provide feedback on these important matters.

If you have any queries regarding the above please don't hesitate to contact me on ph 0419 271 819 or email wgiblin@bigpond.net.au

I request the opportunity to meet with DPE officers to discuss the matters raised herein.

Yours sincerely,

Warwick Giblin

Managing Director
OzEnvironmental Pty Ltd