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Draft Voluntary Land Acquisition and Mitigation Policy

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1. Introduction

NSWMC supports the updating of the Voluntary Land Acquisition and Mitigation Policy to reflect recent changes in the assessment criteria for noise and air quality. The approach of undertaking a limited revision of the policy expressed by the Department of Planning and Environment (DPE) in the supporting materials is largely appropriate. However there are some areas of the proposed policy, including some of the revisions that should be reconsidered. In particular DPE should:

- Provide discretion to the consent authority to consider approving a project without acquisition where the project will have minimal additional impacts on air quality, but will exceed the criteria because of cumulative impacts. Government should be using strategic approaches and programs to reduce the overall impacts on air quality, including Pollution Reduction Programs for industry and initiatives such as reducing wood smoke from residences.
- Apply the revised VLAMP to planning applications consistently with the application of the Approved Methods for the Modelling and Assessment of Air Pollutants in NSW (Approved Methods) and the Noise Policy for Industry (NPfI). The approved methods and NPfI provide for appropriate transitional arrangements.
- Remove the requirements for minimum standards for negotiated agreements. The revised policy acknowledges that agreements are private contracts and that the consent authority has no role in approving the contracts, which is inconsistent with minimum standards.
- Remove the use of the compulsory acquisition legislation to assess the amount of compensation payable for disturbance, as this legislation is not fit for this purpose. Land acquired under the policy is done so voluntarily and under very different circumstances to compulsory acquisition.
- Remove the inclusion of impacts on non-contiguous lots in 'close proximity' as a trigger for acquisition. The criteria of 'close proximity' will be difficult to interpret. No evidence is provided by DPE of a need for this additional right to acquisition. Issues that arise for impacted properties with non-contiguous lots are currently dealt with adequately by negotiation.
- Remove the requirement that landholders pay the reasonable costs of tenants moving to alternative accommodation. Any future inconvenience/costs to tenants of a mine-acquired property is already reflected in the price and the right of tenants to early termination.

2. Application of the revised policy

It is proposed to apply the revised policy to pending development applications and future modifications. This is not appropriate. Developments should be considered on the basis of the policy that applied at the time the Secretary's Environmental Assessment Requirements were issued (and in the case of a modification without SEARs, when the application was lodged). Retrospectively applying

new policy is detrimental to the business case for a project, and this practice harms investment in NSW. Retrospectively applying new policy to projects in the planning system also causes significant increases in the cost of assessments and delays to projects.

The Approved Methods for the Modelling and Assessment of Air Pollutants in NSW and NPfI provide transitional arrangements for application to the assessment of developments.

The NPfI applies to new planning applications through the Secretary's Environmental Assessment Requirements (SEARs). For projects with SEARs the assessment method provided for in the SEARs continues to apply for a period of two years from the date of the issue of the SEARs. For projects without SEARs, the NPfI does not apply (at the discretion of the planning and regulatory authorities) where the assessment has already been substantially commenced, for a period of 12 months from the commencement of the NPfI.

The EPA will reference the Approved Methods for any planning application submitted after January 2017 and will reference the 2005 document of any planning application submitted prior to 20 January 2017.

The application of the VLAMP should follow the requirement to use the Approved Methods and NPfI.

Recommendation

- The application of the VLAMP to current planning applications should be consistant with the requirement to apply the Approved Methods and NPfI.

3. Cumulative impacts and new projects

Under the VLAMP, the last project in a particular area may be required to acquire properties, despite having minimal air quality impacts and best practice management. This will be particularly the case for $PM_{2.5}$ impacts, which have not previously triggered the VLAMP. There is no planning power to reopen existing consents and in many cases the impacts are not industrial such as impacts from wood smoke.

Where the impact of a new project is minimal, the policy should provide discretion for the consent authority to approve the project without mitigation/acquisition. This would be limited to circumstances where the background levels already exceed the annual average criteria and the project only has a minimal additional impact and there is a significant impact of the acquisition (for example it will have a significant social impact or cost impact on the project).

Cumulative impacts should instead be dealt with through strategic responses such State-wide initiatives to reduce wood smoke pollution and through industry/region specific programs such as Pollution Reduction Programs. These types of programs improve air quality across a range of sources, without losing the benefits that accrue from new projects.

Recommendation

- Amend the policy to provide that the consent authority has the discretion to approve a new development or modification to an existing development without mitigation/acquisition where the background levels already exceed the annual average criteria and the project only has a minimal additional impact and there is a significant impact of the acquisition.

4. Negotiated agreements

While there is benefit to providing some guidance on what should be included in negotiated agreements, these are private contracts between the landholder and the proponent and it is not appropriate therefore to provide the 'minimum standards' that are set out on pages 8 and 9 of the draft policy. Instead the policy should provide guidance on what 'may' be included. This would be consistent with other private negotiated agreements with landholders, such as the access agreements, where the *Mining Act 1992* at section 141 provides that an access agreement "*may make provision for or with respect to"* a number of matters listed in the section.

This approach is consistent with the statement in the Draft VLAMP that *"As with all contracts, the final terms of any negotiated agreement are a matter for the parties to that agreement. The Department has no role in the negotiation, approval or review of negotiated agreements."*

Given the private nature of these agreements, it is not appropriate for the VLAMP to provide minimum standards or for DPE to provide guidance. A template for a negotiated agreement would be a useful tool for landholders and proponents. DPE should consider working with stakeholders including NSWMC to prepare a template agreement.

Recommendations

- Remove the minimum standards for negotiated agreements from the policy and replace this with guidance on what should be included in a negotiated agreement.
- DPE should consider working with stakeholders including NSWMC to prepare a template negotiated agreement.

5. Voluntary acquisition of non-contiguous lots

Footnote 8 of the draft policy provides that *"non-contiguous lots owned by the same landholder may also be considered on a case by case basis, particularly if they are in close proximity and are operated as a single agricultural enterprise".* The definition of 'land' in the standard consent conditions does not include non-contiguous lots.

This is a considerable change to the policy and if included will lead to significant increases in expenditure for proponents. It is not clear why DPE has extended the definition. The use of subjective criteria - 'close proximity' - for determining whether the non-contiguous lots should not be included, will lead to uncertainty for proponents and landholders. The criteria of 'in close proximity" does not necessarily assist to identify those agricultural enterprises whose business/value of landholding will be impacted by the acquisition of part but not all of the landholding. These issues currently arise and are dealt with appropriately on a case by case basis as part of the negotiated agreement. This is the appropriate way to deal with this issue. No change should be made to the current practice without evidence that it is inadequate and a significant issue exists.

The policy should not be extended to include non-contiguous lots.

Recommendation

- Remove the inclusion of non-contiguous land from the policy.

6. Valuation of land to be acquired

Both the current and draft VLAMP reference the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (Land Acquisition Act). The current policy provides that the Land Acquisition Act should be used to determine the market value of land and specifically states the acquisition price must also include an amount *"no less favourable than an amount calculated with respect to the matters referred to in s 55 of the Land Acquisition Act (other than market value)".*

The draft policy provides that the matters provided in section 55 of the Land Acquisition Act should be considered in assessing compensation for *"disturbance as referred to in the standard conditions of consent".* The draft policy also provides that any maximum compensatory amount that would apply under the Land Acquisition Act does not apply under the draft policy. This could mean that a landholder could be paid more by a mining proponent under a voluntary acquisition than under a compulsory acquisition.

The Land Acquisition Act should not be used to assess compensation under the VLAMP. The Land Acquisition Act was specifically designed for the compulsory acquisition of land by public authorities where the land is required for a public purpose. This is a different situation from that contemplated by the policy where the landholder elects to activate a voluntary right of acquisition and can do so over an extended period of time, when impacts may or may not eventuate and may be temporary.

Because of the particular nature of compulsory acquisition the Land Acquisition Act provides for matters including severance, special value, injurious affection and disadvantage resulting from relocation to be taken into account when assessing compensation. These matters are unrelated to disturbance. Assessing a valuation under these heads of compensation is complex and requires specialist knowledge. The process provided for under the Land Acquisition Act provides for the determination by the Valuer General and appeal rights to the Land and Environment Court.

The policy should provide for parties to negotiate an agreed price of the land, which would include the market value of the land and the reasonable out of pocket expenses of the acquisition incurred by the landholder.

If the Land Acquisition Act is to be considered in the assessment of disturbance, then the maximum compensation which applies under the Act should be applied and the final policy should be amended to reflect this. Is inequitable to apply an assessment process that is not fit for purpose and then remove the safeguard of the maximum compensation amount.

Recommendations

- Remove reference to the Land Acquisition Act from the VLAMP.
- Provide that the parties should negotiate an agreed price for the acquisition of the land that would include an assessment of the market value of the land and the reasonable out of pocket expenses incurred by the landholder as a direct result of the acquisition.
- In the event that the Land Acquisition Act is used to assess compensation for disturbance, the maximum compensatory amount provided by the Act should apply and this should be reflected in the policy.

7. Use of acquired land

The current policy and the draft policy provide that *"in the case where an existing tenant decides to move to avoid the impacts of the development, pay the reasonable costs associated with the tenant moving to alternative accommodation".*

There is no justification for providing relocation costs for tenants. Tenants of acquired properties are not any more greatly disadvantaged than any tenant whose lease is terminated. In fact the current standard conditions require the owners of mine land to allow for early termination of the lease agreement without penalty. The standard conditions do not provide for relocation costs.

Given the social impacts of untenanted properties DPE should be wary of implementing policies that make it more difficult to rent acquired properties.

Recommendation

- Remove the requirement to pay the costs of a tenant relocating from the acquired property.

8. Time limitations for mitigation and acquisition rights

Although the policy states that the consent conditions should state the period in which mitigation and acquisition rights are available, frequently the conditions granting voluntary mitigation and acquisition rights are not subject to time limitations: they exist for as long as there is a valid consent. In at least one recent instance a landholder has sought to trigger acquisition rights after the right to carry out mining operations under the consent had lapsed. The policy should provide that the rights of mitigation and acquisition expire:

- When the right to carry out mining operations under the consent ceases; and/or
- In the case of projects where there is a predicted permanent drop in impacts below the relevant criteria at a later stage of the project.

Recommendation

The policy should provide that the rights of mitigation and acquisition expire:

- When the right to carry out mining operations ceases; and/or
- In the case of projects where there is a predicted permanent drop in impacts below the relevant criteria at a later stage of the project.

9. Implications of the NPI low frequency noise provisions

The NPfI introduced a new approach to low frequency noise (LFN) assessment that presents new implications for the triggering of acquisition rights in the VLAMP.

In accordance with the VLAMP and based on a typical recorded minimum night time background noise level of 30 dB, mitigation would be afforded for predicted levels of 38 to 40 dB, and acquisition would be afforded for levels greater than 40 dB.

If the prediction in an EIS is 39dB LAeq,15min, a residence would have rights to mitigation. However, if an LFN penalty of 2dB or 5dB (as per NPfI) is then applied, a strict interpretation of the VLAMP would trigger acquisition rights. This is unreasonable and should be looked at more closely.

Compliance under the NPfI will be based on a measured external sound pressure level. However, the new LFN approach is based on an *internal* noise curve derived from the UK's Department for Environment, Food and Rural Affairs (DEFRA) and corrected for *external* application by virtue of a 'windows open' situation. This is a key short fall at present given that there is no scope for a 'windows closed' scenario, afforded by virtue of dwelling mitigation.

DPE should consider alternate approaches or more flexibility in an approach such as this. For example, a mitigated dwelling or one identified for mitigation should be tested under a 'windows closed' scenario and the DEFRA internal curve test, or an alternate external criteria curve perhaps through an allowance in the revised VLAMP. The whole premise of the new LFN approach is annoyance perceived internally, not externally. With a mitigated dwelling, to take advantage of the mitigation (irrespective of LFN issues) and achieve improved noise amenity, it must by definition have all its elements closed for the mitigation to be effective.

A technical paper presented at Acoustics 2015 provides strong guidance based on attended measurements supporting a case for such an externally based 'windows closed' DEFRA approach (noting this paper uses a light clad home with standard single glazing - i.e. no treatment).

This LFN issue leads to a real dilemma at an EIS stage where up front entitlement to mitigation and acquisition is being defined to inform a proponent and equally to inform the community potentially affected. This has serious implications and the approach needs to be consistent with the intent of the NPfI/VLAMP that is the DEFRA curve - which is an internally based criteria.

Recommendation

- DPE should consider alternative approaches to the assessment of low frequency noise in relation to acquisition criteria, given the NPfI approach is derived from an internal noise curve.

10. Changes to the wording regarding the triggering of noise acquisition rights

The draft VLAMP changes some wording in relation to the acquisition criteria for noise. NSWMC believes the new wording is open to misinterpretation and revisions should be considered.

The text on page 20 of the revised VLAMP states:

> *"The consent authority should only apply voluntary land acquisition rights where, even with the implementation of best practice management:*
>
> *…*
>
> *the noise generated by the project would contribute to exceedences of the acceptable noise levels plus 5dB …"* (our emphasis).

The corresponding text in the current VLAMP uses the wording *"more than 5dB"*.

The new wording may give readers the impression that, for example, in a situation where background is 30dB and the PSNL is set at 35dB, that acquisition rights are triggered at 40dB. However, this is not the intent of the existing policy or revised policy based on the information contained in the tables.

A further issue arises from the rounding of noise predictions. The NPfI provides for noise predictions to be rounded to the nearest whole number. This should be clarified in the draft VLAMP and predictions of, for example, 40.1 dB should be considered as 40 dB.

Recommendation

- Revise the text of bullet two under the heading "voluntary land acquisition rights" on page 20 to be consistent with the criteria in Table 1.
- The VLAMP should advise that in accordance with the NPfI that noise predictions are rounded to the nearest whole number.