NSW EDO
DEFENDING THE ENVIRONMENT
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Department of Planning and Environment
Resources and Industry Policy
GPO Box 39
Sydney, NSW 2001

Online submission: planning.nsw.gov.au/proposals

Dear Resources and Industry Policy team,

Draft Voluntary Land Acquisition and Mitigation Policy (November 2017)
Proposed Mining SEPP amendments: Air and noise impacts Explanation of intended effect – November 2017
Review of the Voluntary Land Acquisition and Mitigation Policy Frequently asked questions

Thank you for the opportunity to comment on the following documents:

- *Draft Voluntary Land Acquisition and Mitigation Policy (November 2017*) (**Policy**)
- *Proposed Mining SEPP amendments: Air and noise impacts Explanation of intended effect – November 2017* (**EIE**)
- *Review of the Voluntary Land Acquisition and Mitigation Policy Frequently asked questions* (**FAQs**)

As you are aware, EDO NSW has engaged extensively in planning reforms, including in relation to the changes to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**Mining SEPP**) and associated policies over many years. This submission builds on our previous comments in this area and highlights a number of concerns with the current proposals.

Our **overarching concern** is that where the impacts of a mine actually make a property unliveable, then land acquisition and mitigation actions are not really 'voluntary', 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 a compulsory acquisition process by private companies, 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 Act 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.[1]

In terms of the proposed draft policy, as we have stated before, it is difficult to provide feedback without seeing proposed provisions. While acknowledging DPE's previously expressed concerns that providing specific wording may create incorrect expectations amongst the broader community, in our experience information in documents such as EIE rarely covers the full range of changes seen in SEPP changes and consequently, fails to provide the community with adequate information to understand the proposed changes.

On the information that is provided we provide comment on:

- Air quality and noise standards - consultation
- Valuation
- Continuous improvement
- Landowner objection rights
- Protection for the life of a project
- Application to vacant land
- Timeframes
- Exceedances and Net benefit considerations
- Cumulative impact

Air quality and noise standards

We are extremely concerned about the approach taken in the EIE, whereby consultation undertaken by the Environment Protection Authority (**EPA**) in relation to air quality and noise standards is considered adequate for the current process and therefore those standards are expressly excluded from consideration during the current consultation.

In our view, the purpose of the consultation undertaken by the EPA was different. The noise standards were considered as part of a broader consultation on proposed new assessment guidelines and the air standards were in response to changes under the *National Environment Protection (Ambient Air Quality) Measure*. In contrast, changes to the Policy will create non-discretionary standards during the environmental assessment process. While the air quality non-discretionary standard has been strengthened, the scientific research is clear that there is no safe level of PM2.5 and the new noise guidelines significant increase the likelihood that new or enhanced industrial activity will have significant negative impacts on surrounding communities in rural areas. In taking the approach it has, DPE is failing to consult on the impact of incorporating non-discretionary standards in assessment frameworks on local communities. In light of this, in our view the position in the EIE (p 6) that "significant changes to policy settings were not made" is incorrect.

[1] The independent arbiter should not be the Department or government agency that is responsible for approving the mining development.

Valuation

In terms of valuation (EIE p 7), we recommend that the approach to valuation should reflect at a minimum what is contained within the *Land Acquisition (Just Terms Compensation) Act 1991* and what the court said was required in *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure*.[2] It should also be clarified that the Policy (p 13) reflects the recognition that prices should allow for equivalent purchase elsewhere.

Continuous improvement

Again, as we have stated previously, in our view all changes to legislative instruments should maintain or increase environmental and community protection and encourage continuous improvement. The EIE (p 7) notes that the Policy will only be applied to modification applications that involve increases to the approved noise or dust impacts. Such an approach actively prevents continual improvement.

Landowner objection rights

We strongly disagree with the statement in the Policy (p 9) that elements in a negotiated agreement could 'reasonably' be expected to include that landowners 'not object' to the Project proceeding. In our view, this is an unacceptable gag clause that fails to recognise that a landowner could (for example) reasonably want to protect their family by entering a voluntary agreement in advance of any development approval but still object to the overall project proceeding.

Protection for the life of a project

Equally concerning is the requirement in the policy (p 9) for a decision maker to not apply assessment criteria to land that is subject to a negotiated agreement, without any guidance or obligation on a Project proponent to remain within a negotiated agreement for the life of the Project. This requirement raises concerns that a land holder could be left in a situation without any negotiated agreement or conditions of consent to protect their health and wellbeing. What is the responsibility on the decision maker to ensure that a negotiated provides sufficient protection for the life of the project?

Application to vacant land

The Policy (p 10) says it should not be applied to vacant land. However, this ignores future development potential. The policy appears to be based on an assumption that a future development would not have to be built in the noise impact zone, and there is no requirement to check the feasibility of this. A similar situation applies to particulate matter (see p 21). It should be clarified if this is limiting future development potential for adjacent properties.

[2] (No 4) [2014] NSWLEC 200. See also: http://www.edonsw.org.au/hunter_environment_lobby_v_minister_for_planning_ashton_coal_operations_limited.

Timeframes

We are concerned about the limited time it is proposed to give community members to respond in relation to voluntary land acquisition process disputes. 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 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).

Exceedances and Net benefit considerations

The Policy (p 17 and 22) and Figures 4 and 5 indicate that if a project complies with the assessment criteria then decision makers must set approval conditions at the assessment criteria. It is only in a situation where there is a significant exceedance with acquisition or negotiated agreement in place that the decision maker is directed to consider net benefit. This suggests that net benefit only needs to be considered if noise or dust impacts exceed the criteria, whereas net benefit should be a consideration in all decisions, regardless of whether the assessment criteria are met. This is unclear in the policy and should be clarified.

Figure 4 (p 17) illustrates a fundamental problem with the policy. There is no need for action if the exceedance of the assessment criteria is negligible. This is defined as <3dB over the criteria, but this ignores the fact that the policy already allows a 15-20dB increase of noise in some areas. It is hard to see how this is not authorising nuisance.

The Policy (p 17 final dot point) needs clarification. It could currently be interpreted that although Table 1 has mitigation measures for exceedances 3-5dB that are considered marginal, the dot point on p 17 means they do not actually have to be applied. This appears to be a change from the previous policy, and should be clarified.

Cumulative impact

The Policy (p 18 table 1) adds an extra criteria relating to cumulative industrial noise levels related to the recommended amenity noise level in the new noise policy. This allows up to 50dB in rural residential areas during the day (p 11 http://www.epa.nsw.gov.au/publications/noise/17p0524-noise-policy-for-industry) which could be 25dB higher than the noise levels prior to the project. (The previous policy also referred to the equivalent criteria but mitigation was based on “or” rather than “and”, i.e. you now have to exceed both to be eligible for mitigation).

The Policy (p 20) the new wording of voluntary land acquisition rights appears to add an extra criteria relating to cumulative impact before acquisition rights are applied. We submit that:

(a) The decision maker should be able to set lower noise limits where appropriate, for example in environments that are currently very quiet.
(b) The standards should apply to all residences and sensitive receivers (defined to include natural areas).
(c) All premises responsible for PM10 and PM2.5 should be subject to a continual improvement regime.
(d) The standards should apply to all residences regardless of ownership.

In summary, we reiterate our concern about the 'voluntary' nature of the proposed measures. The purpose as per the EIE (p 4) 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 liveable.

Effectively, the policy is creating a situation whereby communities could be exposed to 15-20dB more noise without consequence - by adopting the new industrial noise policy[3] 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.

We would be happy to discuss these issues further and can be contacted on (02) 9262 6989, or rachel.walmsley[a]edonsw.org.au.

Yours sincerely,
EDO NSW

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Policy & Law Reform Director

[3] See EDO NSW submission to the Draft Industrial Noise Guideline can be accessed here: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2432/attachments/original/1447644082/151116_Draft_Industrial_Noise_Guideline_-_EDONSW_submission.pdf?1447644082.