



Submission on Coal Seam Gas Exclusion Zones in NSW – draft Mining SEPP amendments

prepared by

EDO NSW
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About EDO NSW

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Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW 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.

EDO NSW is part of a national network of centres that help to protect the environment through law in their [states](#).

Submitted to:

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Introduction

As a community legal centre specialising in public interest environmental and planning law, EDO NSW welcomes the opportunity to comment on the NSW Government's proposals to enact exclusion zones for coal seam gas (CSG) exploration and production.

This submission is divided into three parts. **Part 1** comments on the policy and legal background to these changes, including the NSW Strategic Regional Land Use Policy (SRLUP) and national attempts at regulatory improvements and harmonisation. This includes considering why mining exclusion zones are an important part of good strategic planning. **Part 2** examines and makes recommendations on the Government's draft amendments to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)*. **Part 3** briefly considers the Premier's related policy announcements on 19 February, of an expanded regulatory role for the Environment Protection Authority (EPA) and a scientific review of CSG by the NSW Chief Scientist.

EDO NSW gives its strong in-principle support for exclusion zones from CSG development, including the proposals to be given effect in the draft SEPP amendment, subject to the further recommendations in this submission. This includes comments on:

- the added need to prioritise ecological values and protect 'High Conservation Value' lands, noting that recent policies have focused on protecting agricultural and residential areas from mining,¹ but not environmentally significant areas;
- the legal scope and technical details of the SEPP amendment, for example:
 - ensuring exclusion zones are not undermined by provisions that allow State Significant Development where a mining project is only *partly prohibited*;
 - extending exclusion zones to other forms of extraction such as shale gas and tight gas;
 - clarifying that exclusion zones apply to exploration whether or not the relevant activities require development consent (including in transitional provisions);
 - ensuring exclusion zones apply to infrastructure associated with CSG activity.

We also strongly support the EPA's role as the chief environmental regulator for CSG (and for other mining), and a comprehensive review of CSG by the Chief Scientist.

This submission addresses:

Part One – Policy and legal context of the proposed reforms.

1.1 Background

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Part Two - Detailed comments and recommendations on the draft SEPP amendment

2.1 'Partly prohibited' State significant development projects must not override exclusion zones

2.2 Exclusion zones should apply to important environmental, agricultural and rural residential areas

¹ Including the current draft Mining SEPP amendments; the NSW Strategic Regional Land Use Policy (2012); and energy ministers' *Draft National Harmonised Regulatory Framework for CSG* (2012).

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- 2.4 Excluding other forms of mining (including other types of unconventional gas)
- 2.5 Exclusion zones should apply to linear infrastructure associated with CSG
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- 2.7 Transparency and consultation on finalised area maps

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Part One – Policy and legal context of the proposed reforms

1.1 Background

EDO NSW lawyers have extensive experience working with mining laws, including on CSG – via legal advice and representation, engaging on state and national policy and law reform, and community legal education. Much of this work has arisen from increased public concern about the impacts of mining on environmental, social and other economic values.

Community concerns about CSG and other mining regulation are reflected in recent public attitude research. For example, the NSW Government report, *Who Cares about the Environment? 2012* found:²

almost half believe environmental regulation of two sectors, mining and property development/construction, is too lax, despite an increasingly positive view of environmental regulation of other sectors over successive surveys.

By far the most common response regarding 'mining' was that regulation is 'too lax' (49% of respondents). Only 10% of respondents thought mining regulation was 'too strict'.³ A NSW poll published at the time of writing found that 'Three-quarters of NSW voters oppose coal seam gas exploration on agricultural land', with 'fewer than one in five' (17%) in support.⁴ There is further evidence of community support for expanded protection of ecological, agricultural and social values in submissions on the NSW Government's SRLUP.

In response to such concerns, over the past two years, EDO NSW conducted 24 mining law education workshops at the request of local communities across the State. In December 2012, EDO NSW also released a comprehensive booklet, *Mining Law in NSW: A guide for the community* (December 2012),⁵ funded by the NSW Environmental Trust.

The EDO's recent policy work includes (among other things):

- a law reform discussion paper released in 2011, which recommended the Government establishes "no-go" areas of NSW where mining operations are prohibited as part of a state-wide strategic planning process;⁶
- appearance and submissions to the 2011-12 Legislative Council Inquiry into CSG;
- comments on funding the Upper Hunter air quality monitoring network;

² NSW Office of Environment & Heritage, *Who Cares about the Environment in 2012?* (2013), 'At a glance'.

³ 24% said mining regulation strictness was 'about right'; 17% were 'not sure'. For other sectors including fishing, farming, individuals, tourism, retail and forestry mentioned, the most prevalent response was that regulation is 'about right' (OEH 2013, full report, 41-42).

⁴ S. Nicholls and P. Manning, 'Fracking fails the poll test', *Sydney Morning Herald*, 3/4/2013.

⁵ In hard copy and online at: <http://www.edo.org.au/edonsw/site/publications.php#mining>.

⁶ This strategic planning process would also involve identifying competing land uses, undertaking baseline environmental studies, taking account of cumulative impacts, and integrating economic, social and environmental factors in decision making. See EDO NSW mining law discussion paper (June 2011), recommendation 3, available at: http://www.edo.org.au/edonsw/site/policy_discussion.php#mining.

- comments on the establishment of a NSW Land and Water Commissioner;
- submissions seeking greater environmental emphasis in the NSW Strategic Regional Land Use Policy (**SRLUP**);
- detailed submissions on strategic planning as part of the NSW Planning Review.⁷

In 2013, EDO NSW and the Australian Network of Environmental Defenders Offices (**ANEDO**) recommended that mining and planning law frameworks that prioritise ecologically sustainable development (**ESD**) and apply ESD principles in decision-making. We have explored these issues in detail in responses to a proposed guideline from Australian energy ministers (*Draft National Harmonised Regulatory Framework for CSG*) and a Productivity Commission inquiry into mineral exploration.⁸

The EDO's policy work coincides with substantial law reform and policy initiatives from state and federal governments. In addition to reforms already noted above, these initiatives include a national partnership agreement on CSG and large coal mining development, and the welcome establishment of the related Independent Expert Scientific Committee (**IESC**) to provide oversight of mining projects, and advice to federal and state governments.⁹ Noting that NSW is the only jurisdiction which has not met its first milestone under the agreement, **EDO NSW recommends that the NSW Government conclude negotiations with the Australian Government on the referral of relevant mining projects to the IESC as a matter of priority, and in a way that '[ensures] that the best scientific information and expertise underpins all relevant regulatory processes and decisions'**.¹⁰

Most recently, on 19 February the NSW Premier announced the creation of buffer zones from CSG activities around residential areas (the subject of this submission), as well as a further scientific review by the NSW Chief Scientist, and more independent oversight and regulation from the Environment Protection Authority (**EPA**).¹¹ Finally, in March 2013 the federal Environment Minister introduced a bill to create a new 'water trigger' under national environmental law (the *EPBC Act 1999*).¹² This will require federal assessment and approval of large coal mines and all CSG activities likely to have a significant impact on a water resource – a protection measure that EDO NSW strongly supports.¹³

1.2 EDO NSW strongly supports exclusion zones as part of good strategic planning

EDO NSW has consistently highlighted the need for better land use planning, greater certainty and proper protection for sensitive areas from the negative impacts of mining and CSG. This includes the need for 'no go areas' that recognise unique and important environmental, social and economic values that should not be in constant competition with mining interests. **EDO NSW therefore gives its strong in-principle support for exclusion zones from CSG development.** This includes the proposals to be given effect in the draft SEPP amendment, subject to the further comments (particularly in Part 2) below.

⁷ Submissions and reports available at: <http://www.edo.org.au/edonsw/site/policy.php>.

⁸ February and March 2013. Submissions and reports available at: <http://www.edo.org.au/edonsw/site/policy.php>.

⁹ EDO NSW (as part of ANEDO) made a submission on the establishment of the IESC in April 2012, available at: http://www.edo.org.au/policy/120426epbc_bill_inquiry.pdf.

¹⁰ See COAG Reform Council, *Coal Seam Gas and Large Coal Mining Development: First assessment report* (February 2013), available at <http://www.coagreformcouncil.gov.au/agenda/coal.cfm>. See in particular, p 3, 'Objectives and outcomes' of the national partnership agreement.

¹¹ See NSW Premier media release, 'Tough new rules for coal seam gas activity', 19/2/2013.

¹² Australian Environment Minister media release, 12/3/2013, 'Greater protection for water resources', at <http://www.environment.gov.au/minister/burke/2013/mr20130312.html>. This Bill has passed the Lower House.

¹³ See ANEDO submission to the Senate Inquiry into the EPBC Amendment Bill 2013, available at www.edo.org.au.

1.3 NSW Strategic Regional Land Use Policy

As the Department is aware, there has been a high level of community interest in the development of the SRLUP, including almost 1600 written submissions on the draft policy.¹⁴ An official submissions analysis conducted for the Planning Department found that 1,110 submissions, or 70%, were concerned with how the SRLUP would protect the natural environment.¹⁵ This included 41% of community group submissions, and 36% of individual submissions (excluding form letters).

Importantly, the official analysis also found ‘There is a strong view from community, agricultural and environment groups that the SRLUPs should clearly identify “no go” zones in which mining and coal seam gas development is not allowed.’¹⁶ This included submissions from seven of the 12 key stakeholder groups who were closely involved. The SRLUP was finalised in September 2012. By this stage its scope had narrowed to protecting agricultural lands and resources, particularly water. Many stakeholders expressed concerns at the ongoing uncertainty of protection for agricultural *and* environmental land uses in the SRLUP.

In December 2012, EDO NSW made a submission on the draft ‘Gateway’ assessment process to give effect to the SRLUP.¹⁷ **The submission made 20 recommendations on the SRLUP across several areas, and identified a number of significant shortcomings:**

- While the proposed Gateway process allows for additional scientific scrutiny, it does not afford definitive protection to mapped Strategic Agricultural Land.
- There is no specific prohibition of exploration or mining in Strategic Agricultural or High Conservation Value lands, despite the Government’s previously stated belief (in Opposition) ‘that agricultural land and other sensitive areas exist in NSW where mining and coal seam gas extraction should not occur.’¹⁸
- The inability for the expert panel to *refuse* a ‘Gateway certificate’ (removing previously proposed powers to do so), no matter how severe the potential impact on Strategic Agricultural Land.
- A complex series of exceptions which limit the application and rigour of the new processes (including the Gateway assessment and Aquifer Interference Policy), and introduce additional inconsistency and complexity to the system.¹⁹

In our view, the Government’s proposed exclusion zones for residential areas and ‘critical industry clusters’ are an important first step in addressing some of the inadequacies of the 2012 SRLUP. We also recommend the Government considers the other key matters noted above. Clearer protection for mapped High Conservation Value land is explored below.

¹⁴ NSW Government, *Strategic Regional Land Use Policy* (September 2012).

¹⁵ Goldberg Blaise report for the NSW Department of Planning and Infrastructure, *Analysis of Feedback: Draft Strategic Regional Land Use Plans* (June 2012), p 20.

¹⁶ Goldberg Blaise, *Analysis of Feedback: Draft Strategic Regional Land Use Plans* (June 2012), p 12.

¹⁷ Available at: http://www.edo.org.au/edonsw/site/policy_submissions.php.

¹⁸ NSW Liberals & Nationals policy statement, *Strategic Regional Land Use: Triple bottom line assessment to protect our regions* (2011), p 2.

¹⁹ For example, the following activities are to be excluded from the new Gateway assessment – renewals of existing exploration licences and production leases; ‘linear infrastructure’ associated with CSG and mining; and expansions of CSG and mining projects that are located on Strategic Agricultural Land, but within existing leases. See NSW Government, *Strategic Regional Land Use Policy* (September 2012), p 4.

1.4 Protect High Conservation Value Lands and adopt a ‘catchment-centred’ approach

EDO NSW recommends the Planning Department liaise with the Office of Environment and Heritage (and other environmental and resource agencies²⁰) to jointly agree on:

- (1) greater protections for High Conservation Value lands, and
- (2) a ‘catchment-based’ approach to strategic planning.

High Conservation Value Lands

One of the EDO NSW’s key concerns around the SRLUP,²¹ which also extends to the current proposals to amend the Mining SEPP, is the lack of any specific protection or strategic recognition of environmental land uses and ecological values beyond water. This is despite recent investment in strategic mapping and assessment of ‘High Conservation Value’ areas in NSW.²²

There has been a considerable (and justified) focus on protecting water resources from mining impacts at both state and federal levels, including in the context of impacts on agricultural land. In addition, the Government’s previous emphasis on ‘triple bottom line’ protections should be reasserted,²³ to ensure balanced and sustainable land-use planning and development assessment.

The Department’s official submissions analysis of the SRLUP process found: ‘An important view regarding the natural environment is that stronger policies are required to protect mapped areas of high conservation value.’²⁴ This is reinforced by the NSW OEH finding that ‘almost half the community [45%] believes we do not place enough emphasis on the protection of natural habitats in competition with other land use needs’. (The most common response to this survey question.²⁵) This is also important given the federal State of the Environment 2011 committee finding that ‘Our unique biodiversity is in decline, and new approaches will be needed to prevent accelerating decline in many species.’²⁶

Legal, scientific and public support for increased protection of environmental values coincides with the growing sophistication of international and domestic methods to valuing ecological assets and services for economic and social wellbeing.²⁷

EDO NSW supports previous statements by the NSW Liberals and Nationals that:

²⁰ This could include the Office of Environment & Heritage (OEH), the EPA, Natural Resources Commission, the Department of Trade and Investment (Division of Resources & Energy) and the federal Environment Department.

²¹ EDO NSW, *Submission on draft amendments to give effect to the ‘Gateway’ process under the Strategic Regional Land Use Policy (amendments to the Mining SEPP and Environmental Planning & Assessment Regulation)* (December 2012), available at <http://www.edo.org.au/edonsw/site/pdf/subs/121217SubmissionongatewayprocessSRLUP.pdf>.

²² EDO NSW understands that the term ‘High conservation value’ has been used in the mapping process agreed between the Office of Environment and Heritage and the Department of Planning during the development of the SRLUP in 2011-12. The term ‘high conservation value’ has developed internationally (see for example www.hcvnetwork.org) but would need to clear definition in the NSW context. Related terms in NSW include ‘environmental conservation zone’ and ‘environmentally sensitive area’ (see, for example, the Mining SEPP cl 3).

²³ NSW Liberals & Nationals, *Strategic Regional Land Use – Triple bottom line assessment to protect our regions* (circa 2010-11). Available at <http://www.nswnationals.org.au/images/stories/pdf/strategic%20regional%20land%20use%20policy.pdf>.

²⁴ Goldberg Blaise report for the NSW Department of Planning and Infrastructure, *Analysis of Feedback: Draft Strategic Regional Land Use Plans* (June 2012), p 9.

²⁵ NSW Office of Environment & Heritage, *Who Cares about the Environment in 2012?* (2013), ‘At a glance’.

²⁶ *State of the Environment 2011*, ‘Headlines’, available at www.environment.gov.au.

²⁷ See for example the ‘stepwise approach’ to valuing environmental benefits under UNEP’s *The Economics of Ecosystems and Biodiversity* program, at <http://www.teebweb.org/publications/teeb-study-reports/local-and-regional/>; and the High Conservation Value Resource Network, www.hcvnetwork.org. See also Australian Bureau of Statistics, *1370.0.55.001 – Measures of Australia’s Progress: Summary Indicators 2012*, ‘Environment’.

*Strategic land use plans will be prepared using triple bottom line assessments of the environmental, social and economic values in regional areas. These assessments will inform our decisions about the best way to use land and identify the environmental, social and economic values that need to be protected.*²⁸

However, despite the strategic mapping and assessment of 'High Conservation Value' areas during the development of the SRLUP, and significant public support for protecting these valuable environmental assets, these 'triple bottom line assessments' have not resulted in meaningful strategic-level protection for environmentally significant areas and values (such as forests, ecosystems, habitat and stored carbon). Instead, local communities who wish to protect these areas must do so a site-by-site basis. This makes it difficult to consider the cumulative, catchment-based implications of projects. Mining companies too may face the uncertain prospect of losing their initial investments in areas of intractable land-use conflict.

Overall, the lack of protection for valuable environmental assets contrasts markedly with the proposed exclusion zones for residential areas and critical industry clusters under the draft Mining SEPP amendments. **EDO NSW strongly recommends the protection of high conservation value lands as part of a triple bottom line approach to mining and CSG regulation. As part of this, the NSW Government should model a policy option to establish 'mining exclusion zones' around scientifically-defined High Conservation Value lands (in addition to residential areas and strategic agricultural land).** This is an important priority for further implementation, as the SRLUP consultation and other findings above demonstrate.

A catchment-centred management approach

To further improve strategic planning, mining and CSG regulation, **EDO NSW recommends that the Government:**

- **identify environmental baselines and cumulative limits to the environment's carrying capacity, and**
- **ensure that mining and any other development will not occur if it would compromise the catchment's limits and capacity.**

This proposal for a catchment-centred management approach is consistent with EDO recommendations on harmonising national CSG regulation,²⁹ and reflects the findings of a recent review of CSG regulation by the former NSW Natural Resources Commissioner.³⁰ A cumulative impact assessment tool developed by the Namoi Catchment Management Authority (**CMA**) is a practical example of this approach. The Namoi tool uses comprehensive environmental baseline data to establish the carrying capacity of the landscape, and then models the cumulative impact of potential mining developments to see what activities can take place without exceeding this capacity.³¹ As Dr Williams notes, 'Unfortunately the current legislative arrangements in NSW mean that the outputs of the Namoi CMA tool will have no legislative power.'³² **EDO NSW recommends the Government**

²⁸ NSW Liberals & Nationals, *Strategic Regional Land Use – Triple bottom line assessment to protect our regions* (circa 2010-11), p 2.

²⁹ ANEDO Submission on the *Draft National Harmonised Regulatory Framework for Coal Seam Gas 2012* (February 2013), available at http://www.edo.org.au/edonsw/site/pdf/subs/130228CSG_draft_national_framework_ANEDO.pdf.

³⁰ John Williams Scientific Services Pty Ltd, *An analysis of coal seam gas production and natural resource management in Australia - Issues and ways forward* (October 2012), recommendations 1 and 2.

³¹ See John Williams Scientific Services, *ibid* (2012), p 102; see further EcoLogical Australia, *Proposed Framework for Assessing the Cumulative Risk of Mining on Natural Resource Assets in the Namoi Catchment*, prepared for Namoi CMA (2011).

³² John Williams Scientific Services, *ibid* (2012), p 102. The Report continues: 'The existing arrangements in NSW and Queensland and federally do not use an assessment of regional landscape capacity and landscape limits to determine what developments should proceed.'

adopt and legally integrate such catchment-centred tools and approaches in the planning system.

By contrast, approaches to date (including the NSW SRLUP and energy ministers' Draft National CSG Framework) have adopted an underlying presumption that CSG activities can occur in any landscape, provided impacts are properly 'managed'. This ignores the need for evidence-based land-use planning to maintain environmental assets, resolve conflicts, and provide linkage between planning and natural resource management (NRM) aims and targets.

Part Two - Detailed comments and recommendations on the draft SEPP amendment

This part of the submission considers the details of the draft *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Coal Seam Gas Exclusion Zones) 2013 (SEPP Amendment)*.

2.1 'Partly prohibited' SSD projects must not override exclusion zones

EDO NSW is very concerned that existing provisions in the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) could allow CSG proposals that are State Significant Development (**SSD**) to override the proposed exclusion zones. Unless the EP&A Act is amended along with the Mining SEPP, s 89E of the Act would allow SSD (which includes most CSG exploration and production³³) to be approved wherever CSG is *only partly prohibited*. Section 89E(3) states: 'Development consent may be granted despite the development being partly prohibited by an environmental planning instrument.' The EP&A Act overrides the provisions of the Mining SEPP.

In practice, while the draft Mining SEPP amendments may prohibit CSG in and within two kilometres of a residential area, for example, if part of a CSG project footprint goes beyond this exclusion zone, this is likely to constitute only a *partial prohibition*. The effect of s 89E(3) would override this partial prohibition and allow the approval of any CSG activity that is SSD. This would seriously undermine the stated intent of the draft Mining SEPP amendment.

EDO NSW recommends that s 89E of the *Environmental Planning and Assessment Act 1979* be amended in tandem with the Mining SEPP, either by removing s 89E(3) (so that if part of an SSD site is prohibited, then the whole project cannot be granted consent); or clarifying that s 89E(3) does not apply where the project overlaps with an exclusion zone.

2.2 Exclusion zones should apply to important environmental, agricultural and rural residential areas

The proposed exclusion zones for residential and critical industry cluster lands (surface *and* underground) are an important step towards improved strategic land use planning and the resolution of incompatible land uses. **In summary, EDO NSW recommends appropriate mining/CSG activity exclusion zones around important social, environmental and economic areas.** We make four key recommendations on this.

First, as discussed above, **EDO NSW strongly recommends exclusion zones for other sensitive areas, including for High Conservation Value (HCV) lands identified during the SRLUP development process, and Strategic Agricultural Lands.** EDO NSW would

³³ As declared in the *SEPP (State and Regionally Significant Development) 2011*, Schedule 1, cl 6.

also welcome the publication of HCV land maps (including on the SRLUP websites), as we understand that these have not yet been made available for public viewing.³⁴

Second, while a minimum two-kilometre buffer zone would provide some clarity and certainty, there may well be circumstances where increased buffer zones are justified, particularly on environmental grounds (such as aquifer location and connectivity). The proposed buffer zones have a social focus in that they will provide a physical separation between residential areas and CSG activities. However as mentioned previously, EDO NSW believes exclusion zones should also apply to important environmental areas. In this context, buffer zones will need to cover the full environmental resource or asset (such as an aquifer) rather than be based on a simple distance measure. The buffer zone will also need to consider connectivity between assets such as groundwater and surface water. Similar buffer zones could be afforded to 'critical industry clusters', which will not currently attract a two kilometre buffer.

EDO NSW recommends that best available scientific information, including geospatial mapping of sensitive areas, should form the basis of exclusion zones – to protect environmental and other land uses (such as 'critical industry clusters'). The two kilometre buffer zones could therefore be extended further on scientific grounds (consistent with the objectives of the national partnership agreement, referred to above).

Third, the Government should consider the effectiveness of existing mining prohibitions (including CSG) in Environmental Zones under Local Environmental Plans.³⁵ Under the existing Mining SEPP, surface mining and petroleum production can be carried out, only with consent, on land for which *agricultural and industrial uses* are permitted (with or without consent).³⁶ There is no default prohibition of agricultural uses in zones E2, E3 or E4 under the Standard Instrument. This leaves Environmental Zones open to CSG development in some local government areas, in contrast to the exclusion zones currently being proposed for *residential* zones. Noting the first point above about protecting sensitive areas, **EDO NSW recommends CSG exclusion zones also be considered for Environmental Zones.**

This problem should also be considered in relation to the Government's proposed new *E5 Environmental Protection Zone* for the Standard Instrument. Consistent with our current concerns, in May 2012 EDO NSW recommended that the proposed zone should explicitly prohibit all mining, petroleum production and extractive industries (including *underground* mining). We also recommended clarifying that State significant mining and extraction projects do not override an E5 zoning prohibition.³⁷

Fourth, the EDO notes that the exclusion zones in the draft SEPP Amendment do not apply to rural residential zones. (The accompanying FAQs note this 'will be considered' in the Chief Scientist's review of CSG activities in NSW, discussed below). The Government has not provided any specific justification for excluding rural residential areas from the draft SEPP Amendment; or statistics or maps to explain the scope of areas this would affect if exclusion zones applied to rural residential zones. To give equal protection to communities and residential areas in rural and regional areas, **EDO NSW recommends the exclusion zones could be extended to rural residential areas as an interim measure.** This could

³⁴ See for example, the information available at <http://www.nsw.gov.au/strategicregionallanduse> and <http://www.planning.nsw.gov.au/srlup> (accessed April 2013). EDO NSW has not seen the HCV maps to date.

³⁵ Zone E1 National Parks and Nature Reserves; Zone E2 Environmental Conservation; Zone E3 Environmental Management; Zone E4 Environmental Living. See *Standard Instrument Principal LEP*.

³⁶ See Mining SEPP, cl 7(1)-(2). See also Department of Planning and Infrastructure, LEP Practice Note (2009), *Environmental Protection Zones* (PN09-002), p 8.

³⁷ EDO NSW Submission on standard instrument amendments (May 2012), http://www.edo.org.au/edonsw/site/pdf/subs/120529Standard_Instrument_Amendments.pdf.

then be subject to further review by the Chief Scientist as to the ongoing scope of exclusion zones, and the impact on communities, mining and other industries, and the environment.

2.3 Exclusion zones should apply to exploration whether or not development consent is required

EDO NSW understands the Government intends to prohibit 'all new CSG exploration and production activity' within the exclusion zones, as noted in the accompanying FAQs. Under draft clause 9A(1) 'the carrying out of coal seam gas development is prohibited on or under land within a coal seam gas exclusion zone.' These zones include a 2km buffer around zoned 'residential areas'.³⁸ In brief, *coal seam gas development* means development for the purposes of petroleum exploration or production, but only in relation to prospecting, recovery, obtaining or removal of CSG (with two further, relatively minor exemptions³⁹).

It is understood that this would prohibit CSG exploration *whether or not development consent is required* (other than existing 'exempt development' of minor environmental significance). However there is no specific reference to the issue of development consent in the SEPP Amendments or the FAQs. Furthermore, draft cl 20 states that draft cl 9A 'extends to (a) an application for development consent made, but not finally determined...'. That is, the draft transitional provisions in cl 20 do not specifically include CSG activities that can be approved (without consent) under Part 5 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*.

EDO NSW recommends:

- **clarifying that exclusion zones to apply to CSG exploration whether or not that exploration requires development consent;**
- **clarifying the transitional provisions so that exclusion zones apply to 'Part 5' activities that have not yet received approval.**

2.4 Excluding other forms of mining (including other types of unconventional gas)

The current phrasing of exclusion zones in the draft SEPP Amendment is deliberately and narrowly targeted at CSG. However, EDO NSW notes the potential for development of other forms of unconventional gas in Australia,⁴⁰ which may pose similar risks and disruptions to important existing land uses. **EDO NSW recommends the draft SEPP Amendment be amended to exclude other forms of mining, including other unconventional gas (such as shale gas and tight gas).** At the very least, the Government should seek advice from the Chief Scientist and Engineer, and/or the national IESC, on the potential application of exclusion zones to other forms of mining and unconventional gas development in future. For example, the Planning Assessment Commission has noted the need for 'a clear policy position' if social (and environmental) values are 'to be balanced in the approval process for coal mines' more equitably.⁴¹

³⁸ See draft clause 9A(4) and 'residential zone' definition. Includes zones R1-R4, RU5; and specified areas zoned R5 (large lot residential) to be nominated by local councils and approved by the Minister.

³⁹ See SEPP Amendment, item [1], 'coal seam gas development' (insertion into cl 3(2)). The two exemptions are for the removal of CSG 'in the course of mining' ('mining' is currently defined in cl 3 of the Mining SEPP); and 'exempt development' under existing cl 10-10A of the Mining SEPP.

⁴⁰ See further, CSIRO, *Unconventional gas fast facts* (2012), available at <http://www.csiro.au/en/Outcomes/Energy/Energy-from-oil-and-gas/unconventional-gas.aspx>.

⁴¹ Planning Assessment Commission, Warkworth Extension Project (09_0202), 3 February 2012, pp 8-9.

2.5 Exclusion zones should apply to linear infrastructure associated with CSG

The SEPP Amendment prohibits ‘coal seam gas development’ in exclusion zones. However, the SEPP Amendment (including the definition of ‘coal seam gas development’⁴²) does not make clear that exclusion zones also apply to ‘linear infrastructure’ or ancillary ‘petroleum related works’ such as pipelines and processing plants. This issue turns on the interpretation of several intersecting, new and existing definitions.⁴³ **EDO NSW recommends that the SEPP Amendment be clarified in a way that protects residential, environmental and agricultural assets and land uses (including linear reserves⁴⁴) from disturbance by ancillary mining works.** In December 2012, EDO NSW expressed a similar concern about the exclusion of related ‘linear infrastructure’ from the gateway assessment under the SRLUP.

2.6 Remove or limit local council discretion to reinstate excluded areas

EDO NSW is concerned that the proposed process of ‘reinstating’ excluded areas contains few details or legal safeguards to ensure the community and environment will be protected in the public interest. The proposed process allows local councils to nominate residential areas or critical industry cluster lands that should be open to CSG activity, despite the general prohibition. It is not clear whether this amendment has been requested by any councils themselves. However, an open-ended ability (both in time and location) to ‘reinstate’ areas for CSG exploration and production, via local council nomination, will increase uncertainty and complexity of the overall proposal. As ICAC has noted, an ‘increasing tendency towards departures from the stated requirements [or sets of “rules”]’ can also introduce corruption risks.⁴⁵ This uncertainty could be addressed in several ways – the simplest being to remove the proposed discretion.

EDO NSW recommends either:

- **removing the ability for local councils to nominate ‘exclusions from exclusion zones’**, on the grounds of clarity and administrative simplicity (that is, removing cl 9A(2)-(3) and Schedule 2 from the draft SEPP Amendment); or
- **imposing clear and significant additional safeguards, including:**
 - limiting the circumstances in which such zones can legally be excluded (for example, based on social and environmental characteristics of an area);
 - limiting the timeframe in which councils can nominate the reinstatement of an excluded area (such as six months from commencement of the SEPP Amendments);
 - requiring specific public consultation and exhibition requirements before councils formally nominate areas to be reinstated for CSG activities; and
 - clarifying that such zones can only be ‘reinstated’ for CSG activities with PAC review and approval, and where public consultation requirements were followed.

⁴² See SEPP Amendment, item [1], ‘coal seam gas development’ (insertion into cl 3(2)), noted above.

⁴³ For example, the draft definition of ‘coal seam gas development’ refers to certain development for the purposes of ‘petroleum production’. We note the Mining SEPP’s existing definition of ‘petroleum production’ includes the construction (etc) of associated ‘petroleum related works’. The latter is itself defined to include works (etc) that a mining company is entitled to construct (etc) under a production lease, but not further works under the EP&A Act. The intent and effect of these definitions should be clarified in a way that properly protects excluded areas.

⁴⁴ The NSW Roadside Environment Committee recognises ‘linear reserves’, including roadsides and Travelling Stock Routes, as containing significant biodiversity, including ecological communities and critical wildlife habitat, requiring appropriate protection and management. See:

<http://www.rta.nsw.gov.au/environment/roadsideenvironmentcommittee/index.html>.

⁴⁵ See ICAC, *Anti-corruption safeguards and the NSW planning system*, ‘Providing certainty’, p 5.

2.7 Transparency and consultation on finalised area maps

EDO NSW notes that only certain maps have been made available for this consultation process.⁴⁶ It is also understood that the identification of 'R5 Villages', future residential growth areas, 'Critical Industry Clusters', and 'High Conservation Value' lands (for which we recommend added protection) is ongoing; including as the Government proceeds with its SRLUP process across the State. While the current consultation process is timely and important, this has also meant the community has been asked to provide input on the basis of incomplete information. To promote transparency and public engagement in the finalisation of exclusion zones, **EDO NSW recommends the Government provide sufficient further opportunities for public consultation on areas to be identified, mapped and protected from CSG and other mining.**

Part Three - Related announcements

3.1 EPA role

EDO NSW welcomes the Premier's announcement that the EPA will become the lead environmental regulator for CSG in NSW. This is consistent with concerns previously raised by the NSW Ombudsman, EDO NSW and the Legislative Council regarding potential or perceived 'conflicts of duties' for the Department of Trade and Investment – in promoting and facilitating the industry on one hand, and regulating it on the other.⁴⁷

The exact nature of the additional powers proposed for the EPA to regulate 'environmental and health aspects' of CSG, and the timeframe involved, remains unclear since the February policy announcement.⁴⁸ **EDO NSW recommends the Government provide further public detail on the EPA's new role, including the relationship with the proposed Office of CSG within the Department of Trade and Investment. We would welcome the opportunity for further input.**

3.2 Chief Scientist's review

EDO NSW welcomes the Chief Scientist and Engineer's review of CSG in NSW.⁴⁹ We also welcome the opportunity for public input into this review, although the FAQs to the SEPP Amendment do not refer to this. To assist this review, **EDO NSW recommends that:**

- **the Chief Scientist's review take into account:**
 - the recommendations of the NSW Legislative Council Inquiry into the impacts of CSG (May 2012);⁵⁰
 - the implications (and limitations) of the draft *National Harmonised Regulatory Framework for CSG* (December 2012);⁵¹

⁴⁶ As the accompanying FAQs note, 'the Department of Planning and Infrastructure is currently compiling information on all future growth areas across the State in consultation with local councils to include in a final map prior to the finalisation of the SEPP amendment.'

⁴⁷ See for example, NSW Ombudsman, *Submission to NSW Legislative Council Inquiry into Coal Seam Gas* (2011); *Report of the NSW Legislative Council Inquiry into Coal Seam Gas* (May 2012), recommendations 31-35.

⁴⁸ Only basic information is provided on the EPA website (as at April 2013):

<http://www.environment.nsw.gov.au/licensing/coalseamgas.htm>.

⁴⁹ See <http://www.chiefscientist.nsw.gov.au/latest-news/nsw-chief-scientist-and-engineer-to-review-csg-activities-in-nsw>.

⁵⁰ http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/318A94F2301A0B2FCA2579F1001419E5?open&refnavid=CO5_1

⁵¹ Available from the COAG SCER at: <http://www.scer.gov.au/workstreams/land-access/coal-seam-gas>.

- the scientific review of CSG recently conducted by Dr John Williams, which recommended a 'catchment-based approach' to strategic planning and mining assessment;⁵² and
- relatedly, the cumulative impact assessment tools developed by the Namoi Catchment Management Authority.⁵³
- the Chief Scientist **consider the need for exclusion zones applicable to unconventional gas development and other forms of mining in NSW** (including rural residential, agricultural and environmental exclusion zones), if other forms of unconventional gas are not excluded in revisions to the draft Mining SEPP Amendment.
- **the NSW Government commit to tabling the Chief Scientist's CSG report** in Parliament within a month of receiving it, and the Government's own draft regulatory response by December 2013 (or within 6 months of the Chief Scientist's report).

⁵² John Williams Scientific Services Pty Ltd, *An analysis of coal seam gas production and natural resource management in Australia - Issues and ways forward* (October 2012), available at: www.wentworthgroup.org.

⁵³ See EcoLogical Australia, *Proposed Framework for Assessing the Cumulative Risk of Mining on Natural Resource Assets in the Namoi Catchment*, prepared for Namoi CMA (2011).