



**Submission on draft amendments to give effect to
the ‘Gateway’ process under the Strategic Regional
Land Use Policy (amendments to the *Mining SEPP &
Environmental Planning & Assessment Regulation*)**

prepared by

**EDO NSW
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About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

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](#).

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Introduction

EDO NSW welcomes the opportunity to comment on the following draft legislative amendments (which we will collectively refer to as the '**Gateway Legislation**')

1. the Draft *Environment Planning and Assessment Amendment (Gateway Process for Strategic Agricultural Land) Regulation 2012*; and
2. the Draft *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012*.

As these amendments interact with the Government's Aquifer Interference Policy and Codes of Practice for Coal Seam Gas (**CSG**), this submission also comments on those policies where relevant, with input from our in-house scientific advisors.

EDO NSW is a community legal centre with over 25 years' experience in public interest environmental and planning law matters. Through our casework, policy and law reform, community education and scientific advice we have a strong history of engagement with government regulation of the State's water and land resources, and in particular, NSW mining laws.¹ Our recent policy work includes a discussion paper on mining law reform in June 2011; submissions and appearances for the Legislative Council inquiry into CSG in 2011-12; a submission on the Government's June 2012 proposal to introduce a Land and Water Commissioner. In May this year, EDO NSW also made submissions on the draft Strategic Regional Land Use Policy (**SRLUP**) and draft Aquifer Interference Policy.

Background to Gateway Legislation and Strategic Regional Land Use Policy

The purpose of the proposed amendments to the planning law regulation and the Mining SEPP, which together form the Gateway Legislation, is to provide an upfront, scientific assessment of the impacts of certain State significant mining and petroleum proposals (including CSG) located on mapped Strategic Agricultural Land. These amendments give effect to aspects of the NSW Government's proposed SRLUP.

The SRLUP arose from the Government's 2010-11 election policies, which stated in part:

*The NSW Liberals and Nationals believe that agricultural land and other sensitive areas exist in NSW where mining and coal seam gas extraction should not occur. There are other areas where mining and coal seam gas extraction are suitable and should be pursued following a tough assessment of potential impacts. Strategic land use plans will set the framework within which future development will be assessed.*²

Following its election in 2011, the Government formed a working group of key stakeholders including 'farmers, miners and the wider community'³ to progress and finalise SRLUPs in different regions, beginning with the Upper Hunter and New England-North West regions. While EDO NSW was not part of this working group, we note that various working group members have expressed concerns about the final policy outcome.

¹ For example, in 2011 and 2012, EDO NSW conducted 24 community legal education workshops and seminars on mining and CSG law at the request of rural and regional communities across NSW. EDO NSW has also released a comprehensive booklet, *Mining Law in NSW: A guide for the community* (December 2012), available at <http://www.edo.org.au/edonsw/site/publications.php#mining>.

² 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>

³ NSW Department of Planning and Infrastructure website, <http://www.planning.nsw.gov.au/slurp>, accessed December 2012.

EDO NSW supports the broad principle of greater scrutiny of impacts and resolution of competing land uses in key agricultural regions of NSW, with particular emphasis on protection of our State's important environmental values. Agricultural and environmental values are clearly interdependent. However, we note that the Gateway process has narrowed as the SRLUP has progressed, to focus more exclusively on agricultural values rather than, for example, high conservation value land. This has diminished community confidence in the final SRLUP reforms. Nevertheless, this submission comments on the application of the Gateway process as proposed, and whether it affords rigorous protection to land and water affected by coal and CSG extraction.

Summary of recommendations

At the outset, we submit that while the Gateway Process allows for additional scientific scrutiny, it does little to afford any definitive protection to mapped Strategic Agricultural Land. As detailed below, we have a number of concerns about the way the Gateway Process would be implemented under the proposed legislative amendments, and its interaction with related policies. Significant shortcomings include:

- 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;
- 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; and
- the absence of any specific prohibition of exploration or mining in strategic agricultural or high conservation value lands, despite the Government's stated belief 'that agricultural land and other sensitive areas exist in NSW where mining and coal seam gas extraction should not occur.'⁴

In summary, this submission makes 20 recommendations across the following areas.

General concerns as to environmental protections

Recommendation 1: The Gateway legislation should be amended to include specific environment and heritage protection safeguards relating to cumulative impact assessment; private conservation and biodiversity offsetting arrangements; upfront completion of biodiversity mapping; and proper protection of and consultation on Aboriginal culture, heritage, intellectual property and privacy rights.

Lack of application of the Gateway Process to licence and lease renewals

Recommendation 2: The proposed Gateway Legislation should be amended to ensure that the Gateway Process also applies to licence and lease renewals.

Exempting 'linear infrastructure' from the Gateway Process overlooks cumulative impacts

Recommendation 3: Linear infrastructure components of a coal or CSG proposal that are outside a new mining or petroleum production lease should also be subject to the Gateway Process.

Recommendation 4: Furthermore, the cumulative environmental impacts of such proposals should be a specific matter that Gateway Panels must address in their assessment.

⁴ NSW Liberals & Nationals, *Strategic Regional Land Use – Triple bottom line assessment to protect our regions* (circa 2010-11), p 1. Available at <http://www.nswnationals.org.au/images/stories/pdf/strategic%20regional%20land%20use%20policy.pdf>.

Aquifer Interference Policy does not apply to licence and lease renewals

Recommendation 5: The Aquifer Interference Policy should apply to all licence renewals, not just those which require development approval.

Gateway Panel nominations and expertise

Recommendation 6: Nomination of Gateway Panel membership should include a nomination and/or consultation role for the Minister of Environment and Heritage.

Recommendation 7: The Gateway Legislation should be amended to require that Gateway Panel members collectively have qualifications in each of the areas of agricultural science; hydrogeology; ecology (not currently included); and either mining or petroleum development, as the circumstance requires.

Recommendation 8: Experts applying for appointment to the Gateway Panel should be expressly required to disclose any prior or current employment with CSG or coal mining companies, or employment with businesses that have CSG or coal mining vested interests. The prospective member must not hold any interests that would prevent them from exercising functions impartially.

Conditions attached to the Conditional Gateway Certificate

Recommendation 9: All Gateway Certificates issued should include specific requirements for baseline environmental studies to be undertaken by the proponent and for that data to be publically available.

Gateway Panel's engagement with Stakeholders is unclear and non-transparent

Recommendation 10: Any consultation with stakeholder groups should be limited to clear and specific purposes; and should be conducted in a public forum or otherwise transparent manner. Priority should be given to local community and landholder consultation over peak mining bodies.

No land exempted from new coal or CSG proposals, and no ability to refuse a Gateway certificate

Recommendation 11: The available outcomes of the Gateway Process must be amended to include that a Gateway Certificate may be refused in relevant circumstances; and that a Certificate may not be issued for a proposal on Strategic Agricultural Land if:

- a) the proposal may negatively impact on land that is exempt from mining under the Mining Act 1992 (NSW), the Petroleum (Onshore) Act 1991 or another law; or*
- b) the proposal may have a significant impact on the economic, social or environmental values of Strategic Agricultural Land, and placing conditions on the project is not likely to sufficiently ameliorate these impacts (with reference to relevant listed criteria⁵).*

Any 'site verification' processes must be equitable and transparent

Recommendation 12: The Gateway Legislation should be amended so that mining companies are unable to challenge the status of land that has already been mapped as Biophysical Strategic Agricultural Land, except on clear and exceptional grounds.

⁵ State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012, s 17H.

The Gateway Legislation should set out or require clear guidelines as to how the Site Verification Criteria are to apply.

Land and Water Commissioner

Recommendation 13: The Land and Water Commissioner should:

- i) have powers to consult with and seek advice from the federal Independent Expert Scientific Committee on Large Coal and CSG Developments (IESC) (as the Minister's delegate under the federal law), as well as relevant State and Federal agencies⁶ and other relevant experts;*
- ii) publish relevant information and/or advice given to the Government, to promote transparency and understanding (similarly to the federal IESC);⁷*
- iii) have a clearly defined role, scope and powers – including in relation to existing regulatory bodies, functions and processes under the Petroleum (Onshore) Act 1991 (NSW) and Mining Act 1992 (NSW).*

Recommendation 14: Decision makers under mining and planning law should be required to seek and take account of the Land and Water Commissioner's advice on relevant projects (as for the federal Independent Expert Scientific Committee⁸); and be required to give reasons where their decisions do not align with relevant advice.⁹

The above powers and obligations should be given effect in the Gateway Legislation.

Aquifer interference approvals

Recommendation 15: The proposed Gateway Legislation should be amended to require mining proponents to obtain an aquifer interference approval under the Water Management Act 2000 (NSW), notwithstanding any reference to the Aquifer Interference Policy by the Minister for Primary Industries in providing advice to the Gateway Panel. State significant development (SSD) should not be exempt from obtaining aquifer interference approvals.

Office of Water's assessment of impacts under the Aquifer Interference Policy

Recommendation 16: The proposed Gateway Legislation should be amended to include an obligation for the NSW Office of Water's assessment, provided to the Minister for Energy and Resources pursuant to the Aquifer Interference Policy, be made publically available.

The minimal impact assessment criteria under the Aquifer Interference Policy

Recommendation 17: The Aquifer Interference Policy's minimal impact criteria should be amended to include set limits that must be met. If a particular proposal does not, then that proposal must not be granted a Gateway Certificate under the Gateway Legislation.

Recommendation 18: The Aquifer Interference Policy's minimal impact criteria should be amended to reflect the precautionary principle and enshrined in enforceable legislation.

⁶ In particular the NSW Environmental Protection Authority, Office of Environment and Heritage, NSW Soil Conservation Service, Office of Water, National Water Commission, and NICNAS (national chemical regulator).

⁷ See, for example, Explanatory Memorandum to the *Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012* (Cth) (**EPBC (IESC) Bill**), Outline, p 2; and cl 505D(1)(e)-(g) of that Bill.

⁸ See EPBC (IESC) Bill 2012, clause 131AB (as assented to, 24 October 2012).

⁹ The Independent Commission Against Corruption has made a similar recommendation in relation to decisions of the Planning Minister, where those decisions do not reflect the advice from the Department. See ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 8.

Enforceability of the CSG Codes of Practice

Recommendation 19: The Well Integrity Code of Practice and the Fracture Stimulation Activities Code of Practice should be enshrined in enforceable legislation, so that breaches of the Codes can be enforced, and proposals that do not meet the best practice requirements at the application stage are not approved.

Fracture Stimulation Management Plans

Recommendation 20: The Fracture Stimulation Activities Code of Practice should be amended to adopt a precautionary approach whereby if a proposal entails certain identified risks then that proposal is not approved.

Each of these issues and recommendations is explored in more detail below. At the end of this submission we also comment briefly on the Government's *Draft guideline for the use of cost-benefit analysis in mining and CSG proposals*.

General concerns as to environmental protections

The proposed Gateway process will only apply to mapped Strategic Agricultural Land. Strategic Agricultural Land is comprised of two categories – *Biophysical Strategic Agricultural Land (BSAL)* and *Critical Industry Clusters (CICs)*.

The Gateway Legislation fails to include a number of environmental protections that EDO NSW believes should be incorporated into the Gateway Process in relation to Strategic Agricultural Land. These include:

- A. Ensuring that there is appropriate Aboriginal engagement in the processes for considering Aboriginal cultural heritage, and that the intellectual property and privacy rights of Aboriginal people are protected when their cultural heritage is catalogued.¹⁰
- B. Prioritising the assessment of cumulative environmental impacts of a new CSG or coal mining exploration or production project. This is a significant issue in areas where there are a number of considerable mining operations within close proximity to each other.
- C. Ensuring that areas set aside for private conservation of biodiversity, or set aside to offset biodiversity impacts of other development, remain off limits to any mining development.
- D. Provisions relating to the protection of land from CSG or coal operations until all biodiversity mapping in that area is completed.

Recommendation 1: The Gateway legislation should be amended to include specific environment and heritage protection safeguards relating to cumulative impact

¹⁰ The SRLUPs state that the Department of Planning and Infrastructure is currently developing guidelines with the Office of Environment and Heritage to ensure the early and thorough consideration of Aboriginal cultural heritage in the development assessment process for State significant development (SSD). These guidelines are to highlight the importance of undertaking an appropriate level of assessment, and consultation with Aboriginal people, in determining the significance of cultural heritage and the significance of proposed impacts. However, these guidelines are not yet in place, nor is there adequate detail provided as to how such consultation with Aboriginal people on issues of heritage is to be undertaken. See *New England North West Strategic Regional Land Use Plan*, published by State of New South Wales through the Department of Planning and Infrastructure, September 2012, page 68; *Upper Hunter Strategic Regional Land Use Plan*, State of New South Wales through the Department of Planning and Infrastructure, September 2012, page 72.)

assessment; private conservation and biodiversity offsetting lands; upfront completion of biodiversity mapping; and proper protection of and consultation on Aboriginal culture, heritage, intellectual property and privacy rights.

Gateway Process will not apply to licence and lease renewals

Under the Gateway Legislation, only new proposals for State Significant Development (SSD) or SSD proposals that extend beyond an existing mining or CSG project on Strategic Agricultural Land will be subject to the Gateway process.¹¹

Accordingly, the Gateway Legislation applies to new proposals for the following instruments issued under the *Mining Act 1992* (NSW) and the *Petroleum (Onshore) Act 1991* (NSW):

- a) certain exploration licences (for most CSG exploration, but not coal exploration);
- b) assessment leases; and
- c) production leases.

As proposed, coal or CSG titles issued prior to 11 September 2012 will not be subject to the Gateway process.¹² This also means that *renewals* of exploration licences and production leases currently in place will not be required to obtain a Gateway Certificate under the proposed Gateway Legislation.

An exploration licence gives the holder the right to explore for coal or petroleum listed in the licence over the area covered by the licence. Exploration licences for coal can be issued for up to 5 years.¹³ Accordingly, exploration licences for CSG can be issued for up to 6 years.¹⁴ Moreover, assessment leases can be granted for up to 5 years for coal¹⁵ and for up to 6 years for CSG.¹⁶ A petroleum production or a mining lease can be granted for up to 21 years.¹⁷

It is clear that there are already a significant number of titles already in circulation.¹⁸ These titles cover significant areas of NSW that would not be afforded protection of up-to-date requirements. These exemptions raise concerns as to the practical application of the Gateway Process in future.

Recommendation 2: The proposed Gateway Legislation should be amended to ensure that the Gateway Process also applies to licence and lease renewals.

Exempting 'linear infrastructure' from the Gateway Process overlooks cumulative impacts

The Government's 2011 policy stated that the strategic land use planning process 'will provide certainty to local communities that cumulative impacts are being taken into

¹¹ SEPP (Mining, Petroleum Production and Extractive Industries) Amendment 2012, c; 17A.

¹² Explanation of the intended effect of the proposed amendment to the *State Environmental Planning Policy (Mining, Petroleum Productive and Extractive Industries)* 2007.

¹³ *Mining Act 1992* (NSW), section 17.

¹⁴ *Petroleum (Onshore Act) 1992* (NSW), section 31.

¹⁵ *Mining Act 1992* (NSW), section 45.

¹⁶ *Petroleum (Onshore) Act 1991* (NSW), section 35.

¹⁷ *Petroleum (Onshore Act) 1992* (NSW), section 45; *Mining Act 1991* (NSW), section 71.

¹⁸ <http://www.resources.nsw.gov.au/titles/status-reports/CoalMonthly-TitlesCurrent2012-10.pdf>;
<http://www.resources.nsw.gov.au/titles/status-reports/Petroleum-TitlesCurrent2012-10.pdf>

account...'.¹⁹ However, under the proposed Gateway Legislation, linear infrastructure components of coal mining or CSG developments are to be excluded from the Gateway Process.²⁰ The proposed legislation requires the agricultural impacts of linear infrastructure relating to coal and CSG proposals (such as gas pipelines) to be addressed as part of the Agricultural Impact Statement (AIS).²¹ However, the exclusion of linear infrastructure from the Gateway Panel assessment means that the Gateway Process does not provide for a comprehensive upfront assessment of the cumulative environmental impacts of CSG and coal mining processes. For example, this related infrastructure can have impacts on areas of significant biodiversity and agricultural value, such as travelling stock routes. These are known to be crucially important as biodiversity corridors and for stock feed, especially in times of drought. The Gateway Process should assess the potential impacts of linear infrastructure, in line with the policy aims of increased scrutiny of cumulative impacts.

Recommendation 3: Linear infrastructure components of a coal or CSG proposal that are outside a new mining or petroleum production lease should also be subject to the Gateway Process.

Recommendation 4: Furthermore, the cumulative environmental impacts of such proposals should be a specific matter that Gateway Panels must address in their assessment.

Aquifer Interference Policy does not apply to licence and lease renewals

As we understand the proposed Gateway Legislation, most licence and lease *renewals* will not be subject to environmental assessment by the Department of Planning and Infrastructure,²² and therefore most renewals for CSG or coal projects will not be subject to the Aquifer Interference Policy (AIP)²³ requirements.

Under the Gateway Legislation, the AIP applies to the environmental assessment stage of a CSG or coal exploration licence or mining lease. This may occur at the Gateway Panel stage, or through the development assessment process conducted through the planning system.²⁴

The AIP will therefore apply to those CSG and coal licence and lease renewals that are required to undergo project approval. This relates to renewals for projects that are considered SSD at the renewal stage (such as renewals for a CSG project that includes 5 or more pilot wells).²⁵

¹⁹ NSW Liberals & Nationals, *Strategic Regional Land Use – Triple bottom line assessment to protect our regions* (circa 2010-11), p 1.

²⁰ Explanation of the intended effect of the proposed amendment to the *State Environmental Planning Policy (Mining, Petroleum Productive and Extractive Industries)* 2007.

²¹ Explanation of the intended effect of the proposed amendment to the *State Environmental Planning Policy (Mining, Petroleum Productive and Extractive Industries)* 2007.

²² *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012*, 17A

²³ *NSW Aquifer Interference Policy*, published by NSW Office of Water, Department of Primary Industries, dated September 2012.

²⁴ *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012*, 17B and 17G.

²⁵ *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012*, 17B

As noted, there are already a significant number of titles already in circulation.²⁶ This raises concerns and inconsistencies around how many (and which) projects the AIP will apply to, with regard to current coal mining and CSG operations and the future expansion of those operations. In the case of CSG, we note that the infrastructure required for exploration or pilot projects is similar (albeit on a smaller scale) to that required for the production stage. Accordingly, the risks to aquifers need to be properly assessed upfront.

Recommendation 5: The Aquifer Interference Policy should apply to all licence renewals, not just those which require development approval.

Gateway Panel nominations and expertise

Although the Panel is to be made up of independent experts,²⁷ these experts are to be chosen by the Minister for Planning and Infrastructure²⁸ in consultation with the Minister for Resources and Energy and the Minister for Primary Industries.²⁹ We recommend an additional consultation or nomination role for the Minister for Environment and Heritage, given OEH's relevant expertise and sectoral knowledge.

Secondly, to be qualified and appointed as an expert on the Gateway Panel, the Gateway Legislation only requires that the experts appointed have expertise in agricultural science, hydrogeology, mining or petroleum development.³⁰ We submit that amendments should specifically require that at least one member of the Panel has each of these qualifications (with mining or petroleum as a combined area of expertise). This would avoid the situation whereby a Panel could be validly constituted by, for example, three experts with mining or petroleum expertise, but no agricultural scientist or hydrogeologist. We would also include 'ecology' as a relevant area of expertise for members of the Gateway Panel.

Thirdly, although the requirement for experts applying to the Gateway Panel to disclose prior employment with CSG or mining companies is mentioned in the Frequently Asked Questions,³¹ the proposed Gateway Legislation does not expressly mention this disclosure requirement. Furthermore, the proposed legislation does not require experts to disclose *current* employment such as consultancy work that may be with mining or CSG companies, or work with businesses that have mining or CSG vested interests.

Recommendation 6: Nomination of Gateway Panel membership should include a nomination and/or consultation role for the Minister of Environment and Heritage.

Recommendation 7: The Gateway Legislation should be amended to require that Gateway Panel members collectively have qualifications in each of the areas of agricultural science; hydrogeology; ecology (not currently included); and either mining or petroleum development, as the circumstance requires.

Recommendation 8: Experts applying for appointment to the Gateway Panel should be expressly required to disclose any prior or current employment with CSG or coal

²⁶ <http://www.resources.nsw.gov.au/titles/status-reports/CoalMonthly-TitlesCurrent2012-10.pdf>;
<http://www.resources.nsw.gov.au/titles/status-reports/Petroleum-TitlesCurrent2012-10.pdf>

²⁷ *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012*, 17P(2)

²⁸ *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012*, 17N (1).

²⁹ *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012*, 17N(2)

³⁰

³¹ Amendment to the Mining SEPP & Establishing the Gateway Panel November 2012.

mining companies, or employment with businesses that have CSG or coal mining vested interests. The prospective member must not hold any interests that would prevent them from exercising functions impartially.

Conditions attached to the Conditional Gateway Certificate

Pursuant to the proposed Gateway Legislation, Conditional Gateway Certificates can include conditions including the requirement that further studies be undertaken.³² It is unclear whether such conditions will list specific scientific actions such as baseline monitoring for water and other environmental impacts before a project can proceed to development assessment (or will be left at the level of generalities).

Recommendation 9: All Gateway Certificates issued should include specific requirements for baseline environmental studies to be undertaken by the proponent and for that data to be publically available.

Gateway Panel engagement with Stakeholders is unclear and non-transparent

Before the Gateway Panel's determination of a proposal on BSAL, the Gateway Legislation suggests that the Panel *may* consult with stakeholders such as the NSW Farmers' Association, the NSW Minerals Council and the Australian Petroleum Production and Exploration Association Ltd.³³ In relation to Critical Industry Clusters (**CICs**), the proposed legislation requires that those same stakeholders *may* be consulted as well as the Hunter Wine Industry Association and the Hunter Thoroughbred Breeders Association.³⁴ The Panel must take into consideration any written advice received by the Panel from a 'Stakeholder',³⁵ although it is not clear whether this term only refers to the groups mentioned in the clause.

EDO NSW is concerned that the intended purpose of this selective consultation process is unclear, and the influence of the process is potentially non-transparent. It does not require such consultation in a public forum, and does not appear to provide opportunities for individual landholders to be heard by the Panel. We also submit that peak mining organisations should not be specially consulted by the independent Gateway Panel when assessing an individual mining company's proposal for a coal or CSG development. If such organisations *are* to be consulted, there should also be provision to consult peak conservation groups, in addition to the general public.

Recommendation 10: Any consultation with stakeholder groups should be limited to clear and specific purposes; and should be conducted in a public forum or otherwise transparent manner. Priority should be given to local community and landholder consultation over peak mining bodies.

No Strategic Agricultural Land exempted from new coal or CSG proposals, and no ability for Expert Panels to refuse a Gateway certificate

It is unacceptable that there is no option for the Gateway Panel to refuse to issue a Gateway Certificate. This means that all projects for new CSG or coal leases/licences that pass through the Gateway process will be given a Gateway Certificate (whether it is conditional or

³² *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012, 17H(3)(b).*

³³ *SEPP (Mining, Petroleum Production and Extractive Industries) Amendment 2012, 17G(1).*

³⁴ *SEPP (Mining, Petroleum Production and Extractive Industries) Amendment 2012, 17G(2).*

³⁵ *SEPP (Mining, Petroleum Production and Extractive Industries) Amendment 2012, 17G (1)(c) and 17G (2)(b).*

non-conditional). In contrast, the term 'gateway' itself implies the ability to decide whether a project should or should not pass the relevant stage.³⁶ It is normally used to describe a tool for prudent investment and improved governance. A true Gateway process should not be downgraded to a 'certificate of participation'.

EDO NSW believes there is (and should be) a clear public policy preference to avoid projects which may significantly degrade water, ecosystems or other agricultural resources. The expert Panel should not be placed in a position where they can only achieve this policy outcome by placing onerous conditions on a project that should clearly be refused at the Gateway stage. The ability to refuse a Gateway certificate would also encourage better-planned projects, giving proponents an incentive to demonstrate their environmental, health and safety credentials (rather than being 'assured' of a certificate, with the entire onus on the Panel to limit it appropriately).

Interaction of Gateway process and existing prohibitions on mining in certain areas

We also note that the Gateway Legislation and explanatory material make no reference to existing legal prohibitions or limitations that prevent mining in certain areas under the *Mining Act 1992* (NSW) and the *Petroleum (Onshore) Act 1991* (NSW). These limitations, outlined below, must be acknowledged so that the wider land use context remains clear.

It is unlawful to mine (which includes CSG extraction) in a National Park, historic site, nature reserve, karst conservation reserve or Aboriginal area.³⁷ A special Act of Parliament would be needed to authorise mining or CSG production in these areas. CSG production is also prohibited within a State Recreation Area³⁸ without the agreement of the NSW Environment Minister.³⁹

In regard to coal, the NSW Governor can declare certain land to be a reserve and can direct that no exploration or mining is permitted within that reserve.⁴⁰ A mining lease can't be granted over land within a reserve where such an order prohibits the granting of mining leases.⁴¹

The proposed Gateway Legislation does not make reference to the Government's power to create further 'off limits' areas by amending the Mining SEPP.⁴²

Under the *Mining Act 1992* (NSW)⁴³ and the *Petroleum (Onshore Act) 1991* (NSW)⁴⁴ there are a number of areas where exploration activities cannot take place without the consent of the Minister for Resources and Energy. This includes State Forests, National Parks, Travelling Stock Routes, State Conservation Areas, public reserves, community land, Crown Land and land held on trust as a race course, cricket ground, recreational reserve, park or permanent common.⁴⁵ In addition, the NSW Governor also has the power to declare certain

³⁶ See, for example, *Treasury Circular 10/13* (2010) on the Gateway Review System for NSW Government procurement: "Gateway gives Government a level of assurance on whether the investment is warranted; the strategic options; and the agency's capability and capacity to manage and deliver the project." See further NSW Government, *Gateway Review Toolkit 2006* (for government procurement), tables pp 7-8.

³⁷ *National Parks and Wildlife Act 1974* (NSW), ss. 41, 54, 58O and 64.

³⁸ Under the *National Parks and Wildlife Act 1974* (NSW).

³⁹ *Petroleum (Onshore) Act 1991* (NSW), s. 70(3).

⁴⁰ *Mining Act 1992* (NSW), s. 367. Such a declaration would appear in the NSW Government Gazette.

⁴¹ *Mining Act 1992* (NSW), ss. 57, 367.

⁴² See: SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl. 9 and Sch. 1.

⁴³ section 30, *Mining Act 1992* (NSW).

⁴⁴ section 70, *Mining Act 1992* (NSW).

⁴⁵ ss 41, 54, 58O and 64, *National Parks and Wildlife Act 1974* (NSW). The Resources Minister can issue an 'exempted area consent' to allow for exploration in such areas.

areas to be exempt from mining activities so that no exploration licence can be granted for that land.⁴⁶ We also note that the Resources Minister also has the power to cancel or suspend titles already granted.⁴⁷ However none of these powers is referred to in the Gateway Legislation or explanatory material.

Recommendation 11: The available outcomes of the Gateway Process be amended to include that a Gateway Certificate may be refused in certain circumstances; and that a Certificate may not be issued for a proposal on Strategic Agricultural Land if:

- c) **the proposal may negatively impact on land that is exempt from mining under the Mining Act 1992 (NSW), the Petroleum (Onshore) Act 1991 or another law; or**
- d) **the proposal may have a significant impact on the economic, social or environmental values of Strategic Agricultural Land, and placing conditions on the project is not likely to sufficiently ameliorate these impacts (with reference to relevant listed criteria⁴⁸).**

Recommendation 17 below includes further suggestions for the refusal of Gateway Certificates where a mining proposal does not meet the 'minimal impact criteria' in the AIP.

Any Site Verification processes must be equitable and transparent

If a site is mapped as Biophysical Strategic Agricultural Land (**BSAL**), an applicant for a State Significant coal or CSG project can choose to either accept that the land is BSAL, or have the land verified as to whether or not the land meets the criteria for BSAL by lodging a site verification application.⁴⁹ Agricultural landholders can also apply for a site verification certificate to verify whether or not their property is BSAL.

In our view, if a parcel of land has already been mapped as BSAL, it should not be subject to further contestation as to its significance, particularly without clear *prima facie* reasons that the mapping is wrong. Otherwise, this option will put landowners at an unfair disadvantage in responding to site verification processes brought by mining companies that have more expert and financial resources at their disposal. In addition, if applicants are able to challenge the status of already mapped BSAL, the Gateway Legislation should set out clear guidelines as to how the Site Verification Criteria⁵⁰ are to be applied. This includes ensuring the Director General applies the criteria transparently and publically; and allowing landholders to respond to the application of the criteria and any decision reached.

Recommendation 12: The Gateway Legislation should be amended so that mining companies are unable to challenge the status of land that has already been mapped as Biophysical Strategic Agricultural Land, except on clear and exceptional grounds. The Gateway Legislation should set out or require clear guidelines as to how the Site Verification Criteria are to apply.

⁴⁶ Mining Act 1992 (NSW), s 367,.

⁴⁷ Petroleum (Onshore Act) 1991 (NSW), s 22; Mining Act 1991 (NSW), Part 7.

⁴⁸ SEPP (Mining, Petroleum Production and Extractive Industries) Amendment 2012, s 17H.

⁴⁹ Fact Sheet: Strategic Regional Land Use Policy, Development of protocol for site verification and mapping of Biophysical Strategic Agricultural Land (BSAL), published by the NSW Government, November 2012 page; State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012, 17E

⁵⁰ SEPP (Mining, Petroleum Production and Extractive Industries) Amendment 2012, s 17E.

Land and Water Commissioner

Under the NSW Government's SRLUP package, a Land and Water Commissioner has been appointed⁵¹ to provide advice to the community on exploration activities on Strategic Agricultural Land throughout the State, and as an advocate for landholders. Our previous submission on this new role is available on the EDO NSW website.⁵²

The role of the Land and Water Commissioner is only advisory, and the SRLUP policy documents do not suggest that any review by the Commissioner will result in changes to the development application or affect its prospects of approval.⁵³ Moreover, the Commissioner's role is not referred to in the proposed Gateway Legislation.

Recommendation 13: The Land and Water Commissioner should:

- i) have powers to consult with and seek advice from the federal Independent Expert Scientific Committee on Large Coal and CSG Developments (IESC) (as the Minister's delegate under the federal law), as well as relevant State and Federal agencies⁵⁴ and other relevant experts;***
- ii) publish relevant information and/or advice given to the Government, to promote transparency and understanding (similarly to the federal IESC);⁵⁵***
- iii) have a clearly defined role, scope and powers – including in relation to existing regulatory bodies, functions and processes under the Petroleum (Onshore) Act 1991 (NSW) and Mining Act 1992 (NSW).***

Recommendation 14: Decision makers under mining and planning law should be required to seek and take account of the Land and Water Commissioner's advice on relevant projects (as for the federal Independent Expert Scientific Committee⁵⁶); and be required to give reasons where their decisions do not align with relevant advice.⁵⁷

The above powers and obligations should be given effect in the Gateway Legislation.

Aquifer interference approvals

Pursuant to the AIP⁵⁸, if a proposal goes through the Gateway Process, it will be *exempt* from the requirement to obtain an aquifer interference approval under the *Water*

⁵¹ Andrew Stoner MP, Deputy Premier of NSW, Minister for Trade and Investment, Minister for Regional Infrastructure and Services, Media Release, 1 December 2012, "Jock Laurie Appointed Inaugural Land and Water Commissioner".

⁵² EDO NSW, *Letter in response to CSG policy announcements* (July 2012), at:

http://www.edo.org.au/edonsw/site/pdf/subs/120713EDONSW_Letter_CSG_policy_announcements.pdf

⁵³ Strategic Regional Land Use Policy, Fact Sheet: Land and Water Commissioner, September 2012.

⁵⁴ In particular the NSW Environmental Protection Authority, Office of Environment and Heritage, NSW Soil Conservation Service, Office of Water, National Water Commission, and NICNAS (national chemical regulator).

⁵⁵ See, for example, Explanatory Memorandum to the *Environment Protection and Biodiversity Conservation Amendment (Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development) Bill 2012* (Cth) (**EPBC (IESC) Bill**), Outline, p 2; and cl 505D(1)(e)-(g) of that Bill.

⁵⁶ See EPBC (IESC) Bill 2012, clause 131AB (as assented to, 24 October 2012).

⁵⁷ The Independent Commission Against Corruption has made a similar recommendation in relation to decisions of the Planning Minister, where those decisions do not reflect the advice from the Department. See ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 8.

⁵⁸ The Aquifer Interference Policy (AIP) is to be considered by the Minister for Primary Industries when providing advice to the Gateway Panel before the Panel determines the application for a Gateway Certificate;

Management Act 2000 (NSW).⁵⁹ Presently, and until any correlative amendment is made to the *Water Management Act* and/or its Regulations, this exemption is in direct conflict with the Act. Under section 91F of the *Water Management Act*, it is an offence to carry out an aquifer interference activity without an approval.

The proposed exemption from obtaining an aquifer interference approval also undermines the measures currently under the *Environmental Planning and Assessment Act 1979* (NSW), which require SSD projects to obtain an aquifer interference approval.⁶⁰ EDO NSW supports a continued requirement that SSD projects must obtain an aquifer interference approval.⁶¹ This is consistent with the Government's policy to 'ensure that major projects are subject to greater scrutiny during the assessment and approval process.'⁶² Any attempt to 'integrate' AIP requirements any earlier in the process must be no less rigorous in terms of information, environmental studies, or thresholds for approval.

Recommendation 15: The proposed Gateway Legislation should be amended to require mining proponents to obtain an aquifer interference approval under the Water Management Act 2000 (NSW), notwithstanding any reference to the Aquifer Interference Policy by the Minister for Primary Industries in providing advice to the Gateway Panel. State significant development (SSD) should not be exempt from obtaining aquifer interference approvals.

Office of Water's assessment of impacts under Aquifer Interference Policy

Pursuant to the AIP, the scientific assessment of aquifer impact activities of a coal mining or CSG proposal is to be undertaken by the NSW Office of Water.⁶³

This assessment is to then inform the subsequent advice provided by the Minister for Energy and Resources to the Gateway Panel, the Planning Assessment Commission (**PAC**) or the Minister for Planning.⁶⁴

If the Gateway process applies to a particular aquifer interference activity, the AIP assessment is to inform the Minister for Energy and Resources' advice to the Gateway Panel. The AIP requires that the *Minister's* advice is to be made publicly available, however it does not specifically require that the NSW Office of Water's assessment is also to be made publically available.

State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012, 17G (3)(a).

⁵⁹ *NSW Aquifer Interference Policy*, published by NSW Office of Water, Department of Primary Industries, dated September 2012, page 10-11.

⁶⁰ *Environmental Planning and Assessment Act 1979* (NSW), s 89J(1)(g).

⁶¹ State Significant Developments (SSD) were initially proposed to be exempted from the Aquifer Interference Policy, when the SSD and AIP regimes was brought in in 2011; but this proposed exemption was removed after good faith negotiations between the Government, farmers and conservationists. However, the Government's planning Green Paper (August 2011) has again suggested a 'streamlining' of this process (p 59).

⁶² NSW Liberals & Nationals, *Strategic Regional Land Use – Triple bottom line assessment to protect our regions* (circa 2010-11), p 4.

⁶³ *NSW Aquifer Interference Policy*, published by NSW Office of Water, Department of Primary Industries, dated September 2012, page 11.

⁶⁴ *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012*, 17G(3); *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2012*, page 13

Recommendation 16: The proposed Gateway Legislation should be amended to include an obligation for the NSW Office of Water's assessment, provided to the Minister for Energy and Resources pursuant to the Aquifer Interference Policy, be made publically available.

The minimal impact assessment criteria under the Aquifer Interference Policy

The Aquifer Interference Policy (AIP) adopts minimal impact considerations, with the minimal impact assessment criteria being regularly reviewed and updated.⁶⁵ The AIP is based on predictive models and does not provide for regular review mechanisms to prevent projects from continuing where the impacts are greater than those predicted.

Gateway processes in other sectors can have multiple stages which assess a project to ensure it remains on track over time.⁶⁶ In this regard, the AIP lacks a process of iterative project assessment to track progress against predicted outcomes. This conflicts with the precautionary principle; a fundamental concept of ecologically sustainable development.⁶⁷

Applying the precautionary principle to the AIP, projects should be postponed or amended if serious adverse environmental impacts to aquifers and natural water systems are identified. The fact that these adverse impacts are recognised as risks and may not be supported by full scientific certainty as to their harm, should not be a reason to allow such projects to go ahead.

Pursuant to the minimal impact assessment outlined in the AIP,⁶⁸ once a project has passed through the Gateway and has been granted approval through the planning assessment process, it is more likely to then be granted the necessary water access licences by the Office of Water as the considerations to be applied in granting such licences (i.e. minimal impact assessment) will have already been addressed by the proponent. The flow on effect of this is that pursuant to the minimal impact assessment criteria imposed by the AIP, these water access licences are likely to be granted without any regard to the precautionary principle.

In light of the limited amount of scientific data on aquifer locations, composition and connectivity in a number of regions where CSG exploration is already taking place, it is particularly pertinent that the precautionary principle be included in the operation of any policies concerning the practices of CSG exploration and production in this regard.

Recommendation 17: The Aquifer Interference Policy's minimal impact criteria should be amended to include set limits that must be met. If a particular proposal does not, then that proposal must not be granted a Gateway Certificate under the Gateway Legislation.

⁶⁵ NSW Aquifer Interference Policy, published by NSW Office of Water, Department of Primary Industries, dated September 2012, page 14.

⁶⁶ See, for example, NSW Government, *Gateway Review Toolkit 2006* (for government procurement).

⁶⁷ This principle requires that: 'Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.' Principle 15 of the *Rio Declaration (1992)*; *United Nations Conference on Environment and Development, Rio, 1992 (the "Rio Declaration")*. See also *Protection of the Environment Administration Act 1991* (NSW), s 6; and the *Environmental Planning and Assessment Act 1979* (NSW) objects, s 5(a)(vii).

⁶⁸ NSW Aquifer Interference Policy, published by NSW Office of Water, Department of Primary Industries, dated September 2012, Table 1.

Recommendation 18: The Aquifer Interference Policy's minimal impact criteria should be amended to reflect the precautionary principle and enshrined in enforceable legislation.

Enforceability of the CSG Codes of Practice

All new CSG exploration licences and production leases (and renewals) will be subject to the Well Integrity Code of Practice⁶⁹ and the Fracture Stimulation Activities Code of Practice.⁷⁰ Although particular requirements within the Codes of Practice are to form enforceable conditions on title, a comprehensive list of best practices requirements in relation to well integrity and fracture stimulation activities is not contained in any enforceable legislation.

In addition, while the Codes identify the risks involved in certain CSG activities, the Codes should go further and identify what risks amount to serious environmental harm, which will in turn prevent a project from proceeding. This approach would be consistent with the precautionary principle – a key element of ecologically sustainable development, which underpins planning and environmental laws in NSW.

Recommendation 19: The Well Integrity Code of Practice and the Fracture Stimulation Activities Code of Practice should be enshrined in enforceable legislation, so that breaches of the Codes can be enforced, and proposals that do not meet the best practice requirements at the application stage are not approved.

Fracture Stimulation Management Plan

Pursuant to the Fracture Stimulation Activities Code of Practice,⁷¹ prior to the commencement of fracking, a Fracture Stimulation Management Plan (**FSMP**) is to be prepared by the titleholder and approved by the NSW Government.⁷² The FSMP identifies and demonstrates how all relevant issues associated with the fracking will be managed to ensure that residual risks to the environment, community and workforce are reduced to acceptable levels.⁷³

A risk assessment covering specified issues is required to be included in the FSMP which complies with standards under the AS/NZS ISO 31000:2009 Risk management.⁷⁴ In regard to this risk assessment, the Fracture Stimulation Activities Code of Practice does not provide

⁶⁹ *NSW Code of Practice for Coal Seam Gas Well Integrity*, published by the NSW Trade and Investment, Department of Trade and Investment, Regional Infrastructure & Services Resources & Energy, September 2012

⁷⁰ *NSW Code of Practice for Coal Seam Gas Fracture Stimulation Activities*, published by the NSW Trade and Investment, Department of Trade and Investment, Regional Infrastructure & Services Resources & Energy, dated September 2012.

⁷¹ *NSW Code of Practice for Coal Seam Gas Fracture Stimulation Activities*, published by the NSW Trade and Investment, Department of Trade and Investment, Regional Infrastructure & Services Resources & Energy, dated September 2012.

⁷² *NSW Code of Practice for Coal Seam Gas Fracture Stimulation Activities*, published by the NSW Trade and Investment, Department of Trade and Investment, Regional Infrastructure & Services Resources & Energy, dated September 2012, page 2.

⁷³ *NSW Code of Practice for Coal Seam Gas Fracture Stimulation Activities*, published by the NSW Trade and Investment, Department of Trade and Investment, Regional Infrastructure & Services Resources & Energy, dated September 2012, page 2.

⁷⁴ *NSW Code of Practice for Coal Seam Gas Fracture Stimulation Activities*, published by the NSW Trade and Investment, Department of Trade and Investment, Regional Infrastructure & Services Resources & Energy, dated September 2012, page 5.

any guidance to operators, the community or agencies in relation to when fracking ought not to occur due to the risks of impacts on water resources being too great.

Moreover, under the Fracture Stimulation Activities Code of Practice:

1. if the risk assessment for water resources identifies that there is a moderate or higher risk of cross contamination between coal bed waters and other water resources then a 'fate and transport model study' (*sic*) must be undertaken (to quantify impacts and the changes to the beneficial use of the aquifer by other aquifer users)⁷⁵; and
2. where there is a moderate or higher risk of significant changes to pressure or levels of groundwater or surface water, the impacts of these changes need to be quantitatively assessed.²⁰

It is unclear how the above approach to risk assessment regarding impacts on water resources under the Code is to work in conjunction with similar provisions provided for in the AIP.

Under the AIP, the minimal impact criteria requires further assessment when moderate and higher risks of cross contamination of coal bed waters and fresh water aquifers and/or depressurisation of aquifers are identified.⁷⁶ However, this minimal impact assessment does not refer to a prohibition on fracking where there is a moderate or higher risk of these impacts occurring.

The NSW Government needs to clarify how the Fracture Stimulation Activities Code fits within the proposed Gateway Legislation, particularly in relation to the AIP.

Further, much like the requirements included in the Well Integrity Code, the requirements under the Fracture Stimulation Activities Code of Practice are premised on the view that adaptive management or mitigation is an appropriate response to the risks identified. This approach fails to provide a process by which the actual risks are to be dealt with should the risk management approach fail. Such processes could include licence cancellation or suspension in response to a breach of the best practice requirements under the Code.

Recommendation 20: The Fracture Stimulation Activities Code of Practice should be amended to adopt a precautionary approach whereby if a proposal entails certain identified risks then that proposal is not approved.

Draft guideline for the use of cost-benefit analysis in mining and CSG proposals

EDO NSW notes that the Government has released a *Draft guideline for the use of Cost Benefit Analysis in mining and coal seam gas proposals* alongside the draft Gateway legislation.⁷⁷ Our expertise lies in legal and environmental law and policy, and this submission does not consider the draft guideline in detail. Nevertheless, we welcome the

⁷⁵ *NSW Code of Practice for Coal Seam Gas Fracture Stimulation Activities*, published by the NSW Trade and Investment, Department of Trade and Investment, Regional Infrastructure & Services Resources & Energy, dated September 2012, page 8.

⁷⁶ *NSW Aquifer Interference Policy*, published by NSW Office of Water, Department of Primary Industries, dated September 2012, Table 1.

⁷⁷ Available at Department of Planning and Infrastructure website (accessed December 2012), at <http://www.planning.nsw.gov.au/Development/Onexhibition/tabid/205/ctl/View/mid/1081/ID/102/language/en-AU/Default.aspx>.

input of Economists at Large, who note that there is considerable room for improvement in the way cost benefit analysis are used to assess coal mining and CSG projects.⁷⁸

Relevant issues raised by Economists at Large include querying whether cost benefit analysis should be at the proponent's discretion; clear scope of analysis; use of peer review; the need to consider important aspects such as public health costs and greenhouse gas emissions (direct and indirect); equity of impacts and costs; and the use of appropriate discount rates to ensure that long-term, low-likelihood but high consequence environmental impacts are appropriately considered.

⁷⁸ Campbell, R., Lee, J., 2012, *Submission on NSW Government Guideline for the use of Cost Benefit Analysis in mining and coal seam gas proposals*, prepared by Economists at Large, Melbourne, Australia.