

16 July 2014

Director of Assessment Policy Systems and Stakeholder Engagement
Department of Planning & Environment
23-33 Bridge Street
Sydney NSW 2000

Submitted online: http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=6596

Dear Director

Draft Environmental Planning & Assessment Amendments (Mining and Petroleum Development) 2014 and related Mining SEPP Amendments

As a community legal centre specialising in public interest environmental law, EDO NSW welcomes the opportunity to comment on the Department of Planning & Environment's proposal to amend coal seam gas (CSG) and mining law and policy.¹ We note these changes would amend the:

- *Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act)*,
- *Environmental Planning and Assessment Regulation 2000 (EP&A Regulation)*, and
- *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)*.

EDO NSW recognises the need for clarity in the Gateway process and acknowledges that current legislative instruments should be updated to reflect progressive Strategic Agricultural Land (SAL) mapping. However, we have concerns regarding some aspects of the proposed amendments. In order to achieve the best possible outcomes from the finalised legislation and policy, we make a number of comments and recommendations below. These comments are structured to reflect the order of issues in the Government's explanatory document,² i.e.:

1. **Clarification of the 'five wells/3km rule'** (the issue of main concern to EDO NSW)
2. **'Minor modifications' to approved CSG projects in exclusion zones**
3. **Update Gateway commencement date in savings and transitional provisions.**³

We also note that EDO NSW has made prior submissions raising serious concerns with other parts of the Mining SEPP.⁴ Accordingly we make an upfront recommendation.

Recommendation:

- *EDO NSW urges the Government to address significant concerns with other aspects of the Mining SEPP raised in previous consultations. This includes the elevated*

¹ Under the draft *Environmental Planning and Assessment Amendment (Mining and Petroleum) Regulation 2014 (EP&A Amendments)* and draft *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2014 (Mining SEPP Amendments 2014)*.

² NSW Dept of Planning, 'Explanation of the intended effect', July 2014, available on [NSW Planning website](#).

³ This submission does not comment on 'Mapping issues' in relation to additional Critical Industry Cluster land.

⁴ Submissions available at: http://www.edonsw.org.au/mining_coal_seam_gas_policy. See for example, *Submission on amendments to the Mining SEPP Amendment (Resource Significance) 2013* - [Download PDF](#); *Submission on Coal Seam Gas Exclusion Zones in NSW (2013)* - [Download PDF](#); *Submission on draft Gateway process for Strategic Regional Land Use Policy (2012)* - [Download PDF](#).

prioritisation of economic benefits of mining projects in 2013; and the lack of protection for mapped High Conservation Value lands under the Strategic Regional Land Use Policy (SRLUP) and exclusion zones.⁵

1. Clarification of the 'five wells/3km rule' (assessment of CSG exploration)⁶

EDO NSW opposes this amendment to the *SEPP (State and Regionally Significant Development) 2011 (SRSD SEPP)*⁷ and cl. 7 of the Mining SEPP. It is more appropriate to adopt a clear, plain and more conventional reading of well distance in the SRSD SEPP. EDO NSW submits that for the purposes of the 'five wells/3km rule' (discussed below), the distance of a set of up to five new CSG wells should be taken as the shortest distance between a proposed well and any other existing well, not at the 'geometric centre' of the set of new wells.

Currently, development for the purposes of 'drilling or operating petroleum exploration' (including CSG) is classed as State Significant Development (**SSD**). One exception to this is where a set of five or fewer wells is more than 3 kilometres from any other petroleum well in the same petroleum title (**the five wells/3km rule**).⁸

The relevant amendments in the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2014* represent a significant change in the method for determining whether CSG projects are classified as SSD. This is important because all SSD project applications need development consent, and must be accompanied by an Environmental Impact Statement (**EIS**).⁹ These amendments propose to calculate the '3 kilometres' distance of a new set of up to five CSG wells by reference to the 'geometric centre' of the set.

EDO NSW is concerned about this change and opposes it for a number of reasons below.

First, the changes reduce the scope of CSG exploration that would be subject to an EIS (see diagrams at **Attachment A**). For example, one or more proposed wells could be within 3km of other existing wells (which on an ordinary reading of the existing legislation would trigger an EIS) – but if the 'geometric centre' of the set of proposed wells is *more than* 3km away, the development will escape classification as SSD. Instead it would be assessed under Part 5 of the EP&A Act, without development consent, and requiring only a small-scale 'review of environmental factors' (**REF**). EDO NSW has previously flagged concerns about the adequacy of REFs for CSG projects.¹⁰ This includes a lack of transparency, limited government oversight and no public consultation process (as distinct from the 28 day exhibition period for an EIS). Indeed, this is why the Government introduced the general rule that CSG production and 'most' exploration would be assessed as SSD.

Second, 'geometric centre' is not defined, and the equations for determining it can be complex.¹¹ The geometric centre is likely to be beyond the community's ability to independently assess in many cases. This is further complicated where there are multiple

⁵ We understand the term 'High conservation value' was used in the mapping process during initial SRLUP development (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, Mining SEPP cl 3).

⁶ See Mining SEPP Amendments 2014, Sch. 1 item [1] & Schedule 2.

⁷ *SEPP (State and Regionally Significant Development) 2011 (SRSD SEPP)*, Schedule 1, clause 6(2)(c).

⁸ SRSD SEPP Sch. 1 cl. 6(2). Development for the purposes of *petroleum production* is also classed as SSD (cl. 6).

⁹ *EP&A Act 1979* (NSW) s 78A(8A). The SRSD SEPP (Sch. 1, cl. 6) sets out petroleum (oil and gas) that is SSD.

¹⁰ See EDO NSW, [Submission to NSW CSG Inquiry - Appendix 1 - Flaws in the REF process](#) (Sept 2011).

¹¹ See, for example, Bourke, Paul (July 1997). "[Calculating the area and centroid of a polygon](#)".

groups of wells and it is unclear how the wells will be grouped. Against this, any advantages of the 'geometric centre' approach over a plainer reading are not made clear.

Third, the added complexity of the proposed approach, and reduced need for EISs, limits transparency and community oversight of new CSG developments at a time when such projects are highly contentious and their environmental effects uncertain. Furthermore, the similarity of processes between CSG exploration and production warrant scrutiny upfront.

Fourth, the immediate effect of this amendment appears to reduce the environmental assessment and public consultation requirements for the Gloucester Gas Waukivory Pilot Project. EDO NSW, on behalf of a local community member, raised concerns about this project's compliance with the '3km rule' in a letter to the Office of CSG in November 2013. Significantly, no substantive response has been received to this query prior to the current exhibited amendments. Reports have suggested that the Waukivory project has prompted the five wells/3km rule to be 'clarified' in the proposed manner.¹² However, this project is not explicitly noted in any of the explanatory documents as the prompt for the change. Whether or not this is the case, EDO NSW does not support these amendments. Furthermore, EDO NSW does not support special legislation or policy development driven by individual projects, as this undermines community confidence in fair and consistent decision-making in accordance with the rule of law.

Finally, if the proposed changes to the Mining SEPP concerning reduced environmental assessment could adversely affect critical habitat or threatened species, populations or ecological communities, or their habitats, this may trigger consultation requirements with the Director of the Office of Environment & Heritage under s 34A of the EP&A Act.

Recommendations:

- *EDO NSW recommends that, for the purposes of the 'five wells/3km rule' determining whether a CSG project is State Significant Development, the 3km threshold should be taken as the shortest distance between an existing well and a proposed well, and not a more complex formula such as the 'geometric centre'.*
- *If the Mining SEPP Amendment 2014 may affect critical habitat or threatened species, populations or ecological communities, or their habitats (whether in relation to the five wells/3km rule, or other amendments) the Director-General must fulfil EP&A Act obligations to consult with the Director, Office of Environment & Heritage.*

2. 'Minor modifications' to approved CSG projects in exclusion zones¹³

If this amendment proceeds, EDO NSW suggests four additional clarifications below.

Currently all new CSG activities are subject to CSG exclusion zones in certain areas.¹⁴ For existing projects, the Government's explanatory document notes that, when first implemented, the exclusion zones drew no distinction between 'minor/operational modifications' and 'modifications that would expand, enlarge or intensify operations to extract CSG.'¹⁵

¹² See for example, *Sydney Morning Herald*, 7 July 2014, www.smh.com.au/environment/water-issues/legal-tweak-may-fasttrack-agl-gloucester-fracking-20140707-zsyvg.html.

¹³ See Mining SEPP Amendments 2014, Sch. 1 item [2].

¹⁴ Around most residential-zoned land; 'Biophysical SAL'; and 'Critical Industry Cluster' land.

¹⁵ 'Explanation of intended effect', p 2; *SEPP (Mining, Petroleum Production & Extractive Industries)* 2007 cl 9A.

Accordingly, the amendments to the Mining SEPP (cl. 20) seek to allow ‘minor modifications’ to certain CSG projects – that already have prior Part 3A approval or development consent – within exclusion zones.¹⁶ Modifications for these projects could take place if three conditions are satisfied, namely:

- The Minister or consent authority (e.g. senior Planning Department officials or the Planning Assessment Commission) is satisfied that the modification is of ‘minimal environmental impact’ (which is not defined or expanded on); and
- Any drilling or well operation authorised by the modification relates to a well already approved as at 3 October 2013 (the date of implementation for exclusion zones¹⁷), and does not result in increased *depth* or *lateral extent* of the well; and
- The development is carried out in compliance with the conditions of the modified approval/consent.

Recommendations:

- *EDO NSW recommends further clarification is needed on what constitutes ‘minimal environmental impact’. To limit the Minister’s or consent authority’s discretion in this regard, strict criteria or binding guidelines should be established which a decision maker must comply with when determining the environmental impact of a modification.*
- *Clarify that modifications of minimal environmental impact must not include:*
 - *hydraulic fracturing (the amendments and explanatory documents do not address the issue of fracking); or*
 - *activities that may affect ‘environmentally sensitive areas’,¹⁸ or threatened species, populations or ecological communities, or their habitats.*
- *Clarify that (prohibited) increase in ‘lateral extent’ of a well means extent in length along the coal seam (as opposed to an increase in the width of the well).¹⁹*

3. Update Gateway commencement date in savings & transitional provisions²⁰

In relation to this amendment, EDO NSW proposes some additional safeguards around ‘non- or pre-Gateway’ mining projects below.

Currently, development applications for (and modifications to) mining and CSG projects on SAL must go through the Mining and Petroleum Gateway Panel (**Gateway Panel**).²¹ Specifically, the Gateway Panel must issue a ‘Gateway Certificate’ or a ‘Site Verification Certificate’ for projects where environmental assessment requirements (**DGRs**²²) were

¹⁶ i.e. modifications to transitional Part 3A projects that are approved, or are the subject of an approved ‘concept plan’; and modifications to projects that were granted development consent before exclusion zones commenced in 2013. See existing Mining SEPP cl 20(1A) and Mining SEPP Amendments, Sch. 1 item [2].

¹⁷ NSW Govt joint ministerial media release, ‘NSW Government protects key farmland and homes’, 3/10/2013.

¹⁸ The Mining SEPP 2007 (cl .3) defines ‘environmentally sensitive areas of State significance’

¹⁹ See for example, NSW Office for Water website, ‘[How coal seam gas is extracted in NSW](#)’.

²⁰ See EP&A Amendments 2014, Sch. 1 (amending EP&A Act, Schedule 6A cl. 20) & Sch. 2 (amending EP&A Regulation, cl. 50A & 119A); and Mining SEPP Amendments 2014, Schedule 1, items [3]-[4].

²¹ *Environment Planning and Assessment Act 1979* (NSW) Sch. 6A cl. 20; *EP&A Regulation 2000*, cl. 50A, 119A; Mining SEPP 2007, cl. 21. The Gateway Panel undertakes a scientific assessment of the agricultural impacts of projects on SAL (see Mining SEPP 2007, Part 4AA).

²² Environmental Assessment Requirements (Director-General’s Requirements) under EP&A Reg. Sch. 2, Part 2.

granted (or modification applications made) after 10 September 2012. This is the date of publication of SAL maps for the Upper Hunter (**UH**) and New England North West (**NENW**).

We understand that these amendments retain the same date for the UH and NENW regions. For *other regions*,²³ a new date is proposed from which such Certificates are required for development applications and modification applications located on SAL (i.e. 3 October 2013, when draft SAL maps for other regions were exhibited). Therefore, a CSG or mining project application or modification outside the UH or NENW regions will *not* be subject to the Gateway process if DGRs had been issued by 3 October 2013 (provided the land was not mapped as SAL before 28 January 2014, when SAL for the other regions were finalised).

Finally, the amendments to the EP&A Act and Regulation also state that, with regard to such applications that do not require Certificates, the Minister or Director-General of Planning *may* seek advice from the Gateway Panel. There is no *requirement* that the Gateway Panel be consulted. EDO NSW is concerned that these latter provisions provide too much discretion.

Recommendation:

- *The relevant proposed amendments (to EP&A Act, Schedule 6A clause 20; EP&A Regulation, clauses 50A(3B) and 119A(5B); and Mining SEPP, clause 21) should require that the Minister or Director General 'must' (instead of 'may') seek the Gateway Panel's advice when dealing with applications that do not require Gateway/Site Verification Certificates (prior to relevant commencement dates).*²⁴

We hope this submission and recommendations are of assistance to the Department. In conclusion, we reiterate our broader concerns with the balance of assessment considerations under the Mining SEPP, and the lack of protection for ecological values under the SRLUP and CSG exclusion zones, as raised in previous submissions noted on page 1. We would be happy to provide a brief summary of key recommendations in this regard.

For further information please contact Mr Nari Sahukar, Senior Policy & Law Reform Solicitor on 02 9262 6989.

Yours sincerely,

EDO NSW

[signed]

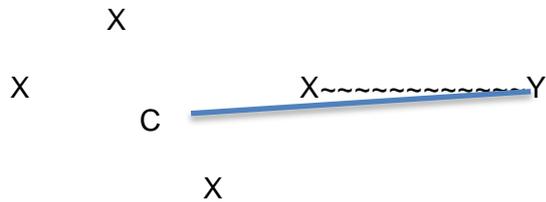
Rachel Walmsley, Policy Director

²³ Such as Central West; Mid and Far North Coast, Southern Highlands, Western, South Coast and Illawarra.

²⁴ Additional wording to give full effect to this recommendation could be along the following lines: *'However, the Minister or the Director-General, in dealing with an application referred to in [subclause (10A); (3) or (3A); or (5) or (5A)] must seek the advice of the Gateway Panel, and address any key issues raised by the Gateway Panel by notifying the proponent of any additional environmental assessment requirements appropriate to address those issues [as permitted under Schedule 2, subclause 3(5) of the EP&A Regulation].'*

ATTACHMENT A – Distorting effect of proposed interpretation of ‘five wells/3km rule’

As noted, in our view, the more conventional and appropriate interpretation of the SRSD SEPP 2011 (Schedule 1, clause 6(2)(c)) would measure the distance from a set of up to five proposed wells from the closest well in the set to any other existing well. We demonstrate the difference in the diagram and explanation below.



- The Xs above represent a set of four proposed wells.
- C represents their ‘geometric centre’ (as calculated by a relevant formula).
- Y is another hypothetical well within the same petroleum title.
- The line X~Y is the distance from the nearest X well, to existing well Y (i.e. using a plain reading, conventional interpretation of Schedule 1, cl. 6(2)(c)).
- The line C-Y is the distance from the geometric centre of the set of X wells to well Y (new interpretation based on ‘geometric centre’, as per proposed amendment).

Under the conventional interpretation, if the distance X~Y is 3 km (or less), then the proposed set of X wells will be SSD, and will need an EIS and development consent under Part 4 of the EP&A Act. However, under the proposed new interpretation, as the distance C-Y is *more than* 3km, the same set of X wells will *not* be SSD and could instead be approved by the Office of CSG without public consultation on the small-scale REF. The same problem arises for the different orientation of proposed X wells and existing Y wells below, despite the fact that the new wells are so close to the existing ones:

