



Submission on the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Significance of Resource) 2015*

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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Executive Director
Resources and Industry Policy
Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

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For further information on this submission, please contact:

Rachel Walmsley, Policy & Law Reform Director, EDO NSW
T: 02 9262 6989
E: rachel.walmsley@edonsw.org.au

EDO NSW

ABN 72 002 880 864
Level 5, 263 Clarence Street
Sydney NSW 2000 AUSTRALIA
E: edonsw@edonsw.org.au
W: www.edonsw.org.au
T: + 61 2 9262 6989
F: + 61 2 9264 2412

Introduction

This submission concerns the proposed *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Significance of Resource) 2015 (SEPP amendment)* exhibited on 7 July.

As a community legal centre specialising in public interest environmental law, EDO NSW has a strong interest in the regulatory framework for mining, and we have contributed to a range of mining policy consultations.¹ Mining issues continue to dominate community requests to our office for legal education workshops. Calls about mining issues also represent a significant share of public enquiries to our telephone advice service, particularly from rural and regional areas.

We strongly **support** the proposed SEPP amendment to repeal clause 12AA of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)*. This amendment will remove certain provisions that relate to the significance of the resource being the principal matter for consideration by the consent authority under Part 3 of the Mining SEPP.

We note that consent authorities will still be required to consider a range of factors when assessing a development under the Mining SEPP and the *Environmental Planning and Assessment Act 1979* including relevant social, environmental and economic impacts.

We also note that this amendment does not address all outstanding community concerns with the current process and therefore we welcome the statement that this is a “first step” in reviewing the Mining SEPP and there will be an opportunity for further reform.

One example of ongoing concern with the Mining SEPP relates to the thresholds set by ‘non-discretionary development standards’ inserted at the same time as the resource significance provisions. Our 2013 submission raised a number of concerns with these thresholds, and requirements relating to certification of biodiversity impact mitigation by the NSW Office Environment and Heritage (OEH).² These are summarised further below.

The 2013 amendment – prioritising economic benefits of resource extraction

EDO NSW has consistently **strongly opposed** the prioritisation of economic benefits of minerals as the ‘principal consideration’ over other economic, social and environmental impacts of mining proposals. The law should not distort the rigour of the NSW development assessment process by requiring decision-makers to prioritise the economic benefits of mining ahead of any negative impacts, or more appropriate land uses.

It was not a sound legal insertion from the outset. There are many important matters that must be responsibly considered when determining whether to approve or refuse a mine. A best practice planning system does not prioritise the economic benefits of mining a particular resource over the health and well-being of its communities and environment.

¹ For example, NSW Legislative Council Inquiry into coal seam gas (CSG), Draft Aquifer Interference Policy, Draft Code of Practice for CSG Exploration, Division of Mineral Resources’ Draft EIA Guidelines, establishment of the NSW Land and Water Commissioner and royalties reforms, CSG exclusion zones, Senate Inquiry on the Independent Scientific Expert Committee on CSG and Large Coal Developments, COAG draft national harmonised regulatory framework for CSG, and the new ‘water trigger’ under the EPBC Act. These submissions are available at: http://www.edo.org.au/edonsw/site/policy_submissions.php#3.

² EDO NSW, *Submission on amendments to the Mining SEPP*, August 2013, pp 7-12 - [Download PDF](#).

The previous SEPP amendments to Part 3 of the Mining SEPP created significant community concern, mistrust and uncertainty. This is despite being ostensibly designed to “increase confidence for investors and the community about how decisions are made on mining proposals” and to “properly” balance “economic and environmental issues...”.³ We understand that the provisions were inserted in response to calls from the mining industry after Rio Tinto’s Warkworth Mine expansion was refused by the NSW Courts.

At the time we raised five main concerns with the 2013 amendment,⁴ namely that it:

- 1) reinforced that the approval of mines and the consequent encroachment on villages and biodiversity is acceptable and/or inevitable;
- 2) pre-empted and undermined evidence-based strategic planning;
- 3) prioritised short-term gains instead of a landscape approach to land use planning;
- 4) prioritised ‘economic benefits’ of mining without equal emphasis on ‘costs’ to neighbouring communities, land users and the environment.⁵ This skews the decision making process, instead of relying on the actual weight of the evidence before the decision-maker. This is contrary to the Warkworth decisions that highlighted the need for more robust economic analysis of mining projects, and greater scrutiny of economic modelling put forward by proponents;⁶ and
- 5) increased discretion of DTIRIS, and exacerbated the perception of potential conflicts of duties between promoting and regulating the mining industry (highlighted by the NSW Ombudsman in the context of CSG⁷); and raised perceptions of poor governance, further eroding public trust in decision-making about mining development.⁸

We noted in 2013 that the amended SEPP was unlikely to achieve the stated aim of requiring that economic and environmental issues are ‘properly balanced’. In our view, the amended SEPP was also likely to decrease, rather than increase, the NSW community’s confidence about how decisions are made on mining proposals. It was also likely to reinforce community perceptions that mining industry regulation, more than any other industry, is ‘too lax’.⁹ These predictions proved to be correct.

³ NSW Department of Planning and Infrastructure website, at

http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=6065, accessed August 2013.

⁴ EDO NSW, *Submission on amendments to the Mining SEPP*, August 2013 - [Download PDF](#).

⁵ Negative impacts or costs that will become secondary considerations to a mineral resource’s ‘significance’ (under Part 3 of the Mining SEPP) may include, for example:

- the effects on neighbouring towns and villages and their supporting environment (water, native vegetation, threatened species and habitats);
- people’s sense of place and heritage in NSW, including Aboriginal cultural heritage;
- impacts of mining on other industries (such as agriculture, viticulture, clean energy);
- costs of foregoing development of other industries and land uses, post-mining boom.

⁶ See *Bulga Milbrodale Progress Association Inc v Minister for Planning & Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48, at 450-496. In particular:

[451] *The [Input-Output] analysis is a limited form of economic analysis... The deficiencies in the data and assumptions used affect the reliability of the conclusions.... More fundamentally... the IO analysis does not assist in weighting the economic factors relative to the various environmental and social factors...*

[452] *The [Benefit Cost Analysis], and the Choice Modelling on which the BCA depends, are also deficient...*

[453] *At best, the two forms of economic analysis... provide some information about some of the relevant matters that are to be considered... in determining whether or not the Project should be approved.*

⁷ See NSW Ombudsman, *Submission to NSW Legislative Council Inquiry into Coal Seam Gas* (Sept. 2011).

⁸ See NSW Office of Environment & Heritage, *Who Cares About the Environment in 2012?* (2013), pp 41-42, noted above.

⁹ See NSW Office of Environment & Heritage, *Who Cares About the Environment in 2012?* (2013), a survey of over 2000 people in NSW. In response to a question about regulation of different sectors, by far the most common response was that mining regulation is ‘too lax’ (49% of respondents). Only 10% of respondents thought mining regulation was ‘too strict’. For almost all other sectors mentioned (fishing, farming, individuals, tourism, retail and forestry), the most prevalent response was that regulatory strictness is ‘about right’ (the other exception, apart from mining, was the property/ construction sector). See full report, pp 41-42, at www.environment.nsw.gov.au/community/whocares2012.htm.

By contrast, we have consistently submitted the need for more robust and balanced environmental, social and economic criteria in development decision-making processes; and the need to ensure that development assessment and approval ultimately aims to achieve ecologically sustainable development (**ESD**).

Amended objects of the Mining SEPP

In addition to the repeal of clause 12AA, EDO NSW would support the repeal of clause 2(b1) of the Mining SEPP, which inserted a new object 'to promote the development of significant mineral resources' as part of the 2013 amendments. The exhibited amendments do not repeal clause 2(b1). However, this additional object is unnecessary, particularly with the repeal of clause 12AA.

As our submission noted at the time, the pre-existing aims of the Mining SEPP are sufficient to promote the development of significant mineral resources, without the need for an additional aim. The Mining SEPP already recognises 'the importance to New South Wales of mining', and provides for 'the proper management and development of mineral... resources for the purposes of promoting the social and economic welfare of the State'.

In addition to repealing the unnecessary 'significant mineral resources' aim, we submit that the Mining SEPP should be strengthened by specific reference to 'the *ecologically sustainable* development' of relevant resources as part of the broader review.

Non-discretionary development standards

As noted, in 2013 EDO NSW commented on the specific development standards inserted as part of the same Mining SEPP amendment package. We were concerned that the drafting of these 'one-way' standards tends to favour mining proponents. In particular, where a project met the standards, decision-makers could not set more stringent limits, even if the circumstances warranted this (for example, in sensitive environments). But if the project *fell short* of the standards, the decision maker still had discretion to approve the project.

We noted that in principle, specific environmental and social impact standards for assessing mining projects must be robust, enforceable, and fair; subject to continuous improvement, and regular and independent review; and permit decision-makers to set more stringent limits.

Our specific comments on the 2013 development standards can be summarised as follows:

- *Cumulative noise levels* – the requirements should:
 - specify compliance with the 'acceptable' (not maximum) noise levels in the Industrial Noise Policy (**INP**) Table 2.1, with a view to consulting on the appropriateness of the INP's current levels;
 - permit decision-makers to require lower noise limits where appropriate, including by reference to the INP's intrusive noise criteria for quieter environments; and
 - apply to all residences regardless of ownership, and to 'sensitive receivers' (defined to include natural areas).
- *Air quality levels* – requirements should include both annual averages and daily maximums for PM10 particles and PM2.5 (improved in line with our air quality NEPM)

recommendations¹⁰); should apply to all residences; and require continual improvement.

- *Air blast overpressure and ground vibration* – decision-makers should be able to set lower limits where appropriate, and ‘sensitive receivers’ should include natural areas.
- *Aquifer interference* – while we support increased requirements to apply standards under the Aquifer Interference Policy (**AIP**), we retain significant concerns about the thresholds and exemptions in the AIP itself.
- *OEH certification* – The reference to OEH certification in new clause 14(2) is vague, as it does not clarify the context for certification. Nor does it point to safeguards to ensure that mitigation and offset of biodiversity impacts are assessed against robust standards.¹¹ EDO NSW also recommended this item require decision-makers to comply with (or at least take account of) *any* OEH advice on proposals to mitigate or offset biodiversity impacts, including where OEH finds measures are *not* adequate.

Conclusion

EDO NSW supports the repeal of the ‘principal consideration’ of the economic significance of a mining resource project as a requirement in the Mining SEPP. We would also support removing the accompanying object added by clause 2(1b), as resource significance can be sufficiently considered under the SEPP’s pre-existing aims. The ‘principal consideration’ amendments made in 2013 have had a range of undesirable consequences which threaten the integrity and public confidence in the mining assessment process.

We welcome ongoing review of the Mining SEPP. In order to maintain public trust and integrity of decision-making, we recommend that the Mining SEPP should be amended to promote the *ecologically sustainable* development of significant mineral resources; and to require that consent authorities consider both the benefits *and costs* of developing the resource (that is, the positive and negative impacts of the proposed project).

Our 2013 submission also raised concerns with the nature and thresholds of the ‘non-discretionary development standards’ inserted into the Mining SEPP at the time. The Department should reconsider those concerns as a priority under the broader SEPP review. It should also strengthen standards in line with ongoing developments since 2013, such as proposed changes to the National Environmental Protection Measure for Ambient Air Quality.

EDO NSW would be happy to be involved in further consultation on how the Mining SEPP could be strengthened to better consider environmental, social and economic factors.

¹⁰ See: EDOs of Australia *Submission on the Draft Variation to the National Environment Protection (Ambient Air Quality) Measure*, October 2014, that supports an annual average for PM10 of 20µg/m³ and a 24-hour average of 40µg/m³, and an annual average for PM2.5 of 25µg/m³ and a 24-hour average of 8µg/m³ with a stated goal of reducing this to an annual average of 20µg/m³ and a 24-hour average of 6µg/m³ within 5 years.

¹¹ Key safeguards include a clear goal to *improve or maintain* environmental outcomes; requirements to *avoid and mitigate* first (offsets as a last resort); *like-for-like* offsetting to ensure compensating gains are equivalent; *red-flag* protections that exclude offsetting from high value areas; ensuring offsets are *additional* to what would happen anyway; minimal use of *indirect offsets*; and *in-perpetuity* protections, not ‘offsets for offsets’.