NSW EDO
DEFENDING THE ENVIRONMENT
ADVANCING THE LAW

Submission on Stage 2 of the Integrated Mining Policy

prepared by

EDO NSW
7 September 2015

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.

Submitted to:

The Executive Director - Resources & Industry Policy
NSW Department of Planning & Environment
GPO Box 39
Sydney
NSW 2001

For further information on this submission, please contact:

Dr Emma Carmody,
Policy & Law Reform Solicitor
EDO NSW
T: 02 9262 6989
E: emma.carmody@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

EDO NSW welcomes the opportunity to comment on Stage 2 of the Integrated Mining Policy (**Stage 2 of the IMP**). Our comments form part of a significant body of policy and law reform work concerning planning and mining in NSW.

EDO NSW is generally supportive of the documents that comprise Stage 2 of the IMP. These documents are clearly intended to improve the transparency and accountability of companies engaging in state significant mining developments.

However, certain amendments to these documents would enhance their capacity to value-add to the current regulatory regime. Our recommendations, which are outlined below, are based on our practical experience as environmental lawyers and on feedback received from the community.

We would also welcome the opportunity to discuss specific matters raised in this submission in person.

Finally, we note that concerns remain regarding certain aspects of Stage 1 of the IMP, in particular the Swamps Offset Policy. We look forward to working with you on improving laws and policies designed to protect these fragile, unique ecosystems. Specifically, we reiterate the importance of avoiding impacts as peat cannot be rehabilitated. This can be achieved by creating red flag areas and focussing on appropriate mine layout.

This submission will cover the following areas:

1. General comments
2. Post-Approval Guidelines – Independent Audits (**Independent Audit Guidelines**)
3. Post-Approval Guidelines – Annual Review (**Annual Review Guidelines**)
4. Post-Approval Guidelines – Web-Based Reporting Framework (**Web-based Reporting Guidelines**)
5. Water Regulation and Policy – Application to Mine and Petroleum Developments in NSW (**Water Regulation and Policy Framework**)
6. Planning Agreement Guidelines – For State Significant Mining Projects (**Planning Agreement Guidelines**)
7. Agreements as to conduct and other agreements – gag clauses

1. General comments

While EDO NSW generally supports Stage 2 of the IMP, we note that it is not linked to enforceable legislative provisions. Questions therefore remain regarding the extent to which it will result in tangible improvements to the auditing and reporting processes.

Please note that we use the terms approval and approval conditions in this submission to refer to all relevant consents, licences and leases and associated conditions.

2. Independent Audit Guidelines

We wish to make some brief comments regarding the following matters:

- The Guidelines state that 'State Significant developments may be required to undertake periodic independent audits.' This statement highlights the discretionary nature of the auditing process. For auditing to improve compliance rates across the State, it needs to be undertaken on more than an ad-hoc basis.

- The Guidelines indicate that audit criteria 'may' require consideration of a range of approvals and approval documents. We are therefore concerned that these Guidelines do not require compliance to be assessed against the specific requirements of various approvals.

- We further note that as significant components of state significant mining projects are dealt with in plans of management, it is imperative that the auditing process assess the extent to which these plans are fit for purpose.

- Finally, these Guidelines allow the proponent to select its own audit team (subject to approval by the lead regulator). Based on our experience – and despite the requirement to demonstrate the team's independence - the community is likely to question the impartiality of a team chosen by the proponent.

Recommendations

The Independent Audit Guidelines should be amended to include:

- a requirement that auditing assess compliance with all approvals and associated conditions (or in the alternative a requirement to assess a minimum, specified set of approvals and conditions, with flexibility to add additional matters relevant to the particular project);
- a requirement that compliance with approvals and approval conditions be based – where appropriate - on raw monitoring data;
- a requirement that the auditing process include assessment of all plans of management with a view to determining whether amendments to these plans are necessary to ensure compliance with conditions of consent and more generally whether the outcomes outlined in plans are being achieved;
- a requirement that the auditing process assess all plans and strategies regarding cumulative impacts which are developed with neighbouring mines (as required by certain

conditions of consent – see Case Study 1, below). Auditing should consider whether these plans and strategies are meeting conditions of consent and are generally fit for purpose following analysis of monitoring data;

- a requirement that the audit team be selected by the lead regulator. A list of suitably qualified and independent experts should be compiled by the relevant government agencies to facilitate this process;
- a mandatory timeframe (for example 14 days) within which the final audit report is to be published on the development's website;
- a requirement that the auditor consult with any relevant community groups or individuals (as well as the Chair of the development's Community Consultative Committee) to obtain feedback/draw the auditor's attention issues of concern; and
- a requirement that the audit report include an appendix listing any amendments made by the company to the draft audit report.

We also note that:

- standard conditions requiring independent auditing to be undertaken at particular intervals should be developed and included in all consents for state significant mining developments and modifications to approved state significant mining developments; and
- more random auditing is required to improve compliance with approvals and associated conditions.

Case Study 1
Maules Creek Coal Project – need to assess plans of management in audits and reviews

EDO NSW is concerned that plans of management may be unenforceable and are not subject to periodic, mandatory review in order to assess their capacity to properly regulate environmental impacts over the life-time of projects.

The approval for the Maules Creek Coal Project includes a number of conditions of consent which defer decisions regarding management of environmental issues to plans of management. These plans were not required to be developed or approved prior to consent being given for the overall project (that is, they are not 'deferred commencement' conditions).

The conditions of consent which require the development of these plans of management are general in nature, leaving the details to be fleshed out in the plans themselves. Based on our experience, this is standard practice for major developments.

Specifically, the consent for the Maules Creek Coal Project requires the proponent to prepare the following:

- Heritage Management Plan
- Noise Management Plan
- Blast Management Plan
- Air Quality and Greenhouse Gas Management Plan
- Traffic Management Plan
- Water Management Plan
- Biodiversity Management Plan

- Rehabilitation Management Plan
- Social Impact Management Plan

These plans are required to be prepared to the 'satisfaction of the Director-General.' This is problematic insofar as it constitutes a subjective test (as opposed to an assessment of fitness based on objective, measurable criteria). Relevant agencies with specific expertise are 'consulted' but their input is not required to be adopted.

In certain instances, plans of management are required to include strategies for managing cumulative impacts across different impact areas. For example, this approval requires the 'Air quality and greenhouse gas management plan' to include a 'Leard Forest Mining Precinct Air Quality Management Strategy' which has been prepared in consultation with other mines in the Precinct.

As we have argued in previous submissions and reports, cumulative impacts are not adequately regulated under the existing legislative regime. As a consequence, it falls to these plans and strategies to assess and manage the significant air, noise, water, biodiversity and heritage impacts that are the inevitable result of multiple, large-scale mining projects operating within the same area.

In summary, and as this particular project approval demonstrates, the bulk of environmental management is dealt with in plans of management (and in certain instances in cumulative impact strategies). In other words, environmental performance ultimately depends on the fitness of these plans and strategies. It is therefore imperative that auditing and reporting processes assess whether these plans and strategies are fit for purpose (that is, whether they enable the proponent to meet conditions of consent and more generally properly manage environmental impacts). Findings can help to inform any necessary amendments to these plans.

3. Annual Review Guidelines

We wish to make some brief comments regarding the following matters:

- We are strongly supportive of the colour-coded 'Statement of compliance.'

- We are concerned that current wording of the document may lead the community to assume that the 'Statement of compliance' is based on an official assessment undertaken by a regulator (as opposed to self-assessment). This should be clarified.

- We note and support the requirement to document all water access licences. The requirement to include this information in the annual review tends to negate the argument that mandatory disclosure of water entitlements would breach privacy laws (an argument which we have vigorously rejected in previous submissions). To that end, we believe that the NSW Water Register[1] should be reconfigured to allow the public to easily retrieve complete licensing details (including the name of licence holders) for each water source.

[1] Available on the NSW Office of Water website.

- Finally, the criteria for assessing environmental performance (Part 6) are arguably vague insofar as they do not require the proponent to assess performance against specific conditions of consent, plans of management or cumulative impact strategies.

Recommendations

The Annual Review Guidelines should be amended to include:

- information which clarifies that the 'Statement of compliance' is based on self-assessment (as opposed to an assessment undertaken by the lead regulator or relevant agency);
- where compliance has been assessed by an independent third party, this information should be included in the annual review;
- a requirement that reporting include information on all bonds (including rehabilitation bonds);
- a requirement that reporting assess compliance with all approvals and associated conditions;
- a requirement to assess whether plans of management and cumulative impact strategies are fit for purpose, or whether amendments are necessary to fulfil conditions of consent;
- a requirement that annual reviews identify any planned or assessed modifications to the development;
- a requirement to include information regarding water allocations (in addition to entitlements); and
- a requirement to assess whether actual water take reflects predicted take (as determined by modelling undertaken during the assessment process).

4. Web-based Reporting Guidelines

We are strongly supportive of measures which improve the transparency of all aspects of the development process, including the post-approval stage. To that end, we cannot overemphasis the importance of making raw monitoring data available to the community on the development's website.

We understand that certain companies have objected to this information being disclosed on the basis that first, it is their property and second, it is likely to be misinterpreted by the public (see Case Study 2, below). However, we reject these arguments on the following grounds. First, the data is collected to determine compliance with conditions of a publically available and legally enforceable consent. Second, based on our experience, individuals or community groups are likely to engage competent experts to interpret the data and explain the extent to which it complies with relevant conditions. Finally, the law requires public disclosure of certain technical documents. For example, under the *Environmental Planning and Assessment Act 1979*, proponents are required to put environmental impact statements on public exhibition.[2] This tends to negate the suggestion that technical information and data should be concealed from the public to prevent it from being misinterpreted and missed.

[2] See for example *Environmental Planning and Assessment Act 1979* (NSW), s. 89F.

We also note that at least one of our clients has raised concerns regarding the misuse of noise monitoring equipment. In this instance, the misuse amounted to a breach of the *Surveillance Devices Act 2007* (NSW).

Recommendations

The Web-based Reporting Guidelines should be amended to include:

- a requirement that the development's website include a central repository of all assessment and approval information (including but not limited to development applications, consents, environmental impact statements and so on);
- a requirement that raw monitoring data be uploaded to the development's website on a monthly basis; and
- a requirement that plans of management be published on the development's website.

Case study 2
Xtrata's Glendell Coal Mine – obtaining raw data

On 9 August 2012, EDO NSW wrote to the NSW Department of Planning and Infrastructure (**Department**) on behalf of Deidre Olofsson requesting raw noise monitoring data. The request was made due to suspected noise exceedances.

In a response dated 18 September 2012, the Department stated that the following:

"*Because of the way that real-time noise monitors collect data, the expertise required in interpreting this data, and the potential for it to be misinterpreted, the Department does not currently require this data to be published on mine websites or for it to be otherwise generally released to members of the public.*

The Department considers that the general freedom of access that the Department enjoys in respect of such monitoring data may be affected if mining companies were of the view that this data had been misinterpreted or misapplied by a third party."

5. Water Regulation and Policy Framework

This is a useful document insofar as it sets out the regulatory and governance framework for what is considered to be a particularly complex area of law and policy.

Recommendations

The Water Regulation and Policy Framework should be amended to:

- clarify the difference between legal requirements (which are enforceable) and policies and guidelines (which are not). This is particularly important as non-lawyers do not generally understand the distinction between the two;
- note that not all policies listed in the document are relevant to each mining project; and
- note that the requirement to obtain an aquifer interference approval has not yet commenced

6. Planning Agreement Guidelines

We would like to take this opportunity to briefly comment on the following two matters which relate to planning agreements.

- First, we wish to draw the Department's attention to the fact that certain councils have not been exhibiting planning agreements in accordance with the requirements set out in the *Environmental Planning and Assessment Act 1979*.[3]

- Second, we are of the view that the community should be provided with greater input into the development of these plans, particularly as they are designed to ameliorate the impacts of mining developments on local communities.

Recommendations

- We note that the Practice Note for Planning Agreements 2005 is not available on the Department's 'Planning Systems Circulars' page.[4] Furthermore, the Practice Note could not be located anywhere online. This Practice Note should be uploaded to the Planning Systems Circulars page and annexed to the Planning Agreement Guidelines.

7. Agreements as to conduct and other agreements – gag clauses

EDO NSW would like to draw your attention to the existence of agreements as to conduct (usually in relation to compensation) and rental agreements which contain either of the following:

- clauses which prevent the signing party from reporting any potential breaches of approval and approval conditions;; and
- clauses which compel individuals to sign any additional waiver or consent regarding impacts that are required by the mining company.

The agreements we have viewed also include confidentiality clauses. We are concerned that this may lead some individuals to assume that they are unable to seek legal advice in relation to the agreement.

It has been reported to us that individuals assume that they must sign these agreements. This is deeply concerning and clearly reflects the significant disparity in resources and knowledge between mining companies and residents.

It is our understanding that government departments and agencies rely on local residents to report suspected breaches of consent conditions. The concern arises that these agreements are effectively preventing reporting of suspected breaches and subsequent compliance checks from being undertaken.

---

[3] Ibid, s. 93G.

[4] The Development Contributions Practice Note PS 05-004 includes a link to the Practice Note for Planning Agreements, however this link is broken (it is to the DIPNR website).

Recommendations

- The Department should develop guidelines regarding agreements as to conduct, rental agreements and other related agreements. These guidelines should inform the community of their rights and prohibit mining companies from including gag clauses which are designed to prevent reporting of suspected breaches of consent conditions. These guidelines should form part of Stage 2 of the IMP.

For further information and to arrange a meeting to discuss certain matters related to this submission, please contact emma.carmody@edonsw.org.au