

Brief: explosive documents reveal the genesis NSW's mining and planning Acquisition Policy

Lock the Gate obtained documents under Government Information (Public Access) law about the genesis of the NSW Government's controversial "Voluntary Acquisition and Mitigation Policy" for mining projects, which was gazetted just prior to the approval of the Shenhua Watermark coal mine on the Liverpool Plains in late 2014.

On Saturday it was revealed that the Resources and Energy Division of the Department of Trade and Investment removed a key provision of the policy, preventing the adoption of a threshold for the most dangerous fine particle pollution prior to the policy's release.

Today, Lock the Gate releases the full GIPA documents, revealing possible interference in the policy at the last minute by the Minerals Council, and the motivation behind the policy, which was to lessen the scale of farmland buy-outs triggered by Shenhua's Watermark mine on the Liverpool Plains.

The GIPA documents are available for download here:

<https://spideroak.com/browse/share/flipdog/Acquisition-policy>

- The most explosive revelation is evidence that indicates that the Acquisition Policy was crucially and substantially altered *after* it had been approved by Cabinet's Resources and Land Use Subcommittee – late in the afternoon on the day before it was exhibited to the public.
- In the intervening time, the NSW Minerals Council and executives from 13 coal mining companies had met with NSW Premier, Mike Baird and Resources Minister, Anthony Roberts.
- Evidence in the documents indicates, without conclusively proving, that this change may have been made at the behest of the NSW Minerals Council, through the Department of Planning and the office of then Planning Minister, Pru Goward.
- The change created a huge loophole in the policy, requiring the acquisition criteria for PM₁₀ particle pollution to be measured as an "incremental impact," that is, to be pollution that could be solely attributed to the mine in question, rather than cumulative pollution levels as they are experienced by members of the public, who may be affected by several mines.
- This loophole had been proposed by the Department of Planning in an earlier iteration of the document, but was removed after objection by the NSW EPA, who stated that there was "no rationale" for such a loophole.
- The change back to the "incremental impact" terminology was made more than ten days after a cabinet subcommittee adopted the policy and a week after the finished and adopted policy was sent to the Planning and Assessment Commission to apply to Shenhua's Watermark mine on the Liverpool Plains.
- Two days after the changes were made, the Department of Planning sent a note to NSW Minerals council representatives, informing them that it had been done.
- It is clear from the documents that the pending determination of Shenhua's Watermark mine was a driver of its adoption. Under the guise of preventing 12,000ha of high quality agricultural land from being sold to a Chinese state-owned corporation, the NSW Government introduced the policy to prevent the Planning and Assessment Commission giving more landholders the right to get away from the noise and dust impacts of the mine.
- There was no change made to the scale of the mining operation, nor change to the dust and noise impacts it would have: the change simply prevented the Planning and Assessment Commission granting landholders the right to demand acquisition of their property by Shenhua should they decide they could not live with the impact of the mine on their lives and properties.

Full chronology

August 2014: Planning and Assessment Commission (PAC) Review of the Watermark mine recommends acquisition criteria that would give the owners of 25 properties the right to sell to Shenhua because of the noise and air quality impacts they will experience due to the mine. The PAC found that the mine “could cause the 24 hour average criteria for PM₁₀ dust levels to be exceeded at 20 different residences during the life of the project” and that an additional five would experience air quality worse than the standard on more than a quarter of the property area.

8 October 2014: DPE hosts “intensive workshop” with DRE, the Department of Health and the EPA “to scope out and commence policy development” on the Acquisition Policy.

10 October: email from Kylie Hargraves to representatives of the Department of Planning re: “Shenhua Acquisition Issues”

With the news this morning about China considering tariffs on imports of coal types, I suspect it is even more important we have a speedy position / solution re the undesired outcome (by all sides) of current recommendation for large scale compulsory acquisition of black soils! agricultural land from PAC recommendations.

I'll be needing to brief Ministers on implications of the policy more broadly and on the potential impact on the China relationship which will no doubt be the topic of discussion when the President visits on Nov 22 — so I would be most grateful for an update on what options we will be presenting for the Shenhua case to the RLU [Resources and Land Use] next week pls.

15 October: Draft interim policy sent to EPA, DRE and Health from Department of Planning.

20 October: EPA sends comments and track changes on the policy, including, “The draft Policy proposes acquisition criteria on page 8 including a 24 hour PM₁₀ acquisition criteria of 150µg/m³.”

22 October: email from Steve Barry (Department of Planning) to David Kitto (DK) and others in that Department and the EPA with new draft, seeking “input from DK [David Kitto] on PM₁₀ 24hr acquisition criteria.” This agency consultation draft dated 23 October is at page 14 of the GIPA PDF.

This version of the policy had acquisition criteria for PM₁₀ 24 hour averages at 50µg/m³ but specified that this had to be the **incremental impact** “(predicted impacts due to the pollutant source alone)” It included acquisition criteria for PM_{2.5} and also had a sunset clause on the acquisition right – land holders had to accept the offer within six months of receiving it.

This version of the draft also stated that, “there is clear evidence that fine PM below 2.5 micrometres in diameter (PM_{2.5}) is responsible for the majority of PM associated health effects” and also noted that these fine particles can travel “Hundreds to thousands of kilometres.” It included acquisition annual average criteria for PM_{2.5} of 8µg/m³ and specifically applied the policy to private dwellings, workplaces and “vacant land with the potential to have a residence.”

24 October 2014 03:16: A “(final?)” draft version is provided by Steve Barry from Planning. David Folwer EPA sends it to EPA people for checking.

24 October 13:57: The EPA responds, noting there is “**no additional rationale**” for making the PM₁₀ criteria incremental, among other matters.

27 October: A final draft is sent to Kylie Hargraves and Mark Paterson from DRE by Alison Frame, Deputy Secretary of the Department of Planning. She says: “The only substantial departure from existing Government practice is the requirement for acquisition if pollution thresholds of fine particle matter [PM_{2.5}] are exceeded.” She explains that this is included because of the health impacts and because the Commonwealth Ambient Air Quality National Environmental Protection Measure (NEPM)

was at that time being reviewed with a view to introducing thresholds for these particulates. Frame notes that, "As you would be aware there has not been any consultation with stakeholders (including industry) on the development of this Policy, due to the above deadline."

29 October 07:56: Kylie Hargraves (Deputy Secretary, DRE) responded suggesting that fine particulate matter be excluded from the policy until the NEPM Ambient Air Quality Review is over "and consultation on the proposed levels is done." She also requests a change to limit the policy's application to vacant land.

29 October 17:21: Final policy draft, with changes made to accommodate DRE. The PM_{2.5} acquisition criteria is gone, and the application of the policy to vacant land is limited.

31 October: Email from Kylie Hargreaves to Mark Paterson (Secretary, Dept. Trade and Investment), Nick McDermott and Robert Vellar drawing their attention to a sentence that had now been added to the policy, specifying that it did not apply to vacant land: "Because the application of voluntary mitigation rights are intended to protect human health and amenity, those rights should not be applied to vacant land other than in the circumstances specifically identified in this policy."

Hargreaves specifically notes that this was done to prevent the PAC granting acquisition rights to 24 additional properties affected by the Shenhua Watermark mine.

3 November: Resources and Land Use meeting of agency CEOs adopts the policy.

5 November: Resources and Land Use Cabinet sub-committee meeting. The sub-committee expected a "comparison map" – a map showing the different extent of properties that would be granted acquisition rights because of the impacts of the Watermark mine.

6 November 18:28: Alison Frame sends a map to Simon Smith, Department of Premier and Cabinet: "Also attached is a plan illustrating the differences between current Government policy on land acquisition (identified as the orange and green shaded areas) and the PACs recommendations (identified as the light blue shaded areas). This represents a difference of over 12,000 hectares of high quality agricultural land which the PAC would require Shenhua to acquire."

7 November 15:50: Alex O'Mara sends Lynelle Briggs, Chair of the Planning and Assessment Commission "a copy of the Voluntary Land Acquisition and Mitigation Policy now adopted by Government." **This version of the policy does not have the "incremental impact" loophole for PM₁₀.** Instead, it applies the PM₁₀ criteria at the "98.6 percentile," allowing five exceedances a year. It includes no acquisition criteria for PM_{2.5} and specifies that the policy only applies to residences or if exceedance of criteria is predicted on "more than 25% of any privately owned land, and a dwelling could be built on that land under existing planning controls."

7 November: NSW Premier Mike Baird and Resources Minister Anthony Roberts have a meeting with the NSW Minerals Council and fourteen coal mining companies, including Shenhua.¹

10 November 2014: A request is sent from NSW Planning to the PAC to determine the Watermark Project, with an Addendum Report to the Department of Planning's Assessment Report. This Addendum Report includes reference to the new Acquisition Policy, specifically citing it in the report and appending it as Appendix E. The appended version was published by the PAC on its website **and**

¹ These meetings are not referred to in the GIPA docs, but can be found here:

http://www.dpc.nsw.gov.au/data/assets/pdf_file/0017/168200/Premier_-_Disclosure_Summary_Oct-Dec_2014.pdf

was the 5 November version of the Policy, applying the “98.6 percentile” loophole, not the “incremental impact” loophole.

And then something happens...

17 November 16:36: Steve Barry sends Alex O’Mara (Department of Planning) an “updated policy” which she sends on to Jason Walsh, copying David Kitto, Marcus Ray and Alison Frame, Deputy Secretaries of the Department. This version of the policy is dated 17 November, and replaces the “98.6 percentile” loophole with the “incremental impact” loophole. Jason Walsh writes back “Thanks for the updated policy – it is approved” (Document 17, page 211 of the PDF). Another version of it is attached, specifically highlighting this change (see page 250 of the PDF)

18 November: the new policy, and changes to the SEPP to require determining authorities to consider it, is put on public exhibition. The version released to the public is the 17 November version, replacing the “98.6 percentile” loophole with the “incremental impact” loophole.

19 November: Alex O’Mara sends the changed Policy to Lynelle Briggs, saying, “There was a slight change in the version of the policy that is currently on exhibition, from that originally provided to you, which brings the policy more into line with current practice.” (Doc 19, page 213 of PDF)

20 November: Alison Frame writes to Claire O’Doherty and David Frith from the NSW Minerals Council, copying Alex O’Mara, David Kitto, Marcus Ray and Steve Barry. In this email, she explains that the PAC was given a copy of the Acquisition Policy on 7 November, “to ensure that the policy was considered in applications to be reviewed or determined by the Planning and Assessment Commission this year.” She alerts them that the new policy is now on public exhibition, and that “The Planning Assessment Commission has since been provided with the policy that is currently on exhibition and advised that this is the policy which the Planning Assessment Commission is asked to consider in its decision-making. The Planning Assessment Commission has also been advised that there has been a slight change in the policy that is currently on exhibition, from that originally provided it, in order to bring the policy more into line with current practice.” (Page 346 of the PDF).

21 November: Alison Frame forwards the email that she sent to the Minerals council to Jason Walsh.

28 November: Deadline for public submissions on the policy.

19 December: changes to the Mining SEPP come into force requiring determining authorities to consider the Voluntary Acquisition Policy. [A version of the Acquisition Policy dated 15 December is published in the NSW Gazette](#). This version is now in force, and has the “incremental impact” loophole for PM10 pollution.

28 January, 2015. The PAC approves the Shenhua Watermark mine. In its Determination Report, the PAC relate this chronology of the Acquisition Policy:

This Acquisition Policy was initially released in draft on the 7 November 2014. On 20 November 2014 the Commission was advised of an updated version of the draft Acquisition Policy, which was placed on exhibition from 18 November to 2 December 2014. In light of the changes to the Acquisition Policy, the Commission was provided with a revised set of recommended conditions for this project on the 8 December 2014. The Commission notes that the Acquisition Policy was gazetted on Friday 19 December 2014. Given that the Acquisition Policy has been gazetted, the Commission has applied mitigation and acquisition criteria in accordance with the Acquisition Policy. Some properties that were initially included for mitigation have been removed following implementation of the new policy.