



Nature Conservation Council

The voice for nature in NSW

Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

9 July 2015

NCC SUBMISSION TO THE INTEGRATED MINING POLICY – STAGE 1

Dear Sir/Madam,

The Nature Conservation Council of New South Wales (**NCC**) is the state's peak environment organisation. We represent 150 environment groups across NSW. Together we are dedicated to protecting and conserving the wildlife, landscapes and natural resources of NSW. Our members have a strong interest in planning and development issues, and are strongly committed to securing positive environmental outcomes in their local area.

We welcome the opportunity to comment on Stage 1 of the Integrated Mining Policy. We understand that the Department is seeking feedback on three specific documents at this stage:

- Mine Application Guideline
- Standard Secretary's Environmental Assessment Requirements (**SEARs**) for State Significant Mining Developments
- Policy Framework for Biodiversity Offsets for Upland Swamps and Associated Threatened Species (**Swamp Offset Policy**)

We note that the Department will seek feedback on further material including Standard Development Consent Conditions and Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals, as part of Stage 2.

Our submission will outline:

1. Overarching concerns with the Integrated Mining Policy
2. Comments on the Swamp Offset Policy
3. Comments on the Mining Application Guideline and Standard Secretary's Environmental Assessment Requirements

We note upfront that we do not support the Policy Framework for Biodiversity Offsets for Upland Swamps and Associated Threatened Species (Swamp Offset Policy).

1. OVERARCHING CONCERNS WITH THE INTEGRATED MINING POLICY

NCC is disappointed that the Integrated Mining Policy does not address community concerns around the mining application and assessment process and gives rise to new concerns relating to the potential for increased mining impacts on upland swamps.

We also note that the Integrated Mining Policy is being released in two stages, and that the Government is also making changes to *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP)* with the proposed repeal of clause 12AA (which is supported by NCC) currently on exhibition and an overhaul review of the Mining SEPP due by September 2015. This piecemeal approach to reforms is confusing for the community and NCC members who want to see greater protection for the environment and communities.

We note that in May 2015 Planning Minister Rob Stokes flagged an overhaul of the way large mining and coal seam gas projects secure approval, signalling that the community will be given a greater chance to "test the decision"¹.

With this in mind, we had anticipated significant changes to the mining application and assessment process when the Department announced its Integrated Mining Policy. Instead, Stage 1 simply provides guidelines around existing application processes and introduces a contentious new Offset Policy for Uplands Swamps.

The Integrated Mining Policy does not address key issues and potential reforms that NCC has outlined in various submissions to the Department and the Minister regarding imbalance in the mining application and assessment process². Much more is needed to ensure the long-term ecological sustainability of the State.

Below are a number of key issues that we consider need to be addressed in order to restore balance in the mining application and assessment process:

1. **Introduce no-go zones to protect special natural areas and high conservation areas, drinking water catchments, prime farmlands and residential areas:** for example by prohibiting coal and coal seam gas exploration and mining in these areas.
2. **Strengthen SRLUP 'gateway' and protect high conservation value lands:** The *Environmental Planning and Assessment Amendment (Gateway Process for Strategic Agricultural Land) Regulation 2013* amended the *Environmental Planning and Assessment Act 1979 (EPA Act)* and the *Environmental Planning and Assessment Regulation 2000* to establish a gateway process for mining and petroleum development on strategic agricultural lands. The Gateway Process allows for additional scientific scrutiny, but it does not afford definitive protection to important mapped agricultural and high conservation lands and has significant shortcomings.

¹ *New Planning Minister Rob Stokes signals overhaul of CSG, coal mining projects*, Sydney Morning Herald, 2 May 2015, www.smh.com.au/environment/new-planning-minister-rob-stokes-signals-overhaul-of-csg-coal-mining-projects-20150501-1mxhvk.html

² NCC submissions are available to download on our website: www.nature.org.au/resources/submissions/

3. **Introduce changes to improve the integrity of environmental impact statements:** There is significant community concern regarding the integrity of environmental impact statements. The Government's *NSW Planning System Review Green Paper* proposed that consultants that provide Environmental Impact Statements should be chosen from an accredited panel, and be required to meet certain standards regarding the impartiality and quality of their work. We believe the most effective way of ensuring the integrity of environmental impact assessments is to break the nexus between the developer and the environmental consultant. So long as developers continue to directly pay the consultants there is the risk of bias, undue influence and unethical practices.
4. **Introduce clear guidelines for the assessment of impacts:** We note that the Government is proposing to introduce Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals as part of stage 2 of the integrated Mining Policy. We recommend that the Government also introduce robust assessment guidelines for other key matters including social impact assessment, health impacts and assessment of cumulative impacts.
5. **Restore environmental approvals for State significant development:** Broadly speaking State significant development has the most significant environmental impacts, and proposals with the greatest impact should be subject to the greatest scrutiny. Sections 89J and s89K of the EPA Act override requirements to obtain environmental approvals under environmental legislation. In doing so, the assessment of development impacts may not be subject to the same level of scrutiny as intended by environmental legislation, including via oversight from the relevant agency,
6. **Repeal clauses 12AA and 12 AB of the Mining SEPP:** Changes made to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries)* 2007 in 2013 have been strongly opposed by the community because they put industry interests ahead of local communities and the environment by requiring decision makers to give even more weight to economic considerations over impacts on air, water and existing industries. We welcome the Government's announcement on 7 July 2015 that it will amend the Mining SEPP to remove clause 12AA which makes the significance of the resource "the principal consideration" when determining mining projects. NCC strongly supports the proposed amendment and also submits that clause 12AB be repealed so that development standards are replaced by binding standards for air, water, noise and vibration that are robust, enforceable, and fair to neighbouring residents and land uses.
7. **Strengthen the NSW Biodiversity Offsets Policy for Major Projects:** The NSW Biodiversity Off set Policy for Major Projects does not meet best practice and fails to adequately protect biodiversity. In particular the conservation of biodiversity is not one of the key objectives of the policy; the policy fails to identify and protect 'red flag' areas including areas of high conservation value; 'like for like' offsetting requirements have been weakened; there are multiple pathways to offsetting, including supplementary measures and mine site rehabilitation.

8. **Review the Voluntary Land Acquisition and Mitigation Policy:** While the Voluntary Land Acquisition and Mitigation Policy attempts to provide a solution for potential land use conflicts, it is premised on the assumption that mining and exploration activities should be allowed to go ahead, despite impacts on communities, and that any impacts can be adequately compensated. For example, it provides that consent authorities may decide it is in the public interest to allow the development to proceed, even though there would be exceedances of the relevant assessment criteria, because of assumed social and economic benefits of the development.
9. **Create a clear, objective decision making framework for decision makers:** Discretionary decision-making has contributed to the community losing confidence in the planning system. An objective decision-making framework would afford better environmental protection, reduce the risk of corruption and substantially improve the legitimacy of the planning system. On this point, we note Recommendation 1 of the Independent Commission Against Corruption that the NSW Government ensures that discretionary planning decisions are made subject to mandated sets of criteria that are robust and objective³. Methodologies to support objective decision making can be streamlined through using of information technology and ePlanning processes⁴.
10. **Remove the restrictions on third party merit appeal rights following a PAC public hearing:** Existing restrictions on third party merit appeal rights following a PAC public hearing override judicial oversight of planning decisions, and reduce the transparency and accountability of decisions of the Planning Assessment Commission. We strongly urge the Government to remove the restrictions to third party merits appeals by repealing sections 23F and s98(5) of the EPA Act.

We acknowledge that many of these matters would require legislative change and are not within the current the scope of the Integrated Mining Policy. However, we urge the Department and Government to recognise that the community distrusts the integrity of the mining application and assessment process, and believes that reform is needed to bring balance, transparency and accountability to the system.

2. SWAMP OFFSET POLICY

NCC does not support the Policy Framework for Biodiversity Offsets for Upland Swamps and Associated Threatened Species (Swamp Offset Policy).

Offsetting not appropriate for Upland Swamps

Upland swamps, by their very nature, are not conducive to offsetting. They are unique and fragile environments with significant biodiversity and conservation value. In particular, we note that

³ Independent Commission Against Corruption, *Anti-corruption safeguards and the NSW planning system* (2012), p 6.

⁴ We note that both BASIX and the NorBE Tool under the State Environmental Planning Policy (Sydney Drinking water Catchment) 2011 utilise online tools.

‘existing remediation techniques are unproven and appear insufficient without the destruction of the surface environment’⁵. We have concerns with the ability to enhance existing upland swamp environments in order to achieve an overall no net loss of biodiversity.

The associated impacts of long wall coal mining on upland swamps are significant. The NSW Scientific Committee has recognised that ‘subsidence associated with longwall mining has contributed to adverse effects on upland swamps’⁶. This has led to *alteration of habitat following subsidence due to longwall mining* being listed as a key threatening process under the *Threatened Species Conservation Act 1995 (TSC Act)*.

Many upland swamps are listed as endangered ecological communities under the *Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)* or TSC Act. Upland Swamps are also habitat for a number of species listed as threatened under the TSC Act and EPBC Act including the Broad-headed Snake, Giant Dragonfly, Giant Burrowing Frog, Grey-headed Flying Fox and Red-crowned Toadlet⁷.

We note that in listing the Coastal Upland Swamp in the Sydney Basin Bioregion as an endangered ecological community under the TSC Act, the NSW Scientific Committee recognised one of the key threats to that community as fracturing and drainage of shallow groundwater aquifers as a result of land subsidence associated with longwall coal mining.

We also note the findings of the Southern Coalfields Inquiry⁸. That inquiry found that long wall mining caused subsidence, which had the potential to impact on significant rivers and streams and lead to the loss or redirection of surface water flows, changes in water quality, loss of ecosystem functionality, stream bed cracking and loss of visual amenity in that region.

The Inquiry found, amongst other things, that the application process should require a ‘reverse onus of proof’ from the mining company before any mining is permitted which might unacceptably impact highly-significant natural features, including upland swamps⁹. That is:

“the mining company must demonstrate, on the balance of probabilities, that identified highly-significant natural features would not be unacceptably impacted”¹⁰.

⁵ *Temperate Highland Peat Swamps on Sandstone: evaluation of mitigation and remediation techniques*, Commissioned by the Department of the Environment on the advice of the Interim Independent Expert Scientific Committee on Coal Seam Gas and Coal Mining and prepared by Water Research Laboratory, School of Civil and Environmental Engineering, University of New South Wales, August 2014, page 7

⁶ NSW Scientific Committee - final determination, *Alteration of habitat following subsidence due to longwall mining*, www.environment.nsw.gov.au/determinations/LongwallMiningKtp.htm

⁷ Ibid.

⁸ Impacts of underground coal mining on natural features in the Southern Coalfield: strategic review State of New South Wales through the NSW Department of Planning, 2008, available at www.planning.nsw.gov.au/planningsystem/pdf/report_southern_coalfields_final_jul08.pdf

⁹ Ibid, page 116. Specifically the report found that “the Southern Coalfield contains large areas of natural bushland. Its significant natural features include its rivers and higher order streams; associated sandstone river gorges; major cliff lines and upland swamps. It also contains important flora, fauna and aquatic ecosystems; many listed threatened species, populations and endangered ecological communities and a significant number of Aboriginal heritage sites.

¹⁰ Above no. 8

The report went further and said that:

“If insufficient assurance can be provided, then mining which might cause severe impacts should not be permitted to proceed”¹¹.

Subsequently, in considering BHP Billiton’s Bulli Seam Operations Proposal, the Planning and Assessment Commission report concluded that:

“... it is no longer a viable proposition for mining to cause more than negligible damage to pristine or near-pristine waterways in drinking water catchments or where these waterways are elements of significant conservation areas or significant river systems”¹².

The draft Swamp Offset Policy will essentially give mining companies the green light to impact on groundwater and destroy important upland swamp ecosystems. We submit that upland swamps, particularly those listed as EEC’s should be ‘red flagged’ as no-go zones and must not be allowed to be offset. That is, if proposed development cannot avoid or mitigate impacts on uplands swamps it should not be able to proceed.

Specific comments on the Swamp Offset Policy

We again reiterate our opposition to the Policy Framework for Biodiversity Offsets for Upland Swamps and Associated Threatened Species in its entirety and submit that development that is predicted to have more than negligible impact on uplands swamps should not be allowed to proceed.

However we provide some specific comments on the draft policy, in the event that the Department proceeds with the policy.

- **Relationship with the NSW Biodiversity Offsets Policy for Major Projects**

It is our understanding that the Swamp Offset Policy is intended to sit within the existing framework for the NSW Biodiversity Offsets Policy for Major Projects (Biodiversity Offsets Policy) however there is some confusion about how the two documents will interact. For example:

- The Biodiversity Offset Policy expressly states that it ‘does not provide guidance around certain impacts of a project on biodiversity that are not associated with clearing vegetation. Examples of these impacts include... subsidence and cliff falls associated with mining development’¹³.

¹¹Above no. 8, page 114

¹² The PAC Review of the Bulli Seam Operations Project © State of New South Wales through the NSW Planning Assessment Commission, 2010

¹³ NSW Biodiversity Offsets Policy for Major Projects, page 9

- The Swamp Offset Policy does not explicitly talk about a hierarchy to avoid, mitigate and offset impacts, which is misleading for anyone reading the Swamp Offset Policy in isolation.

We suggest that the integration of the two documents needs to be made clearer.

We also note here our broader concerns with the NSW Biodiversity Offsetting Policy for Major Projects and Framework for Biodiversity Assessment. These concerns are outlined in detail in our submission to the draft NSW Biodiversity Offsetting Policy for Major Projects¹⁴.

- **No definition of Upland Swamp**

We note that there is no definition of upland swamp in the policy, and therefore no clear indication as to which areas of the state the policy will apply.

- **No clear criteria for determining ‘nil’ or ‘negligible’ environmental consequences**

The Swamp Offset Policy does not provide clear guidance on how to determine ‘nil’ or ‘negligible’ environmental consequences (other than to say it is to be supported by evidence). There must be clear, objective criteria put in place for determining ‘nil’ or ‘negligible’ environmental consequences.

- **Scenarios for offsetting**

The Swamp Offset Policy outlines two scenarios for offsetting:

- A. Nil or negligible environmental consequences predicted:** In circumstances where nil or negligible consequences are predicted, no up-front offset is required. Instead a relevant performance measure will be included in the conditions of consent and monitoring will be required to measure compliance with the performance measure. Then, if monitoring shows that mining has significantly impacted the shallow groundwater aquifer in a swamp and that impact has stabilised for a period of 12 month, an offset must be identified and secured within 6 months of the completion of that period.

This scenario does not take into consideration the fact that an appropriate offset might not be able to be secured (which is entirely feasible given the unique nature of swamps). Damage has occurred and will not be appropriately compensated or remedied. It is also unclear why there should be delay in identifying and securing an offset once a greater than negligible impact has been detected.

We note that greater than expected consequences must be enforced as a breach of consent conditions, however punitive action will not see the environmental and ecosystem values of swamps restored.

¹⁴ Nature Conservation Council of NSW and Total Environment Centre *Submission on the draft NSW Biodiversity Offsetting Policy for Major Projects*, May 2014. Download [here](#).

B. Maximum predicted offset liability: In circumstances where greater than ‘negligible’ consequences are predicted then an offset will be required as a condition of consent. We note however that offsets identified are only required to be secured once the outcomes of mining are confirmed through agreed monitoring (that is, if monitoring shows that a predicted groundwater impact has not occurred within 12 months of completion of all mining within 400m of a swamp, or has occurred only in part of the swamp, the applicant may make an application to the Secretary to have the all or part of the offset deducted from the overall maximum predicted offset liability).

This scenario highlights the intrinsic uncertainty and unpredictability of predicting the impacts of longwall mining on swamps and subsequent offset liability. This again highlights that the environmental consequences of longwall mining on upland swamps is not suitable for offsetting. Further we do not understand the justification for the parameters for determining final impacts (within 12 months of completion of all mining within 400m of a swamp) – it is possible that consequences from longwall mining may occur beyond those parameters, in which case, offsetting would not be required. Finally, it is difficult to envisage how there could be partial damage to an upland swamp, given the characteristics of swamp ecosystems.

3. MINING APPLICATION GUIDELINE AND STANDARD SECRETARY’S ENVIRONMENTAL ASSESSMENT REQUIREMENTS (SEARS)

The Mining Application Guidelines and SEARs seek to provide additional information and guidance in relation to existing steps in the mining application process, namely the preparation of a Preliminary Environmental Assessment (in support of an application for SEARs) and the issuing of SEARS (and the subsequent preparation of an Environmental Impact Assessment (EIA)). We note that the Integrated Mining Policy does not introduce any new legislative requirements.

While we understand the general intention of the Department in preparing these two documents, we can see how these additional components create confusion for the community in trying to understand the overall mining application process (in fact, we had to construct our own flow chart in order to understand how the various components of stage 1 and expected components of stage 2 of the Integrated Mining Policy fit within the current application and assessment process). This confusion is confounded by the fact there is some overlapping and inconsistency between the two documents. We suggest that the Department gives further consideration to the structure and content of these new documents and how they can be simplified for the general public. For example, there could be one document that deals with PEAs and another that deals with SEARS.

In terms of the specific content of each of the two documents, we make the following observations:

- The SEARs should clearly identify all matters that must be assessed in the Environmental Impact Assessment, including mandatory requirements under Schedule 2 of the EPA Regulation and any requirements under the EPBC Act. This would provide greater certainty and less confusion for both proponents and the community. Consideration should also be given to expanding the introduction to clarify that the Secretary will still consult with relevant agencies and include additional requirements on a case by case basis.

- The SEARs should also clarify in more detail how the SEARs relate to other processes identified in the introduction. It is our understanding that SEARS is intended to incorporate and consolidate the assessment requirements of the:
 - Department of Planning and Environment for Development Consents;
 - Environment Protection Authority for Environment Protection Licences; and
 - Division of Resources and Energy for Mining Lease Application.

While we understand that this integration is for the purpose of assessment requirements only, the SEARs should make it clear that the processes for EPLs and MLAs are not altered by the SEARs.

- There is general concern amongst our members that the Mining Application Guidelines and SEARs do not provide sufficient detail with respect to the level of environmental assessment required. We note that the Government is proposing to introduce Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals as part of stage 2 of the integrated Mining Policy. We recommend that the Government introduce robust assessment guidelines for other key matters including social impact assessment and assessment of health impacts.
- It would also be useful to provide guidelines to proponents for stakeholder consultation, which we note is a requirement in the preparation of an EIA (SEARs, p 1).
- Clearer guidance should be given in relation to the assessment of cumulative impacts across all environmental indicators (e.g. air, water, biodiversity), particularly when considering the proposal in the regional context (SEARs, p4).
- Both the SEARs and Mining Application Guideline should provide clearer guidance as to how greenhouse house emissions and impacts on climate are to be addressed.
- The proposed SEARs require the proponent to describe the measures that would be implemented to mitigate and/or offset the likely impacts of the development. We note that the proponent should also be required to describe measures used to avoid impacts – the first, and arguably most important, tier of the offsetting hierarchy (SEARs, p2).
- The Department should clarify its policy on mining voids. We note that the SEARs anticipate that voids may be proposed to remain as a part of the final landform (SEARs p6). The community has significant concerns about the long-term legacy of coal mine voids on the landscape, particularly in the Hunter Valley.

CONCLUSION

NCC members and supporters have significant concerns with the mining application and assessment process in NSW. There is strong community concern that the process is heavily weighted in favour of mining proponents, and the system fails to adequately protect the environment and communities from the significant impacts of mining.

NCC is disappointed that the Integrated Mining Policy does not address key community concerns with the mining application and assessment process. We have outlined ten key issues that we consider need to be addressed in order to restore balance in the mining application and assessment process.

In terms of the specific documents currently on exhibition as Stage 1 of the Integrated Mining Policy NCC does not support the Policy Framework for Biodiversity Offsets for Upland Swamps and Associated Threatened Species (Swamp Offset Policy). We submit that upland swamps, particularly those listed as EEC's should be 'red flagged' as no-go zones and must not be allowed to be offset.

With respect to the Mining Application Guidelines and Standard Secretary Requirements we note that these documents seek to provide additional information and guidance in relation to existing steps in the mining application process and do not introduce any new legislative requirements. We suggest that Department gives further consideration to the structure and content of these new documents and how they can be simplified for the general public. We have provided some specific comments on the content of each of the two documents.

We hope to continue to work with the Department and Government to ensure that the mining application and assessment process in NSW is reformed to restore balance and provide adequate protection for the environment and communities.

Please do not hesitate to contact Cerin Loane, Policy and Research Coordinator, on (02) 9516 1488 for any further information or assistance in relation to this matter.

Yours sincerely,



Kate Smolski
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