Submission on amendments to the Mining SEPP – *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013*

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.

Submitted to:

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Executive Summary

This submission provides feedback on the NSW Government's draft amendments to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (**Mining SEPP**), under the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013* (**proposed SEPP**).[1]

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 recent consultations.[2] In the past three years, mining issues have come 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.[3]

We understand that the proposed SEPP exhibited on 29 July includes five main elements:

1) Insert a new aim for the Mining SEPP, 'to promote the development of significant mineral resources', and require the SEPP's aims to be considered in decision making on mining proposals.[4]
2) Prioritise the 'significance' of a mineral resource as the consent authority's 'principal consideration', having regard to the *economic benefits* of developing the resource, and any advice from the Director-General of the Department of Trade & Investment (**DTIRIS**).[5]
3) Set out 'non-discretionary development standards' for five environmental and social impacts (cumulative noise levels, air quality levels, air blast overpressure, ground vibration and aquifer interference). If the standards are met, the project cannot be refused on those grounds. However, consent authorities still have discretion to approve the project even if the 'non-discretionary' standards are not met.[6]
4) Move the consideration of impacts on existing mining projects outside Part 3, thereby shielding existing mining projects from the 'principal consideration' change above.[7]
5) Require consent authorities to 'consider any certification by the Chief Executive of the Office of Environment and Heritage (**OEH**) that measures to mitigate or offset the biodiversity impacts of the proposed development will be adequate.'

Following some general comments about the proposed SEPP amendments, we make more specific comments on these five elements in turn. In summary:

- EDO NSW **strongly opposes** 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

[1] Available at: http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=6065 , August 2013.
[2] 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.
[3] For example, in 2012-13, approximately 1 in 8 calls to our public advice line related to mining laws.
[4] Proposed SEPP, item 1, new clause 2(b1).
[5] Proposed SEPP, item 2, draft clauses 12AA-12AB.
[6] Proposed SEPP, draft clause 12AC(2) and note to clause 12AC(1); see also *Environmental Planning and Assessment Act 1979* (NSW), section 79C(3).
[7] Proposed SEPP, item 3, clause 13.

assessment process by requiring decision-makers to prioritise the economic benefits of mining ahead of any negative impacts, or more appropriate land uses.

- In principle, EDO NSW **supports** the introduction of specific environmental and social impact standards for assessing mining projects – provided that those standards:
    - are robust, enforceable, and fair to neighbouring residents and land uses (including conservation and natural resource management purposes);
    - are subject to continuous improvement, and regular and independent review – to ensure they keep pace with leading environmental management practices; and
    - permit decision-makers to set more stringent limits where appropriate (for example, around particularly sensitive natural or built environments).

- In relation to our comments on the specific standards in the proposed SEPP:
    - *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; should permit decision-makers to require lower noise limits where appropriate, including by reference to the INP's intrusive noise criteria for quieter environments; and should 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 (improved in line with WHO recommendations) and PM2.5; apply to all residences; and require continual improvement.
    - *air blast overpressure* – decision-makers should be able to set lower limits where appropriate, and 'sensitive receivers' should include natural areas.
    - *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.

General comments on the proposed SEPP

The Mining SEPP is a state-wide policy that regulates the assessment and approval of mining and resource-related development applications.[8] It operates in tandem with its parent Act, the *Environmental Planning and Assessment Act 1979* (**EP&A Act**). The Mining SEPP also overrides inconsistent provisions in other environmental planning instruments.[9]

The proposed SEPP's amendments focus on Part 3 of the Mining SEPP. Part 3 sets out considerations that decision-makers must take into account in determining development applications for mining (in addition to standard considerations under section 79C of the Act). The SEPP considerations currently include compatibility with other land uses, and with other mining and extractive uses; natural resource management (**NRM**) and environmental management; efficient resource recovery; roads and transport; and land rehabilitation.[10]

The Planning Department's website states that the amendments in the proposed SEPP 'aim to increase confidence for investors and the community about how decisions are made on mining proposals.' The amendments are also intended to require that 'economic and environmental issues… are properly balanced'.[11] We raise three general problems with this.

1) *Proposed SEPP reinforces that encroachment on villages and biodiversity is acceptable and/or inevitable*

First, the Departmental aims noted above are pertinent in the context of recent comments by the Planning Assessment Commission (**PAC**) in its February 2012 approval of the Warkworth mine expansion, near the Hunter Valley village of Bulga. The PAC members observed in their report:

> *Submissions from community organisations, individuals and Singleton Council all raised the issue of the negative impact of open-cut mining on the viability of rural communities generally and specifically on the risks to Bulga village posed by the proposed project.*
>
> *A number of rural communities have been faced with this situation in the past. In almost all cases the mines have been approved and the communities have either been radically altered in character or become non-viable. With the current price of coal this outcome is almost inevitable when the overall economic benefits of the mines are balanced against local community impacts. It appears that it is only if there are wider negative implications from the mining proposal that refusal becomes a possibility. If this is to change then NSW will need to develop a clear policy position that provides further guidance to decision-makers as to how social impacts on rural villages are to be balanced in the approval process for coal mines.*[12]

Faced with this dilemma, and exercising existing decision-making powers, the PAC went on to approve the Warkworth mine extension. In April 2013 following a challenge by a local residents' group, the Land and Environment Court overturned this approval due to its significant adverse impacts on biodiversity, and the adverse noise, dust and social impacts.[13] The mining company and the Planning Department are now appealing the Court's decision.

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[8] Part 2 of the Mining SEPP sets out types of development that are permissible with or without consent, or are exempt, complying or prohibited development under the EP&A Act.

[9] See Mining SEPP, clauses 5 and 8.

[10] Mining SEPP, Part 3, clauses 12-17.

[11] 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.

[12] Planning Assessment Commission, report on Warkworth Extension Project (09_0202), 3 Feb. 2012, pp 8-9 (emphasis added).

[13] *Bulga Milbrodale Progress Association Inc v Minister for Planning & Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48. See further, EDO NSW website, at www.edo.org.au/edonsw/site/casework_key.php#bulga.

It appears that the proposed SEPP *is* intended to clarify the Government's policy position when mining comes into insoluble conflict with environmental and social values. However, it is concerning that the amendments appear to *endorse and reinforce* the view that the approval of mining projects is 'almost inevitable', even where they have significant negative impacts on human settlements and the environment. This runs counter to the Government's recent announcement of residential and 'critical industry cluster' exclusion zones in the context of coal seam gas (**CSG**), for example.[14]

Through the proposed SEPP, the Government appears to be expressing a view that, in deciding whether to approve a mine, the economic benefits of a significant mining resource *pre-emptively outweigh* the negative impacts on rural and regional towns, villages and communities – and the natural environment that supports their quality of life. The proposed SEPP therefore disadvantages these communities, as significant mining developments are *more likely* to encroach on these areas under the proposed SEPP than under existing decision-making processes (as mining would carry more weight).

The proposed SEPP is unlikely to achieve the stated aim of requiring that economic and environmental issues are 'properly balanced'. In our view, the proposed SEPP is also likely to decrease, rather than increase, the NSW community's confidence about how decisions are made on mining proposals. It is also likely to reinforce community perceptions that mining industry regulation, more than any other industry, is 'too lax'.[15] Given the separate process and short window of consultation, proceeding with the proposed SEPP may also damage confidence in the wider planning reforms.

By contrast, we submit that the PAC's comments above underline the importance of 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**).

2) Proposed SEPP pre-empts strategic planning, and other new planning system commitments

Second, we are concerned that introducing this significant amendment to the way that mining projects are assessed would pre-empt the strategic planning process under the forthcoming Planning Act reforms. For example, the Department's Planning *White Paper* refers to:

- 'a shift to upfront evidence based strategic planning, with a focus on achieving sustainable outcomes' and
- 'a partnership between the state, the community, local councils, agencies and the private sector to develop a shared vision for regions, subregions and local government areas.'[16]

The pre-emptive amendments to the Mining SEPP meet neither of these commitments. Instead, the proposed SEPP represents a State-imposed prioritisation of one industry sector,

[14] The Hon Barry O'Farrell and The Hon Andrew Stoner, media release, 'Tough new rules for coal seam gas activity', 19 February 2013.

[15] 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.

[16] NSW Government, *A New Planning System for NSW – White Paper* (April 2013), 'Strategic planning framework', p 60.

at the expense of an orderly, evidence-based approach to strategic planning in line with the community's shared vision of their area.

Furthermore, in explicitly prioritising the economic benefits of mining at the outset, the proposed SEPP undermines a range of other White Paper commitments, including:

- support for the 'three interdependent key pillars' of 'sustainable development', via 'the integration of economic, environmental and social considerations' (p 16);
- the intention that NSW Planning Policies will give effect to 'the strategic policies and objectives included in existing State Environmental Planning Policies' (p 71);
- a 'risk-based' approach to development assessment (pp 118-19) – as the benefits of significant resources will become a more potent consideration than the risks of mining them.

3) Proposals prioritise short-term gains, instead of a landscape approach to land use planning

Third, by focusing primarily on the economic benefits of developing significant resources, the proposed SEPP fails to properly consider competing and complementary land uses, including the cumulative impacts of past, present or reasonable foreseeable developments, considered in the context of the 'carrying capacity' of the regional landscape.[17] The amendments prioritise short-term gains, by requiring decision-makers to give 'principal' weight to mining the resource, even if this is an unsustainable land use in the circumstances.

Comment on the five specific elements of the proposed SEPP

1) New aim to promote the development of 'significant mineral resources'

As noted, EDO NSW does not support the broad intention of the proposed SEPP. We also submit that the *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'. Accordingly, **we do not support** the additional aim in the proposed SEPP. However, if such an aim is to be introduced, **we recommend** this refer to 'the *ecologically sustainable* development' of such resources.

2) Prioritising the 'significance' of a mineral resource as 'principal consideration'

This proposal is the most concerning aspect of the proposed SEPP. EDO NSW strongly opposes the prioritisation of economic benefits of minerals as the 'principal consideration' over other economic, social and environmental impacts of mining proposals. We **recommend** that if amendments to the Mining SEPP proceed, draft clause 12AA(1)-(2) should be significantly amended or deleted; and clause 12AA(3) should be deleted entirely, for the reasons set out below.

[17] See for example, John Williams Scientific Services Pty Ltd, *An analysis of coal seam gas production and natural resource management in Australia - Issues and ways forward* (October 2012), pp 102-103, recommendations 1-2. See also amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to establish the Independent Expert Scientific Committee to advise on large coalmines and coal seam gas developments, including cumulative impacts.

Amendments prioritise 'economic benefits' of mining without equal emphasis on 'costs'

In combination with draft clause 12AA(3), these provisions explicitly elevate consideration of potential 'benefits' over the consideration of potential 'costs' to neighbouring communities, land users and the environment. This skews the decision making process, instead of relying on the actual weight of the evidence before the decision-maker. This comes at a time where the Land and Environment Court's *Warkworth* decision has highlighted the need for more robust economic analysis of mining projects, and greater scrutiny of economic modelling put forward by proponents.[18]

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.

Consistent with our general comments above, the law should not distort the rigour of the NSW development assessment process, by requiring decision-makers to prioritise the weight of economic benefits of mining ahead of any negative impacts, or more appropriate land uses. By doing so, the proposed SEPP would embed an inappropriate weight in decision-making, where other costs and benefits may deserve greater weight in the particular circumstances.[19]

Amendments increase discretion of DTIRIS, and exacerbate potential conflicts of duties

By placing primary reliance on discretionary advice from DTIRIS about a resource's economic significance, this would transfer significant additional power over mining decisions to the department responsible for promoting the industry (instead of the relevant decision maker under planning laws, such as the PAC). The proposed SEPP is therefore likely to:

- exacerbate concerns about 'conflicts of duties' between promoting and regulating the mining industry (highlighted by the NSW Ombudsman in the context of CSG[20]); and
- raise perceptions of poor governance, further eroding public trust in decision-making about mining development.[21]

[18] 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.

[19] This approach would be exacerbated by revised merit assessment criteria proposed in the Government's planning reforms. See Planning Bill 2013, clause 4.19, which proposes to remove 'suitability of the site' as a consideration; and modifies the public interest test to emphasise 'in particular whether any public benefit outweighs any adverse impact of the development'(cf EP&A Act, section 79C(1)(c) and (e)).

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

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

Potential for other unintended consequences, including failure to meet federal standards

The proposed SEPP may have a range of other unintended consequences that undermine the intention to promote certainty and increase confidence in the development assessment and approval process. In particular, we note that the proposed amendments may prevent federal accreditation of NSW assessment or approval processes in relation to mining developments.

Very generally, the more significant a resource, the more likely the potential need for federal assessment of any significant impacts on matters of national environmental significance (**MNES**) under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). By prioritising the benefits of mining ahead of potential negative impacts on MNES, the decision-making rules in the proposed SEPP are unlikely to meet federal EPBC Act requirements.

3) 'Non-discretionary development standards' for environmental & social impacts

In principle, EDO NSW **supports** the introduction of specific environmental and social impact standards for assessing mining projects – **provided that** those standards:

- are robust, enforceable, and fair to neighbouring residents and land uses (including for conservation and natural resource management purposes);
- are subject to continuous improvement, and regular and independent review – to ensure they keep pace with leading environmental management practices; and
- permit decision-makers to set more stringent limits where appropriate.

In relation to draft clauses 12AC (1)-(2), we are concerned about removing a decision-makers' ability to apply more stringent limits where mining projects meet the listed standards, if particular circumstances warrant such stricter standards (for example, around particularly sensitive natural or built environments).[22] On the other hand, we also note that developments which *exceed* the listed standards could still be approved, on a discretionary basis.[23] We submit that this broad discretion further entrenches the inequality of the decision-making arrangements under the proposed SEPP. We **recommend** that both these issues should be addressed.

In relation to the definitions in draft clause 12AC(8):

- First, we **recommend** that the standards' application be clarified to apply to *all residences*, regardless of property ownership. As drafted, the standards for noise limits, air quality, overpressure and ground vibration only apply to 'private dwellings'. The draft definition means that the proposed SEPP standards *would not apply* if mining companies purchase properties and rent them back to residents (as happens now). This requires amendment to the definition of 'private dwelling' in the proposed SEPP, or use of a different term, in the interests of socially equitable protections.
- Second, we **recommend** that the definition of 'sensitive receivers'[24] be expanded to include relevant natural areas of sensitivity, such as national parks and feeding areas for migratory birds.

The following comments relate to the specific standards in the proposed SEPP.

[22] Proposed SEPP, clauses 12AC(1)-(2); see also EP&A Act section 79C(2).
[23] See proposed SEPP, note to clause 12AC(1); see also EP&A Act section 79C(3).
[24] Defined in proposed SEPP clause 12AC(8) as 'a hospital, school classroom, child care centre or place of public worship.'

i) Cumulative noise levels[25]

EDO NSW gives qualified support for the proposal that mining projects be required to comply with the NSW Industrial Noise Policy (**INP**).

First, Table 2.1 of the INP includes two noise levels – 'acceptable' and 'recommended maximum' (5dB higher than acceptable). The SEPP does not specify whether the acceptable or recommended maximum levels should be applied. This should refer to 'acceptable' levels.

Second, EDO NSW is also concerned that, as drafted, the proposed SEPP's standards may prevent project conditions with lower limits than those specified in the INP. For example, in regions without existing mining, background noise levels might be quite low and a better approach may be to limit the amount of additional noise that can be added to the environment (the INP includes 'intrusive noise criteria' for this purpose). We submit that approval agencies should not be prevented from setting lower levels where appropriate, including by reference to the INP's intrusive noise criteria (for example, where background noise is less than 30dB).[26]

Third, the limited scope of section 12AC(3) also means that the standards do not have to be applied in the vicinity of human and environmental 'sensitive receivers'. This should be addressed.

Fourth, definitions in the INP mean that some acceptable levels may be unclear. For example, the definition of 'rural' includes agricultural areas, except those used for intensive agricultural activities. It is unclear which standards would apply to intensive agricultural activities.

Finally, consistent with a commitment to continual improvement, the INP's existing standards should be reviewed, consulted on and improved (for example, in relation to cumulative noise levels and background noise levels in rural areas). Related to this, the proposed SEPP should permit more stringent standards (if any) as specified from time to time in the INP. References to the INP in the proposed SEPP do not appear to provide for improved standards under future iterations of the INP.[27]

For cumulative noise levels in the proposed SEPP, EDO NSW therefore **recommends**:

- the INP standards should be reviewed and improved, including public consultation;
- the SEPP should require compliance with the 'acceptable' noise levels in the Industrial Noise Policy, Table 2.1 (not 'recommended maximum' levels), subject to more stringent levels in future INPs;
- permit decision-makers to require lower noise limits where appropriate, for example in environments that currently have low background noise levels;
- noise limits should apply to *all residences* and 'sensitive receivers' (defined to include relevant natural areas); and
- the acceptable noise limits in the vicinity of intensive agriculture should be clarified.

[25] The proposed SEPP clause 12AC(3) would require (subject to decision-maker discretion where standards are exceeded):
The development does not result in a cumulative amenity noise level greater than the acceptable noise levels, as determined in accordance with Table 2.1 of the Industrial Noise Policy, for residences that are private dwellings.
Note. This development standard does not prevent a consent authority from imposing conditions to regulate project-related noise impacts that are not the subject of the development standard.

[26] See for example, NSW Industrial Noise Policy, pp 5 and 14, at http://epa.nsw.gov.au/noise/industrial.htm.

[27] Clause 12AC(8) defines the INP to mean 'the document entitled *NSW Industrial Noise Policy* published by the Environment Protection Authority and in force as at the commencement of this clause.'

ii) Cumulative air quality levels[28]

The air quality levels in the proposed SEPP are inadequate, as they fail to address daily averages or levels of PM2.5, and the annual average for PM10 is too high.[29] As noted, the standards also only apply to residences that are 'private dwellings'.

The National Environment Protection Measure (**NEPM**) for air quality currently has a mandatory requirement for daily averages of PM10 to be below 50µg/m^3 (with a number of allowable annual exceedences) and advisory standards of 25µg/m^3 for daily averages and 8µg/m^3 for annual averages for PM2.5.[30]

There is clear scientific evidence of a dose-response relationship between increased levels PM10 and PM2.5 and negative health impacts.[31] This suggests that standards are not an appropriate standalone mechanism for managing particulate matter. In addition to the standards recommended in the table, EDO NSW submits that standards must be linked to a requirement for continual improvement.

For cumulative air quality levels in the proposed SEPP, EDO NSW therefore **recommends**:

- The SEPP should include both annual averages and daily maximum as follows:

Particulate matter	**Annual Average**	**24hr Average**
PM10[32]	20µg/m^3	50µg/m^3
PM2.5	8µg/m^3	25µg/m^3

- All premises responsible for PM10 and PM2.5 should be subject to a continual improvement regime that provides for regular review and improvement of standards.
- The standards should apply to all residences regardless of ownership.

[28] The proposed SEPP clause 12AC(4) would require (subject to decision-maker discretion where standards are exceeded): *The development does not result in a cumulative annual average level greater than 30 µg/m^3 of PM_{10} for private dwellings. Note. This development standard does not prevent a consent authority from imposing conditions to regulate project-related air quality impacts that are not the subject of the development standard.*

[29] Ibid.

[30] A summary of the NEPM standards are available at: www.environment.gov.au/atmosphere/airquality/standards.html.

[31] See for example Raaschou-Nielsen et al. 'Air pollution and lung cancer incidence in 17 European cohorts: prospective analyses from the European Study of Cohorts for Air Pollution Effects (ESCAPE)' (2013) *The Lancet* http://dx.doi.org/10.1016/S1470-2045(13)70279-1.

[32] Recommendations in the *WHO Air quality guidelines for particulate matter, ozone, nitrogen dioxide and sulfur dioxide* (2005) suggest an annual average for PM10 of 20µg/m^3.

iii) Air blast overpressure[33] and Ground vibration[34]

We note that these proposed standards are consistent with the *Australian and New Zealand Environment Council – Technical Basis for Guidelines to minimize annoyance due to blasting overpressure and ground vibration* (1990). Nevertheless, the standards should not prevent the setting of lower levels where sensitive structures may be affected, such as heritage items, or natural features like rock overhangs.

These standards only apply to 'private dwellings' and 'sensitive receivers'. As noted, definitional problems mean that if mining companies purchase properties and rent them, or if overpressure/vibration affects sensitive nearby natural areas (such as national parks), the standards need not apply. This problem should be addressed.

In relation to air blast overpressure and ground vibration levels in the proposed SEPP, EDO NSW **supports** the use of these standards, with the **following amendments**:

- the decision-maker should be able to set lower airblast overpressure and ground vibration limits where appropriate, for example in environments with sensitive natural features or heritage buildings; and
- the definition of 'sensitive receivers' should be expanded to include natural areas.

iv) Aquifer interference[35]

In relation to aquifer interference standards in the proposed SEPP, while EDO NSW supports increased requirements to apply appropriate standards under the Aquifer Interference Policy (**AIP**), we retain significant concerns about the thresholds and exemptions under the AQIP itself.

The current AQIP provides the available standards against which aquifer drawdown can be measured.[36] However, as expressed in our submission to the draft AQIP we remain concerned that a number of thresholds in the AQIP fail to provide a link between the *measure* being used to assess an application for an aquifer interference approval, and the *risk of harm* to the environment.

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[33] The proposed SEPP clause 12AC(5) would require (subject to decision-maker discretion where standards are exceeded):
Airblast overpressure caused by the development does not exceed:
(a) 120 dB (Lin Peak) at any time, and
(b) 115 dB (Lin Peak) for more than 5% of the total number of blasts over any period of 12 months, measured at any private dwelling or sensitive receiver.
Note. This development standard does not prevent a consent authority from imposing conditions to regulate blasting impacts that are not the subject of the development standard.

[34] The proposed SEPP clause 12AC(6) would require (subject to decision-maker discretion where standards are exceeded):
Ground vibration caused by the development does not exceed:
(a) 10 mm/sec (peak particle velocity) at any time, and
(b) 5 mm/sec (peak particle velocity) for more than 5% of the total number of blasts over any period of 12 months, measured at any private dwelling or sensitive receiver.
Note. This development standard does not prevent a consent authority from imposing conditions to regulate ground vibration impacts that are not the subject of the development standard.

[35] The proposed SEPP clause 12AC(7) would require (subject to decision-maker discretion where standards are exceeded):
Any interference with an aquifer caused by the development does not exceed the respective water table, water pressure and water quality requirements specified in item 1 in columns 2, 3 and 4 of Table 1 of the Aquifer Interference Policy for each relevant water source listed in column 1 of that Table.
Note. The taking of water from all water sources must be authorised by way of licences or exemptions under the relevant water legislation.

[36] See EDO NSW, Submission on the Draft NSW Aquifer Interference Policy – Stage 1 (May 2012).

We have also commented previously on the various exemptions where the AQIP does not apply (such as for certain licence and lease renewals).[37] As we understand it, the standards in the proposed SEPP would not overcome these problems. However, this may be an opportunity to address those widely-held concerns. EDO NSW therefore supports inclusion of the AQIP standards, subject to them being applied across all mining projects including all licence and lease renewals, not just those which require development approval.

4) Amendment to move consideration of existing mining projects out of Part 3 (meaning they do not become 'secondary' considerations)

We oppose the amendment at item 3 of the proposed SEPP in the absence of clear reasons. The explanatory material refers to 'minor administrative amendments to improve the structure of the instrument'.[38] However, as we understand it, proposed item 3 would exempt existing mines from becoming a lesser priority compared with new mines. This is because:

- Clause 13 requires a decision-maker to consider whether a new development application (**DA**) for a mine will have significant impacts on existing mining projects.
- Draft clause 12AA(3) provides that 'the significance of the resource [new DA] is to be the consent authority's principal consideration under this Part.' (i.e. under Part 3)
- Item 3 of the proposed SEPP would move existing clause 13 from Part 3 to Part 4.

Moving clause 13 out of Part 3 therefore appears to create a double standard which protects existing mining projects from being downgraded to a 'secondary' consideration. Other land use considerations that will remain under Part 3 (such as water, conservation, housing or agriculture) will become a 'secondary' consideration compared with significant new mining projects. However, the impacts on existing mines will be considered separately under Part 4 of the Mining SEPP (as a new clause 18B). We submit that, if the proposed SEPP is introduced, existing mining projects should not be treated differently from other existing land users.

5) Requirement to consider OEH certification (adequacy of mitigation/offsetting)

The Planning Department's website states that the aim of this change is to 'elevate the importance of the Office of Environment and Heritage in the assessment process'. EDO NSW is concerned that the language of item 4 (new clause 14(2)) is vague and not sufficiently robust.

First, the reference to OEH certification is vague, as it does not clarify the context in which such certification may be provided. Nor does it point to the safeguards in place to ensure that OEH can assess mitigation and offset of biodiversity impacts against robust standards. In this regard, EDO NSW **recommends** any certification from OEH must be consistent with:

- Concerted policy action and long-term strategic planning to *contextualise offsetting* within a broader strategy of environmental conservation;
- Appropriate use of a *mitigation hierarchy* – with appropriate guidance and emphasis on 'avoid' and 'mitigate' aspects prior to considering offsets;
- The use of *'red flag' areas*, to make clear that there are certain matters in relation to which offsetting cannot be an appropriate strategy;

[37] See EDO NSW, Submission on draft Gateway process for Strategic Regional Land Use Policy (Dec. 2012), recommendations 5 and 15; see also Submission on the Draft NSW Aquifer Interference Policy – Stage 1 (May 2012), both available at: http://www.edo.org.au/edonsw/site/policy_submissions.php#3.

[38] Department of Planning, *Explanation of the intended effect of the proposed State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013* (July 2013).

- A goal of *enhancing environmental outcomes* (posited in WA and Victoria), to acknowledge past human impacts on biodiversity loss, and that action is required to reverse this trend;
- A requirement of *like-for-like offsets*, to ensure that the environmental values of the site being used as an offset are equivalent to the environmental values impacted by the proposed action;
- A requirement of *'additionality'* based on clear criteria – to ensure that offsets are not approved unless they provide a conservation benefit additional to what would otherwise occur; and
- No use, or minimal use, of *indirect offsets* – due to higher uncertainty of linkages with impacts, and higher risk that biodiversity outcomes may not be achieved.

Second, in addition to clarifying the context and safeguards of this item, we are concerned about the specific wording in the proposed SEPP, which is narrower than the explanatory notes.[39] Draft clause 14(2) requires that the consent authority 'must consider' any OEH certification that mitigation or offset measures 'will be adequate'. However, no such consideration is required of any OEH finding that such measures are *inadequate*.

EDO NSW therefore **recommends** that this item be amended to require decision-makers to comply with (or at least take account of) *any* OEH advice provided on proposals to mitigate or offset biodiversity impacts, including a finding by OEH that proposed measures are *not* adequate. This would increase the effectiveness of this clause and reflect the explanatory notes.

Conclusion

Overall, EDO NSW does not support the additional, 'principal consideration' of the economic significance of a mining resource project as a new aim in the Mining SEPP. Resource significance can be sufficiently considered under the existing aims. The 'principal consideration' amendments have a range of undesirable consequences which threaten the integrity and public confidence in the mining assessment process.

If a new aim is added to the Mining SEPP, in order to maintain public trust and integrity of decision-making, the proposed SEPP must be amended to:

- promote the *ecologically sustainable* development of significant mineral resources;
- 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);
- remove or limit the discretion of DTIRIS in influencing the decision-making process;
- remove the clause that would make the project's economic significance the 'principal consideration', over and above other factors under Part 3 of the Mining SEPP (such as existing and preferred land uses, and impacts on the natural environment);
- amend the proposed development standards as recommended in this submission; and
- improve the effectiveness and safeguards around the consideration of OEH advice.

[39] NSW Department of Planning and Infrastructure website; and the FAQ document, *Planning Changes for the Resources Industry – Frequently Asked Questions* (July 2013): 'The changes also elevate the importance of advice received from [OEH], by making it necessary for the consent authority to consider any advice which has been received from OEH on biodiversity mitigation and offset measures relating to the project.'