

Ms Carolyn M^cNally
The Secretary
Department of Planning & Environment
GPO Box 39
Sydney NSW 2001

15th February 2018
PO Box 871
TAMWORTH, NSW, 2340

Dear Ms M^cNally,

Re: Feedback on VLAMP Policy & Consideration of Noise & Dust Impacts from Mining & Gas Developments

The Association of Mining & Energy Related Councils of NSW ('AMERC') welcomes the opportunity to provide feedback to the Department of Planning & Environment ('DPE') regarding the NSW Government's policy for voluntary land acquisition and mitigation actions that can be undertaken to address noise and dust impacts from mining and gas projects ('Policy') dated November 2017.

A. About the AMERC

The AMERC (then AMRC) originated in 1978 with several Councils recognising that Local Government Areas associated with coal developments would benefit from a co-ordinated approach when liaising with proponents and the NSW State Government. In 1993 the scope broadened to include metalliferous mines. In 1999 it expanded further to represent Local Government on all extractive industries, including unconventional gas and in 2017 added renewable energy projects to its remit. Currently there are 19 member Councils of the AMERC, most of whom are located in rural and regional areas of NSW.

B. General Comments: AMERC Members and Impacts from Mining Projects on Adjacent Landholders

Local Councils are the sphere of government directly responsible for the daily governance of Local Government Areas. They strive to facilitate human endeavour that is sustainable environmentally, socially and economically. Often, they have to deliver services and facilities across vast distances and sparse populations. Thus, Councils are 'on the front line', interfacing with their communities and have a very good understanding of the local issues and challenges.

AMERC member Councils are aware of the concerns expressed by some landholders who adjoin mining and gas developments. The concerns regarding noise, dust and water impacts, to name a few, can adversely affect the physical and mental health of residents and ratepayers, sometimes seriously. What underpins their concerns is their sense of powerlessness when dealing with both the State Government regulators and the mining and gas companies.

Having carefully reviewed the contents of the draft Policy, AMERC invites the NSW Government to reconsider the Policy to strengthen it, to better address the rights of landholders to have reasonable input.

AMERC's general comments below are separated according to two elements; the VLAMP process as to how negotiations between a landholder and a miner/gas producer might occur and secondly commentary around the Industrial Noise policy changes.

VLAMP

The AMERC recommends the Policy document be revised to better acknowledge and accommodate the following fundamental elements:

- 1) The Crown controls the mineral resources which are exploited, in accordance with government permission and the economic opportunities seen by mining and gas companies, to deliver benefits to the public treasury and company shareholders. However, generating this public advantage or benefit should not, in our view, to be obtained at the cost of arbitrarily allocating private loss, cost, damage or detriment to adjoining landholders, many of whom are highly productive farmers who also provide valuable economic contributions to the welfare of regions and Australia generally;
- 2) Landholders are generally unlikely to welcome an adjacent mine or gas field. To the contrary, the disruption and nuisance – whether personal, environmental, economic or social - can be very considerable;
- 3) Mining and gas companies must, on first principles, own enough land around their activities for an appropriate buffer in order to minimise impacts on neighbours;
- 4) There are substantial power imbalances between mining/gas companies and local landholders. It is our observation that the current playing field is severely in favour of the companies because landholders do not have the time, the technical knowledge or the economic or political influence to match that of the developers;
- 5) Following on from the above, it is recommended VLAMP be made more equitable by incorporating mechanisms and processes that acknowledge the power imbalances and protect a landholder's right to natural justice;
- 6) Any interference by mining or gas developments to a landholder's right of quiet enjoyment must be fairly and adequately compensated. This should include compensation for costs such as legal, technical, valuation and other experts' opinions as required, as well as a recognition of the landholder's time spent on such matters;
- 7) Noise and dust impacts are not the only issues of concern to landholders. Often of equal concern are surface water and groundwater impacts, blast fumes, visual impacts (including night lighting), ecosystem disruption and the loss of social amenity. VLAMP should be broadened accordingly;
- 8) Mining and gas companies should automatically provide the landholder with the provision of independent third-party assessment of noise, dust and water impacts;
- 9) Mining and gas project approvals feature modelling of various environmental parameters that predict the likely impacts. Such modelling is founded on various assumptions and estimates that are challenging for experts to interpret and evaluate, let alone non-experts like landholders. The Policy should make allowances for this by providing procedural safeguards to landholders;

- 10) Once a project is approved and it is found that the actual impacts are different (often worse) compared to those predicted in the models, then the models should be recalibrated and re-run, with the consent conditions revised accordingly;
- 11) The current consenting process provides few consequences for proponents if they underestimate and thus lessen the predicted impact footprint in order to limit more demanding consent conditions and additional land buffer costs. It is recommended Government policy in general and this Policy in particular, articulate punitive consequences for underestimating impacts;
- 12) Noise and dust consent conditions need to be more outcomes-focussed. It is recommended the DPE should have the right to change/tighten conditions based on the first years of actual operational experience; and
- 13) Regarding compliance management, the track record would suggest that both the EPA and the DPE have insufficient limited resources to be able to assess noise and dust compliance to a sufficiently high level of confidence such that the evidence can withstand scrutiny in a court of law. The outcome of this situation is that the mining and gas companies, in effect, have more leeway in the generation of noise and dust impacts without the risk of prosecution.

Mining SEPP changes re noise and dust

The AMERC recommends the Mining SEPP regarding noise and dust aspects be revamped to accommodate the addition of key principles to underpin the SEPP, namely adoption of equity, fairness, Ecologically Sustainable Development (ESD), user pays, intergenerational equity and the precautionary principle as well as no net loss due to environmental impacts.

One of the stated objectives of the new Noise Policy for Industry is to help determine “achievable noise limits for planning approvals and/or licencing”. As the key regulator for noise in NSW, the EPA has an obligation to the community to go beyond determining “achievable noise limits” and develop guidelines that help to determine acceptable noise impacts on the community. Research, including that by the World Health Organisation, is increasingly demonstrating that noise, particularly noise that interrupts sleep, can have significant health impacts. The community reasonably expects that the key regulator for noise in NSW will identify what constitutes unacceptable noise impacts, based on objective criteria, and that this information will also be considered in any project assessment process.

The Noise Policy for Industry also incorporates the significance of residual noise impacts (Table 4.1, page 28) from the '*Voluntary Land Acquisition and Mitigation Policy*' as a guide to the acceptability of residual noise impacts. AMERC does not support the application of this policy and believes a more stringent application of noise mitigation measures is required.

A key objective of industrial noise management should be to limit noise impacts on the community. All projects should be required to assess and implement all reasonable and feasible noise mitigation, i.e. mitigation should not only be required once noise exceeds industrial noise trigger levels. Such a requirement would appropriately put the focus on reducing noise as part of project development and implementation rather than placing the burden of increased noise on the community.

AMERC does not support the raising of the minimum daytime background noise from 30 to 35 decibels (A-weighted (dBA)). This increase will have a disproportionately negative impact on rural communities who are already being subjected to significant increases in noise from mining developments.

For example, recent expert advice tabled in relation to the Bylong Coal Project identified that:

“While there were no major deviations from the INP, due to the very low background noise level in the Bylong area (<19 dBA), the impact of noise from the proposal is likely to be significant. This arises because the INP methodology allows measured background noise levels below 30 dBA to be considered as 30 dBA for the purpose of assessment. In this case, that leads to a prediction of project noise levels of 15-20 dB above the background noise level, instead of the normally accepted 5dB emergence. This is a serious shortcoming of the INP which only affects rural communities.”

With the new Noise Policy for Industry, the combination of an increased minimum daytime background noise from 30 to 35 dBA and the proposed guide to the acceptability of residual noise impacts, mean that the community could be exposed to more than 20 dB of increased noise before the need for mitigation measures is triggered. The new minimum daytime background noise level is likely to create similar problems for many rural communities.

C. Specific Comments on Elements of the Policy

Below are specific comments made in relation to various parts of the Policy; hence are best read in conjunction with the document at hand.

C.1 VLAMP

Background (page 5)

Introductory first three paragraphs:

Suggest the commentary be more even-handed to acknowledge the impacts on adjoining landholders, given that is the real reason for the existence of VLAMP.

Noise Impacts on the community:

Suggest expanding the reference to sleep impacts to address both disturbance and awakenings as they are different elements - see World Health Organisation provisions.

Policy rationale:

Phrases like ‘reasonable and feasible’, ‘consider all alternatives’, ‘in the public interest’, ‘net benefit’ frequently occur throughout the document, including in the various figures. They are nebulous and subjective terms and have proven problematic when industry and external experts disagree. It is recommended the phrases above should be clearly defined with a prescribed outcome stipulated.

2nd bullet page 6: add that if the project is approved because it is deemed to be ‘in the public interest’ then the Government acknowledges there may be the transfer of personal costs to adjoining landholders and that, via VLAMP, the landholder will be compensated by either the proponent or the State Government.

Policy - General (page 8)

On pages 8 and 9 and elsewhere the following phrases occur:

- applicants must ensure that 'landowners are properly informed',
- applicants are to ensure landholders 'have a good understanding of the scale and nature of the predicted impacts through the provision of relevant air quality and noise impact predictions'
- 'the health risks'
- that applicants 'should bear all reasonable costs associated with (the landholder) entering into the agreement' including costs for providing expert advice to landholders to enable them to make informed choices'.

Once again, these terms are quite nebulous and subjective and have proven problematic when industry and independent experts disagree. As above it is recommended the phrases should be clearly defined with a prescribed outcome stipulated.

AMERC recommends the DPE have a leading role in arbitrating any impasses in negotiations, with costs to be borne by the applicant. For the provision of natural justice there needs to be some mechanism whereby there is an independent third party that the landholder can turn to for arbitration as previous examples of 'negotiations' have depicted that some proponents are intractable.

Voluntary acquisition (page 12)

Grant of voluntary acquisition rights

First bullet: To provide for natural justice it is recommended the Policy stipulate that the applicant will fund the provision of independent third parties as required by the landholder to evaluate the robustness of predicted noise and dust impacts (and also water).

Voluntary land acquisition process

2nd para: any offer of acquisition by an applicant ought to be able to be independently assessed as to whether it is fair and reasonable given land valuations, market strength and compensation for disturbance and disruption. Just because an applicant makes an offer does not necessarily mean it is fair and reasonable.

Figure 3 (page 15): Suggest 2nd box read 'valuations by applicant and landholder; paid for by applicant'

Policy - Noise (page 16)

Figure 4 - 2nd box 'Compliant?': Based on the track record of the VLAMP implementations to date, it appears the vagaries of noise and dust measurement, when coupled with the EPA and the DPE having insufficient resources to be able to assess compliance on noise and dust matters to a sufficiently high level of confidence, means that it is very difficult to secure evidence that can withstand scrutiny in a court of law. The consequence of this is that the mining and gas companies, in effect, have more leeway in the generation of noise and dust impacts without the risk of prosecution. AMERC urges the NSW Government to better resource these two regulatory arms and make noise and dust consent conditions more robust and transparent to help build community confidence in the integrity of compliance management.

Policy – Particulate Matter (page 21)

Voluntary mitigation rights (page 22): Suggest add another bullet; namely ‘provision of annual funding to cover the additional electricity expenses for powering air conditioners and clothes dryers (note: funding was provided to residents in a village adjoining a mine when it responded to noise and dust issues).

Definitions (page 25)

Consistent with comments above AMERC recommends that the following phrases be defined to help provide clarity and transparency regarding what is expected. At present there is a wide range of interpretations being promulgated, depending on which side of the argument you wish to defend:

- ‘properly informed’
- ‘good understanding’
- ‘informed choices’
- ‘all reasonable costs’
- ‘in the public interest’
- ‘net benefit’

D. Conclusion

The AMERC thanks you very much for the opportunity to provide feedback on this important Policy.

The Association values its role of participating in debate and discussion on relevant planning matters such as this. To that end it would help us help the DPE even more effectively if you could please provide feedback on the content herein. The AMERC would welcome the opportunity to meet and discuss any matters that you feel need further explanation.

If you have any queries regarding the above please don’t hesitate to contact the Executive Officer of the AMERC Mr Greg Lamont on phone 0407 937 636 or email greg@yourexecutiveservice.com.au

Yours sincerely,

Peter Shinton
Chairman
Association of Mining & Energy Related Councils