



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

PO Box 871
Tamworth
NSW 2340
1 Sept 2017

Dear Ms M^cNally,

Re: Feedback on Draft EIA Guideline Documents – EIA Improvement project

The Association of Mining Related Councils of NSW ('AMRC') welcomes the opportunity to provide feedback to the Department of Planning & Environment ('DPE') regarding the nine exhibited draft EIA guidelines which are part of the EIA Improvement Project. The exhibited documents to which we refer are:

1. Overview of the EIA Improvement Project
2. Community Guide to EIA
3. Scoping an EIS
4. Preparing an EIS
5. Responding to an EIS
6. Community and Stakeholder Engagement
7. Approach to Setting Conditions
8. Modifying an Approved Project
9. Peer Review

a) About the AMRC

The 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 recently included the ambit of renewable energy projects.

Currently there are 18 member Councils of the AMRC, most of who are located in rural and regional areas of NSW.

b) General Comments: AMRC Members and the EIA Guideline Documents

As the sphere of government directly responsible for the daily governance of each Local Government Area, Councils provide the leadership necessary to deliver equitable services and facilities to their various communities, often across large distances and sparse populations, as are found in rural areas.

Thus, Councils play a pivotal role in providing leadership and direction regarding the planning and assessment of proposed land use changes within their LGA. A key focus is facilitating human endeavour that is sustainable environmentally, socially and economically. Councils are also mindful that the EIA process imposes certain obligations on them in the decision-making on major projects.

The comments herein relate primarily to the planning, assessment and determination of major projects. AMRC congratulates you on the DPE's acknowledgement that reforms to the EIA process are necessary to address the lack of confidence and trust the public currently has in the system. We believe the proposed reforms will assist in rebuilding trust. The AMRC also offers herein some suggestions for further improvement.

c) Specific Comments on each of the EIA Guideline Documents

Outlined below are comments specific to each of the Guidelines.

Guideline 1: Overview of the EIA Improvement Project

The AMRC supports the following stated key objectives of the EIA Improvement Project:

- build community and stakeholder confidence in EIA and decision-making;
- improve opportunities for public participation in EIA and clarify how feedback is taken into account in project development and decision-making;
- strengthen planning and environmental outcomes by creating a clearer link between the identification and assessment of impacts, conditions of consent and actions to manage impacts; and
- improve the form and content of EIS's so they provide decision makers with better information to make more robust planning and environmental decisions.

The AMRC agrees there needs to be:

- a greater onus placed on developers, to facilitate active and genuine participation by the community much earlier in the EIA process, to identify concerns and certainly well before the EIA is finalised. It is vital that people should have a say in matters that affect their lives and earlier engagement will allow issues to be identified early in the EIA at a time when there is greater scope to address them. As the DPE acknowledges, it is generally too late for effective and meaningful community input at the formal EIS submissions stage; and
- an increased focus on managing impacts, by linking conditions of consent to the prediction of impacts and supported by clearer compliance and enforcement measures.

In terms of the 'Principles to Guide EIA' the AMRC suggests there be:

- a stronger focus placed on ensuring assessment decisions meet the criteria of Ecologically Sustainable Development (ESD). In our view, many of the decisions on major projects are based on a 'public interest' argument that is really about jobs and royalties. Thus, the focus has been on short term economics, with environmental and social considerations often listed as secondary considerations. To exacerbate matters, often the estimates of the number of jobs and royalty quantum are overly optimistic and fail to eventuate. The AMRC

recommends 'public interest' be redefined to much more closely align with Ecologically Sustainable Development principles;

- a greater priority given to avoidance of impacts before progressing through minimisation to management. It is vital that the environmental impacts are internalised to the project site and not 'outsourced' to neighbouring land users and the broader community;
- greater attention be given to cumulative impact assessment between projects. The EIA process should identify and assess potential cumulative impacts which result from the project and report these in the EIS, including recommendations to manage and mitigate cumulative impacts in the post-approval phase. We do note cumulative impact assessment will be addressed as part of the second phase of the EIA Improvement Project; and
- More robust, transparent, specific and measurable consent conditions. Often consent conditions are somewhat general and proponents have been able to interpret them to their advantage.

The AMRC notes that the EP&A Regulation very much limits the DPE's capacity to reject an EIS as inadequate. For instance, a request for additional information from the proponent can be made by the DPE at any phase in the EIA, however a proponent can choose to not provide the information. We therefore strongly support the DPE's move to review the current provision in the EP&A Regulation to look to strengthen the grounds for rejection of Development Applications and requests for additional information.

Guideline 2: Community Guide to EIA

The AMRC warmly welcomes the DPE's commitment to require the proponent to seek and consider community views especially in project design, as well as assessment of impacts and development of mitigation measures.

For engagement with the community to be truly effective it will depend on the attitude and commitment shown by the proponent as to the value of such an assignment. It will require a mindset that says this is a fundamental task vital to designing the very best project possible, in partnership with the community. Otherwise there is a risk that it will become another "box-ticking" exercise. The challenge for the DPE is how best to draft requirements that will facilitate the adoption of the appropriate attitude.

We note proponents will be responsible for engaging with the community throughout all phases of the EIA and that the approach will include:

- engagement as part of up front scoping, including establishing the level of engagement and participation outcomes during the preparation of the EIS;
- preparation of a Community and Stakeholder Engagement Plan (CSEP), mindful of the engagement outcomes during Scoping, to demonstrate how the participation outcomes will be met during preparation of the EIS;
- implementation of the CSEP during the preparation of the EIS; and
- explaining how issues raised through engagement have been dealt with, in the design of the project and the preparation of the EIS. If raised issues have not been addressed, proponents must give a reason.

The AMRC recommends that the objectives in the guideline be revised to focus more on how the engagement process is conducted. It should be conducted in such a manner that it:

- a) is respectful and empathetic;
- b) builds trust and goodwill. That is, proponents will genuinely listen to understand, help and deliver on promises;

- c) respects and protects local societal norms and deeply held values, sense of place and identity, the things that give meaning to life in that district;
- d) improves the wellbeing of the community as a whole and especially the vulnerable, disadvantaged or marginalised across services, housing, safety and security;
- e) reduces social exclusion and fragmentation; and
- f) builds capacity and governance in institutions.

When the EIS reports on the proponent's engagement with the community, AMRC recommends that the key performance measures need to focus on the above a) – f) measures rather than procedural matters such as how many meetings, forums, workshops, etc. were held. It will be useful for the EIS to describe how the engagement outcomes have been met and how community feedback has influenced the design of the project, alternatives, the potential impacts and the proposed mitigation measures.

We understand a Community and Stakeholder Engagement Plan (CSEP) will be prepared early on by the proponent which will detail the approach to achieving the outcomes identified in the Scoping Report and SEARs, and for participation during the preparation of the EIS.

The benefit of the concept of preparing a Community and Stakeholder Engagement Plan (CSEP) will be dependent on how well the proponent delivers on the a) to f) criteria mentioned above.

Guideline 3: Scoping an EIS

The AMRC supports proponents preparing a substantial Scoping Report up-front in the process to provide clarity and detail to the DPE as it develops the SEARs, and for the proponent to meaningfully engage with the community in preparing this Report.

The community definitely wishes to help shape major projects and have input during the 'project concept' stage and it will be a big step forward if early engagement, as required in preparing the Scoping Report, occurs. Significant engagement with the community at this formative stage will allow any major differences in perspective to be flagged and allow the proponent to develop an engagement strategy for the project that addresses the complexities and controversies of the situation.

The AMRC looks forward to seeing the SEARs being more prescriptive in requiring proponents to address specific Social Impact Assessment (SIA) matters, leading to the detailed conditioning of various social impacts in the consents. We note that SIA Guidelines are currently being finalised.

On the matter of the Santos gas field project and the APA gas pipeline project, the AMRC offers the following comments. An integral component of a major coal mine or wind farm proposal, is how it plans to transport 'product' to market. For a coal mine it is road or rail transport. For a wind farm it is the transmission line. Following that logic why was the proposed Santos Narrabri gas project EIS allowed to be exhibited when the project scope is incomplete, as it omits the gas transport/delivery mode? In our view the project EIS should not have been allowed to proceed and the proponent advised to include the means for delivery to market.

Furthermore, if the Santos gas field project was to be approved, the separate and independent gas pipeline proposal will not be able to be assessed objectively solely on its merits as there will be huge pressure for it to be given approval to link in with Santos. In essence, Santos cannot go ahead unless the pipeline is approved, so why aren't the two projects integrated? We look forward to DPE's response.

We also challenge the SEARS to better address the assessment of cumulative impacts. To undertake this task adequately, we recommend the SEARS require far more robust and thorough baseline data collection and more rigorous environmental and performance monitoring systems implemented across regional/catchment-wide air sheds and water basins.

The aim of having SEARs provide clearer, more explicit direction to the proponent will be a big improvement and hopefully deliver more thorough and objective EISs and more targeted consent conditions.

The AMRC also supports the issuing of a Statement of Reasons by the DPE to accompany the SEARs. It will be informative to know the reasons for decisions to require EIS assessment for certain matters and not for others.

Guideline 4: Preparing an EIS

The AMRC supports the following proposed reforms in the content of an EIS:

- Have a 'project description chapter' which will be updated in response to any changes to the project resulting from the response to submissions and any modifications to the approved project, so that there is always an up to date project description over the life of the project;
- Reduce the length of impact assessment summaries in EIS Volume One by focussing on impact assessment and mitigation, rather than methodology and background, which will be provided in subsequent volumes;
- Provide an 'evaluation and conclusion' section which discusses the merits of the project as a whole, rather than focus on individual matters. The section will also describe how impacts have been avoided and mitigated over the duration of project design and how the concerns of the community informed the design of the project; and
- Have an 'engagement chapter' which evaluates how the engagement outcomes identified through scoping and SEARs have been met, and how feedback has informed the project and EIS.

The AMRC also refers to comments made earlier in this submission which are applicable to how an EIS ought to be prepared.

Guideline 5: Responding to Submissions (RTS)

The AMRC supports the proposed reforms aimed at providing greater detail and explanation for those issues of wider community and stakeholder concern.

We support the following proposed obligations on the proponent in the RTS process:

- Providing detail to allow a submitter to clearly identify where and how their individual submission has been addressed;
- Explaining how the project and/or mitigation measures have changed in response to the issues raised in submissions;
- Providing an updated project description incorporating these changes;
- Describing any additional environmental assessment and engagement undertaken to understand impacts arising from changes to the project;
- supporting responses with evidence; and
- providing reasons, if a suggested change to the project has not been adopted.

AMRC agrees the responses to issues should be more meaningful and respectful, and should take account of both real and reasonably perceived impacts. To support responses to issues, proponents should demonstrate how the response has led to a change to the project's design, an update to the project description or a change to the performance criteria or mitigation measures.

It is important that during the preparation of the RTS, proponents continue to engage with the community in developing solutions to the issues raised in submission and provide updates to the community.

Guideline 6: Community and Stakeholder Engagement

The AMRC supports the proposal that the DPE will, during the 28-day period for setting SEARs for contentious projects, exhibit the Scoping Report and invite feedback on the relevant matters to be considered in the EIS, which will then be taken into account in finalising SEARs.

We are concerned however, that the timeframe of 14 days will be too constraining for some Councils to be able to contribute meaningfully. For instance, a 14 day turn-around may well require the calling of an Extraordinary meeting of Council.

We encourage increased attention being placed on how proponents have engaged, what feedback was obtained, and how the project has evolved as a result of what was heard. We applaud the intention to focus on outcomes from community participation.

The AMRC supports:

- the Scoping Report describing the proposed approach to engagement during the EIS phase including how areas of potential concern identified during scoping will be addressed through engagement;
- the emphasis being on defining the engagement outcomes to be achieved with engagement activities and methods designed to meet said outcomes;
- the DPE's preparedness to meet with the community during the EIS exhibition phase for major projects, where there is a high level of community and stakeholder interest;
- the development of project specific participation outcomes for the EIS phase;
- the preparation of a Community and Stakeholder Engagement Plan (CSEP) following the issue of the SEARs to set out how the participation outcomes will be achieved; and
- documentation in the engagement chapter of the EIS the activities undertaken and evaluation of how the participation outcomes have been achieved through these activities.

The AMRC believes qualitative results will be very important, more so than quantitative data such as how many meetings were held. We believe key data will revolve around the answers to the following types of questions:

- a) did the people who attended the workshop/meeting/etc. feel their values and opinions were respected and taken seriously by the proponent? and
- b) how receptive was the proponent to learn about their views and how willing was the company to adjust the project design accordingly?

We suggest the DPE establish an on-line portal to allow community members to share feedback on their experiences in the engagement process for specific projects. This will enable unfiltered feedback to the DPE on the adequacy of engagement.

The AMRC supports the use of deliberative forums/workshops which aim to increase understanding of the different perspectives from members of the public. We note the guideline mentions the possible use of 'Citizen Juries'. We believe such an approach warrants trials as it may help develop a deeper understanding of issues. Potentially, it can also result in an agreed approach or solution to a previously contentious issue.

On the matter of engagement, a key concern for many in the community is the operation of the PAC. The current format of the hearings is one where a presenter talks to the PAC members but often there is little two-way dialogue which leaves a presenter unsure what the PAC thinks about the content. There is little opportunity for true engagement and dialogue. The AMRC strongly urges the hearings to be far more inquisitorial, with the PAC asking questions and enabling more interrogation.

The AMRC also notes that the PAC public hearings remove merit appeal rights to the Land and Environment Court. However public hearings are directed at the Minister's discretion and are by no means as rigorous or equitable as a court hearing, where the evidence can be properly tested by both objectors and proponents. We thus oppose the continued exclusion of third party merits appeals following a public hearing.

Community consultative committees (CCCs) can potentially play an important role in facilitating dialogue and engagement between proponents and local communities for major projects. The AMRC applauds the recent reforms to the CCC process. Independent chairs are vital, as is clarification as to the scope of responsibilities. The AMRC agrees it is not appropriate for CCCs to be allocating or managing financial contributions from a proponent.

One area of engagement that has sometimes been missing, is with Councils outside the expected area of impact of a project, but for whom a biodiversity offset arrangement on land within its LGA may well compromise its rating base. We request the guideline make specific reference to this matter to ensure proponents are aware of the need to engage.

Guideline 7: Approach to Setting Conditions

Consent conditions should be specific, transparent, measurable and performance based. So-called adaptive management strategies based on plans are not acceptable, as often such practices are skewed in favour of proponents. The wording in such plans is often vague and general, providing ample 'wriggle room' for proponents to avoid accountability. Meanwhile, either the environment or the community (or both) may well have suffered adverse consequences. Deferring detail and substance to project management plans after approval has been granted, has not worked and is unacceptable to the community.

The AMRC also recommends:

- the law be changed, to allow the DPE to amend consent conditions once a major project is operational and it can assess actual performance. This move is necessary because the EIS modelling favours the proponent and there are financial benefits in predicting lesser impacts. The DPE should have a five-year window to allow consent conditions to be reviewed and modified once a development becomes operational and it can cross-check against performance; and
- the burden of proof be reversed so that proponents have to prove that a major project has not caused noise, dust, water and other impacts, rather than community members having to prove a project has caused an impact.

AMRC notes the draft guideline directs the proponents to develop a condition hierarchy of three categories, in order of preference, namely:

- performance-based conditions, which describe the quantifiable performance or outcome to be achieved rather than the means of achieving it;
- prescriptive conditions, which describe a specific action to be taken to manage an impact or specify things that must not be done (often called ‘best practice technology’); and
- management-based conditions, in the form of management plans, to determine detailed management measures for impacts.

Importantly, the guideline sets an expectation for more evidence-based decision-making by requiring an EIS to provide more up-front information. The AMRC supports this approach. We seek performance - based conditions and less reliance on detailed management plans.

The community also seeks greater rigour in how impacts are regulated, and the avoidance of inconsistencies between conditions in an Environmental Protection Licence (EPL) and the consent conditions. We suggest the EPL should take precedence. Conditions need to be specific, unambiguous and enforceable with clear outcomes as to what needs to be achieved, or actions need to be taken, by whom and when.

In the pursuit of more performance-based conditions, AMRC recommends greater attention be given to building robust and thorough baseline data sets and the setting of measurable standards and limits.

Prescriptive conditions or ‘best practice’ approaches are often inadequate to the community because (despite the adoption of so called ‘best practice’) there can still be unacceptable impacts being imposed on people and the environment.

The AMRC also supports:

- the issuing of consent conditions requiring Independent Environmental Audits for all major projects. We suggest the frequency of such audits be every two years rather than three because three years is too big a time gap and the community wants regular reassurance from an independent source that the project is in compliance;
- the EPA be required to install more sensitive, sophisticated monitoring equipment that is easy to remotely interrogate and available in real time to interested stakeholders. For instance, currently unattended noise logger data cannot be used for compliance purposes. Instead, a person must be present and conduct noise monitoring (called attended monitoring) for compliance action to be taken. Thus, delays and community frustration are commonplace;
- the EPA be required to adopt new remote monitoring technology (drones, on-site and vehicle mounted cameras, noise and dust loggers) and change the law so it can use such technology to enhance its regulatory capacity. There should be a consent condition for all major projects whereby the proponent must pay the sum of money that such a system would cost to purchase, install, monitor and maintain; and
- a major project’s environmental monitoring data should be available in real time to all interested parties – providing transparency of performance.

Guideline 8: Modifying an Approved Project

The AMRC notes the DPE seeks to clarify the process proponents must follow when seeking to change approved projects. It is fair to say the community does need confidence that developments

when built and operating are consistent with their project approvals and that there are a clear set of rules that apply to Modification Applications.

We agree there needs to be greater scrutiny on Modifications because there is a perception that some State significant development (SSD) and State significant infrastructure (SSI) projects adopt a 'low profile' approach to gain the initial approval then sequentially pursue several Modifications over time to achieve their ultimate goal - often a much larger project with far greater impacts than for the project initially approved. The community seeks a process that does not allow proponents to adopt an approach that leads to 'death by a thousand cuts'.

Guideline 9: Peer Review

The AMRC supports the peer review process to help build confidence and integrity in decision-making for SSDs and SSIs.

We note the draft guideline suggests peer review is an independent process undertaken by a consultant engaged by the proponent, the DPE, the Planning Assessment Commission (PAC) or other government agencies. The AMRC does not consider the engagement by the proponent of a third party is sufficiently independent as the proponent sets the scope and pays the fees. Any review by the proponent should be seen as just part of preparing an adequate and professional EIS. A proponent - initiated review is no substitute for a Government - initiated one.

We agree with peer review initiated by the DPE, the PAC or other government agencies. We also recommend there be clear rules as to when an independent peer review is undertaken and that it should be mandatory for contentious issues relating to major projects. We thus suggest peer reviews be much more than discretionary, as is currently proposed.

We support the concept that following review of the Scoping Report, the DPE may determine that an assessment of a specific matter requires peer review as part of the proponent's assessment. If this is the case, it will be included in the SEARs. Again, we do not support the proponent being responsible for arranging the peer review, rather the DPE should manage it, funded by the proponent.

Similarly, we understand and support the principle that during assessment or determination of an application the DPE, PAC, the Minister or other government agencies may choose to engage a consultant to undertake a peer review of a specific assessment in the EIS or the Department may request that the proponent has the findings of their environmental assessment, peer reviewed.

We note the draft guideline says 'the structure and content of the peer review report is critical' and that 'it should instil confidence in a range of audiences', including, inter alia 'the public who are likely to be affected by the impact being assessed'. The AMRC is of the view that of equal importance to the report's content is who is selected to perform the review. To instil public confidence, it will be essential that whoever is selected has no perceived, potential or actual conflict of interest and is a leader in the discipline.

In closing, the AMRC urges the DPE to progress with earnest the thrust of the EIA reform, ideally strengthened by incorporating AMRC recommendations listed herein. At the end of the day our society seeks an EIA process that is fundamentally robust, transparent, fair, delivers true ecologically sustainable development and holds proponents accountable for their environmental, social and economic impacts.

The AMRC thanks you very much for the opportunity to provide feedback on these important matters.

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

The AMRC would welcome the opportunity to meet and discuss the matters herein. We look forward to your response in this regard.

Yours sincerely,

Peter Shinton
Chairman
Association of Mining Related Councils