Review of the Voluntary Land Acquisition and Mitigation Policy

Submissions Report
September 2018
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Introduction

This report consolidates and summarises the themes raised in submissions received on the NSW Government’s proposed amendments to the Voluntary Land Acquisition and Mitigation Policy for State Significant Mining, Petroleum and Extractive Industry Developments (VLAMP). It also outlines the changes made to the VLAMP in response to the submissions, and responds to some of the key themes that were not pursued by the Government at this time.

Background

The Environmental Planning and Assessment Act 1979, and subordinate regulations, provide for a special development class termed State significant development (SSD). SSD primarily covers particularly large-scale developments, which may have significant impacts and/or result in significant investment and economic growth for the State. Most large mining projects are SSD.

Applications for SSD are assessed on their merits, with consideration given to the permissibility of the development under existing planning frameworks.

The VLAMP provides a mechanism for managing two critical impacts of open-cut mining that is SSD—air and noise. It does not provide instruction on when and where an open-cut mine may be built.

The VLAMP was first published by the Government in late 2014. It was intended to clarify existing assessment policy relating to the assignment of acquisition and mitigation rights for SSD resources projects, including mining, petroleum production and extractive industries. It also outlined the key assessment criteria used to inform the assignment of acquisition and mitigation rights to affected landowners.

The assessment criteria utilised in the VLAMP are adapted from policies published by the Environment Protection Authority (EPA):

- for air impacts: the Approved Methods for Modelling and Assessment of Air Pollutants in New South Wales (the Approved Methods)

- for noise impacts: the Noise Policy for Industry (NPI), formerly the Industrial Noise Policy.

The EPA recently updated the Approved Methods and the NPI. These updates included revisions to the assessment criteria for air and noise impacts. This necessitated a need for a review of the VLAMP, to ensure that Government policy is consistently applied.

The State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (Mining SEPP) requires that the consent authority\(^1\) consider the VLAMP, when determining a SSD proposal. The Mining SEPP also adapts air and noise criteria from the EPA’s Approved Methods and NPI as non-discretionary standards, that is, if the standards are met, the consent authority may not impose more onerous standards. As the EPA’s policies have been updated and the VLAMP is being revised, associated amendments to the Mining SEPP are required.

The Department of Planning and Environment conducted an internal review of the VLAMP, taking into consideration comments, submissions and input that were previously provided by various stakeholders through

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\(^1\) Under the Environmental Planning and Assessment Act 1979, the statutory consent authority for State significant development is the Independent Planning Commission.
other processes. Legislative change was beyond the scope of this review, which meant that proposals that required significant changes to the regulatory framework were not able to be considered.

Informed by the review, the Department revised the VLAMP to ensure the policy framework was clearly expressed — with a particular focus on the acquisition process, timeframes and the valuation of land.

**Exhibition of proposed amendments**

The Department placed the draft revised VLAMP and the Explanation of Intended Effect (EIE) for amendments to the Mining SEPP on public exhibition between 30 November 2017 and 16 February 2018. This extended consultation period was to allow for adequate consultation time, given the December holiday period.

The Department received submissions from the Better Planning Network, the Association of Mining and Energy Related Councils, Cotton Australia, Narrabri Council, NSW Minerals Council and the NSW Environment Defenders Office. Four submissions were received from members of the public.

In total, the Department received ten submissions, which comprised:

- three submissions that indicated support for the revised VLAMP, subject to additional amendments
- four submissions that did not support the revised VLAMP
- three submissions that provided comments, but were neutral or unclear in their position.

No submissions indicated outright support for the draft revised VLAMP.
Key themes in submissions

Several consistent themes emerged from the various comments provided in submissions. These themes are outlined below, with brief responses.

Better support for landowners in dealing with resource companies

Some submissions proposed that the Government should require project applicants to provide support to impacted landowners by:

- funding independent modelling and/or review of the project’s modelling of impacts
- funding landowners to obtain specialist advice or services to aid in negotiations, and/or
- paying landowners for their time spent in engaging with the applicant and the project.

Response

Applicants are currently required to ensure that landowners have a good understanding of the scale and nature of predicted impacts, and the health risks of such impacts. During voluntary land acquisition, the applicant is also expected to pay all reasonable costs associated with the process. What constitutes ‘reasonable costs’ is a matter for the parties to an agreement to determine in the course of their negotiations, and may vary on a case by case basis.

VLAMP should directly consider sleep interruption from noise impacts

Some submissions highlighted the issue of sleep disturbance, which is receiving increased scientific attention. These submissions called for the VLAMP to directly consider sleep disturbance criteria.

Response

The science of sleep disturbance, including the impacts at different levels of noise intrusion, is still being established. The NPI provides criteria for intrusive night-time noise impacts that trigger the need for additional assessment, to ensure that any impacts from the project are clearly understood. Depending on the outcome of those assessments, the project may be conditioned in different ways to minimise the impact on landowners – including the potential for voluntary acquisition conditions.

New consent conditions around compliance

Some submissions called on the Government to introduce new consent conditions around compliance. There were several variations on this theme, including proposals to:
• introduce ‘safety net’ conditions, where landowners who experience higher impacts than projected by the company’s modelling automatically receive acquisition and/or mitigation rights

• introduce penalties for operations that receive consent and subsequently find that the pollution modelling projected in the development application was inaccurate, resulting in higher impacts

• enable the Government to unilaterally amend consent conditions for a period of time after consent is granted, if impact modelling is proven to be wrong.

Response

Under current arrangements, where pre-consent modelling of impacts is found to be significantly incorrect after consent has been granted, the Department has the power to shut down the operation. In this case, the consent holder would need to ensure the operation is amended to comply with the approved impacts, or lodge an application to modify the consent to be consistent with the observed impacts.

Where impacts are not significantly increased from predictions, government agencies have a range of compliance options to ensure that the development is operating consistent with its development consent.

Valuation of land for acquisition

Some submissions called on the Department to change or dictate the calculation of land value and compensation payments for land acquired through the VLAMP.

Response

The VLAMP already provides guidance around the Department’s expectations on this issue. In brief, the VLAMP outlines that an offer to purchase land should be based on:

• the current market value of the land, as if it was unaffected by the development

• the reasonable costs associated with relocation and compensation for disturbance caused.

The VLAMP also makes provision for an independent valuer to be appointed by the Department to determine a fair and reasonable acquisition price, the reasons for which are provided to both parties.

The Noise Policy for Industry limits should not be applied

Some submissions called on the Department to not apply the NPI assessment criteria limits, for various reasons.

Response

One of the main objectives of the review was to adapt the revised Approved Methods and the revised NPI assessment criteria to the VLAMP to facilitate the consistent implementation of current Government policy.

This review was not revisiting or consulting on the content of the Approved Methods or the NPI, or whether they should be applied. The EPA has previously undertaken public consultation in the development of both the Approved Methods and the NPI.
Changes made in response to submissions

Several submissions raised issues or sought further clarifications on existing policy settings. In response, the Department has made the following changes:

- clarified that project applicants and landowners are expected to negotiate in ‘good faith’
- clarified that while negotiated agreements need to meet certain legal provisions to be implementable, they do not need to include any or all of the example clauses provided in the VLAMP (for example, landowners do not have to agree to ‘not objecting’ to a project proceeding—although a company may still seek to include such a clause as a point of negotiation)
- clarified that all payments and provisions of a negotiated agreement are open to negotiation between the parties (other than the legal provisions necessary to ensure the agreement is implementable)
- corrected the definition of ‘land’ to make it clear that the consent authority can consider both contiguous and non-contiguous lots, depending on the circumstances of the landowner
- included a new footnote to clarify the ‘net benefit’ box in Figure 1 and Figure 2
- corrected the first dot point under ‘voluntary mitigation rights’ (for noise impacts) to clarify that it may be appropriate for the consent authority to assign mitigation rights for marginal impacts (as defined by the VLAMP)
- clarified that the 14-day timeframe for parties to dispute an independent valuer’s report on the valuation of land that is to be acquired need only be sent within 14 days and must only include a notice of intention to dispute, with broad reasons
- corrected text to clarify that, if the landowner does not accept the applicant’s final acquisition offer within six months of the offer being made, the applicant’s obligation to acquire the land shall cease, unless the Secretary determines otherwise. This is consistent with the standard conditions of consent for resources projects.

Adaptation of the Noise Policy for Industry assessment criteria to the VLAMP

Several submissions raised concerns about how the NPII assessment criteria were proposed to be adapted in the revised VLAMP, as the proposed approach could weaken protections for landowners in certain circumstances. In response, the Department has amended Table 1 of the VLAMP to:

- clarify which time periods are relevant to each criterion
- clarify the definition of a ‘significant’ impact (which is a trigger for the application of acquisition rights), such that the total cumulative industrial noise level is no longer a factor in determining whether impacts are significant during the night period. This will mean that the assessment criteria for assigning acquisition rights for noise impacts will remain broadly consistent with the original VLAMP.
Next steps

The Minister for Planning will publish the revised VLAMP in the Government Gazette, giving effect to the revised policy settings. The Mining SEPP will also be amended, consistent with the EIE, to ensure the revised assessment criteria are adopted as non-discretionary standards and to ensure that the consent authority is directed to consider the latest version of the VLAMP when determining a SSD application.

Negotiated agreements and dispute resolution mechanisms

The Department is currently considering the need for:

- new or revised dispute resolution mechanisms, which could assist landowners and applicants in their engagements and negotiations
- further guidance on negotiated agreements to better inform landowners and applicants of the Government’s expectations in relation to these agreements.

The Department is not considering any model that means it will take an active role in reviewing or approving private contracts or agreements.