

4 May 2005

COMMENTS ON THE EXPOSURE DRAFT OF THE NATIVE VEGETATION OPERATIONAL GUIDELINES

INTRODUCTION

The Minerals Council of Australia, Victorian Division welcomes the opportunity to comment on the Department of Sustainability and Environment's Exposure Draft of the Operational Guidelines for Achieving Net Gain in Planning Decisions, received on 13 April 2005. As invited, our comments relate to the clarity, completeness and effectiveness of the Operational Guidelines in supporting the implementation of the Government's Native Vegetation Framework¹.

We have carefully reviewed the draft Operational Guidelines and are pleased to provide the following considered comments.

BACKGROUND

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry in its contribution to sustainable development and society both nationally and internationally. The Australian minerals industry generated \$41 billion in exports for the Australian economy in 2003-2004 which is 28 percent of total exports and 8.5 percent of GDP. MCA member companies produce around 85 per cent of Australia's total mineral output and over 90 per cent of Australia's mineral exports. The MCA's Victorian Division (MCAVic) represents the interests of members operating in Victoria.

Members of the MCA are committed to the Australian minerals industry's framework for sustainable development, *Enduring Value*², which operationalises the International Council for Mining and Metals principles (see **Attachment 1**). For the minerals industry, sustainable development defines our licence to operate and means that investments in minerals projects should be financially profitable, technically appropriate, environmentally sound and socially responsible. Importantly it's about the interdependency of social, environmental and economic considerations. It is a three-dimensional prism through which the industry can focus on its contribution to the economy and to Australian society.

When the Native Vegetation Framework was released in 2002 the minerals industry wholeheartedly endorsed the principles of the policy including the aim to achieve a net gain in native vegetation and to measure that gain through an objective measure

¹ Victoria's Native Vegetation Management: A Framework for Action, Department of Natural Resources and Environment, 2002.

² Minerals Council of Australia, *Enduring Value*, The Australian Minerals Industry Framework for Sustainable Development, 2004.

called the habitat hectare. We remain committed to the goal of a net gain in native vegetation.

However, in the passage from the principles upon which the Native Vegetation Framework was promoted to the draft Operational Guidelines many of the original principles have been changed or constrained through prescription.

Minerals industry developments in regional Victoria that are currently subject to native vegetation constraints involve capital investments of approximately \$600M. The MCAVic therefore expects to be effectively consulted on the native vegetation Operational Guidelines. Further, our members expect practical solutions to be found to achieve a net gain in native vegetation that assists regional development rather than make it more difficult in a regulatory sense.

OVERVIEW COMMENTS

Complexity

It is acknowledged that the draft Operational Guidelines are a significant improvement on the earlier draft reviewed by MCAVic in September 2004. Regrettably the exposure draft remains a very complex document and even if the inconsistencies detailed below were remedied it would remain complex. This complexity results from the highly prescriptive method used in regulating for a net gain, which can be a consequence of unclear policy and principles upon which to base the guideline. The Operational Guidelines attempt to fill the policy voids where no policies exist.

In discussions with Department of Sustainability and Environment (DSE) personnel there is an urgent desire to release the Operational Guidelines with a hope that this will resolve a great deal of the uncertainty that currently exists with the native vegetation controls. It is recognised that uncertainty exists but MCAVic believes that it is far more important that effective consultation with key stakeholders continues to ensure the Operational Guidelines are redrafted into a form that will achieve the stated goal of a net gain, are readily understood by all parties, and are capable of being implemented by local Government without significant referral to DSE and challenges in VCAT.

MCAVic is of the view that unless the draft Operational Guidelines are redrafted to remove the complexity the outcome will inevitably lead to most, if not all, native vegetation clearance applications referred to DSE. However, it is noted that DSE has very few trained officers able to undertake habitat hectare assessments and developers are currently being asked to hire consultants to undertake the assessments.

In addition, if the inconsistencies referred to below are not effectively remedied then it can be expected that VCAT will be called up very extensively to resolve the uncertainties and establish a range of precedents that will become the operational reference and relegate the Operational Guidelines to a curiosity.

Assessment Paths

MCAVic is of the view that the Operational Guidelines in their current form only serve to confuse rather than inform the implementation of Net Gain. The concept of

two assessment paths only serves to create further confusion. MCAVic recommends a single simplified decision tree as a more appropriate means of determining whether land tree offsets or habitat hectare offsets apply.

Avoid, minimise and offset

MCAVic agrees with the fundamental hierarchy of native vegetation management of avoid, minimise and offset.

During exploration activities it is usual for adjustments to plans to be made to avoid, or at least minimise, the clearance of native vegetation. However, it is important to note that mining companies cannot dictate where their ore bodies exist and consequently, where their mining operations are located. In these cases it can be difficult to avoid the clearing of native vegetation. Therefore, the identification and use of offsets becomes of primary importance to the minerals industry.

However, it should be recognised that on a statewide basis the minerals industry is already excluded from 42 per cent of the Crown estate and therefore actively avoids the areas that are recognised as having the highest conservation value in the State.

Exemptions under planning schemes

Native vegetation controls for exploration and mining activities are exempt from the state planning schemes because exploration activities do not require a planning permit and mining activities are closely controlled by the work plan approval processes administered by the Department of Primary Industries (DPI) on behalf of the Government.

The work plan approval process requires DPI to seek endorsements from other agencies such as DSE and the relevant CMA. Where mining requires a planning permit the work plan is endorsed by the local government authority before approval by DPI and where mining is required to undertake an EES the local government authority and DSE are actively involved in the entire approval process. In addition, DPI requires a financial surety (bond) to cover the cost of the mine site rehabilitation and revegetation works.

Consequently, MCAVic supports in principle the arrangements that require native vegetation controls for exploration and mining, where required to be managed through the work plan approval processes under the Mineral Resources Development Act, to be based on simple, effective, transparent and equitable guidelines. The exemption of exploration and mining to the planning scheme arrangements should be clearly included in Section 5.2 of the Operational Guidelines as well as in Section 12 as currently.

Permanent protection of offsets

MCAVic is concerned that there are significant inconsistencies in the exposure draft of the Operational Guidelines related to permanent protection of offsets. These specific concerns are discussed later.

The definition of an offset states “An offset is a gain in native vegetation extent and/or quality that is ‘permanently’ protected and linked to a particular clearing site which

will be actively managed in accordance with a vegetation management agreement for a period of ten years”.

MCAVic is extremely concerned with the requirement that all offsets must be protected by an ongoing permit condition or an agreement registered on the property title.

There is no justification for the permanent protection of all offsets. Offsets are already protected by the Native Vegetation Framework and if cleared as part of a later (unrelated) development will be replaced by further offsets which will always lead to a net gain, including that of the original clearance.

Permanent protection with agreements registered on titles and a prohibition on further clearing of the protected sites will sterilise significant portions of the State from future development. The area sterilised will grow year by year. Eventually, all of the State’s native vegetation will be an offset and there will be no further development permitted that involves the clearing of native vegetation. The aim of the policy is a net gain in native vegetation, not the sterilisation of ground from development.

Further, permanent protection with ongoing licence commitments is a most unsatisfactory outcome for industries such as the minerals industry, which is recognised as a temporary land use. Mining companies must be permitted to undertake their exploration or mining operations, rehabilitate the land (with a net gain), return the exploration or mining licence and move on. There is already a bond held by the government to ensure the rehabilitation work is undertaken. When that work is completed to the agreed standard the bond must be released.

The draft Operational Guidelines fail to appreciate the financial surety (or bond) system applied on all minerals tenements by DPI to ensure the liability for rehabilitation, including revegetation, is achieved. The MCAVic believe that the rehabilitation bonds are more than adequate to satisfy the protection required for offsets.

Inclusion of mining rehabilitation in offsets

MCAVic agrees fully with the inclusion of the full value of revegetation required to rehabilitate exploration or mining sites being counted towards the offset requirement, irrespective of the conservation significance of the vegetation being cleared. This policy should be recorded on Table 6 to avoid confusion.

However, the requirement that revegetation must meet the DSE Revegetation Planting Standard cannot be accepted as this standard is not available. The rehabilitation is currently required to the DPI rehabilitation standard. Surely there must be a whole of government standard and that standard must accommodate a broad range of landscapes. For example, criteria for heath land will be different to those for box-ironbark forests.

Exploration and mining as a temporary land use

MCAVic agrees fully with exploration and mining being defined as a temporary land use. This is a commonsense approach and reflects the long-term reality and nature of the business.

Offsets on Public land

MCAVic agrees that third party offsets will generally be located on land of the same land tenure and that the use of public land will be permitted as an offset for clearing on private land.

It is acknowledged that offsets on public land will be restricted to restoration and management beyond the normal obligations of the land manager.

BushBroker

MCAVic is concerned that the BushBroker scheme is not operational and that there is currently no mechanism for matching private developers who have a need to identify a third party offset and private landowners who have land that they are willing to provide as an offset.

For the Operational Guidelines to be effective it is critical that the BushBroker scheme is operational.

VCEC Review Recommendation

In its review of the regulatory impacts to regional economic development the Victorian Competition and Efficiency and Commission³ (VCEC) recommendation number 6.1 stated “That the Victorian Government initiate the planned review of the native vegetation management framework to provide a basis for assessing any future changes to native vegetation policy.”

It appears to MCAVic that DSE has disregarded this recommendation and wishes to proceed with a document that has been comprehensively shown to be a detriment to regional economic development. More than recommending a review of the Operational Guidelines, the VCEC is recommending a review of the underlying Native Vegetation Framework.

SPECIFIC COMMENTS

Clearing vegetation of very high conservation significance

The requirement that vegetation of very high conservation significance will only be permitted to be cleared under exceptional circumstances (pp 33-34) is an extreme restriction and one that will lead to many lost opportunities. It is noted that Ministerial approval is required and that that approval will consider the triple bottom line on a state wide perspective. This means that only large projects that would normally undertake an EES will qualify.

MCAVic is concerned with the requirement that any applications for Ministerial approval must be accompanied by letters of support from the General Manager or CEO of the Responsible Authority. With this requirement there is no scope for movement should that letter of support not be available; other than referring the matter to VCAT for a solution. A more appropriate process is necessary to avoid legal challenges in the future.

³ Victorian Competition and Efficiency Commission, Regulation and Regional Victoria - Challenges and Opportunities, Draft Report, January 2005.

Government initiatives to reduce regulation and remove duplication of approval processes as espoused by the VCEC and raised by EES independent panels etc are unfortunately significant casualties of this new Operational Guidelines. The uncoordinated requirements for consents for access to Crown land, EPA licencing requirements, local government planning approvals and complex DPI work plan approval processes all occur in addition to the separate, but similar native vegetation clearance procedures. MCAVic seeks minimum effective regulation not clumsy prescriptive overlaying regulation as proposed in the Operational Guidelines.

Timing of Offsets

The requirement that offsets must be proposed in sufficient detail at the time of application (p33) creates a new “rule” under the Framework. This requirement is impractical for large projects requiring large offsets and is inconsistent with current practice applied by DSE. MCAVic recommends that this requirement be reviewed and a more flexible approach proposed.

Permanent protection, management plans and security credits

The draft Operational Guidelines are extremely confusing when it comes to understanding the requirement for permanent protection of offsets.

Page 35 states clearly that permanent protection is required and that this protection can be achieved by an ongoing permit condition or an agreement registered on the property title. The same page also states that the offset will require active management for a period of 10 years.

Table 5, Page 38, specifies the formal agreement to achieve and secure an offset. The gains must be on-going and secure in nature and ultimately recorded on the Native Vegetation Permit Tracking system.

Page 42 states that landholders who agree to security arrangements beyond the 10 year management period will qualify for additional gain in the offset value. This additional security can be achieved by a management agreement registered on the property title.

Page 46 states that an offset which has been nominated on-title will be of more value than one with no formal acknowledgement.

Page 48 states that third party offsets must be subject to permanent agreement on-title and meet the like-for-like rules.

Page 49 states that there are two primary mechanisms to achieve security of offsets; conditions on a planning permit; or a legal agreement.

Page 50 states that permit conditions alone will be deemed to be sufficient to secure many offsets. Only larger or more significant stands of vegetation will require a higher level of security generally achieved through a Section 173 agreement under the Planning and Environment Act.

Some of these requirements imply that no formal security is required (p46) and that additional value of the offset is gained by securing the arrangement beyond the 10 year management plan. (p42). However, other requirements imply that permanent security is required for all offsets.

When temporary land uses are involved such as exploration or mining the concept of permanent protection through a planning permit or legal agreement is difficult to envisage. Also, there is no recognition given to the rehabilitation bond held as security by DPI to ensure the rehabilitation works are completed to the agreed standard. MCAVic believes that more work is required to make the document meaningful for exploration and mining activities.

As stated in the Overview Comments above the concept of permanently securing all offsets and preventing future clearing of offsets will eventually prevent any further development in the State, an outcome that will stifle economic development, particularly in regional Victoria and in the growth corridors around Melbourne.

Protection of old trees

The prescription that tree protection is not available on public land (p37) is unreasonable given that there are many parcels of Crown land that have little or no land manager intervention. Many of these parcels of land would benefit greatly from tree protection and should qualify for offset considerations. These parcels of land include unused road reserves, water frontage reserves, old school and community hall reserves etc. The restriction on p37 should be reviewed.

Inclusion of revegetation in offsets

Table 6 requires clarification to ensure the exemptions provided for temporary land uses such as exploration and mining are acknowledged on the table. For example, the table states that only 10 percent of offset can be obtained from revegetation for clearing of native vegetation of very high conservation significance. As stated earlier, page 54 states that the full value of revegetation can be incorporated in an offset irrespective of the conservation significance (equivalent to low conservation significance). This is a most important exemption as it would be counter productive to establish a disincentive to progressive rehabilitation of mine sites. It is recommended that Table 5 is similarly clarified to state that temporary land uses such as exploration and mining are treated as for low conservation significance land.

Use of prior plantings as offsets

The prescription on page 43 of the draft Operational Guidelines that areas revegetated by a landholder since 30 June 1989 cannot be used as an offset for clearance on different property requires clarification. There are many definitions of a different property. Is a property defined as a single land title; or adjacent land owned by the same landholder; or nearby land owned by the same landholder; or adjacent land owned by the same family etc? This requirement needs clarification.

Location of an Offset

Section 9.4, page 45 states that offsets must be achieved at a different location unless the native vegetation removal is temporary. For completeness it is recommended that the 'temporary' exemption include 'sustainable timber harvesting and mining'. On page 54 it is stated that clearing for the earth resources sector is a temporary loss.

Offsets on Crown land

It is accepted that offsets on Crown land need to be accomplished without cost shifting. This can be achieved, as proposed in the draft, by only including gains that are beyond the land manager's normal obligations as offsets. However, much Crown land is not managed to the full obligations of the land manager due primarily to a lack of resources whilst other areas simply have no management intervention.

To achieve improvements to the quality of Crown land without cost shifting it is proposed that the Operational Guidelines encourage partnerships between developers and public land managers to achieve net gains over and above the land manager's normal obligations. This may involve the agreement to a land management plan that identifies the 'normal' and 'extra' works and financial contributions to cover the extra works or the provision of work in kind by the developer to the agreed plan.

However, there are numerous degraded remnants in the Crown land estate that have little land manager intervention. Improvements to the native vegetation on these lands to achieve offsets will benefit all parties; including and most importantly, ecological function, fauna, threatened species, and biodiversity; and should be encouraged.

RECOMMENDATIONS

In discussions with DSE personnel there is an urgent desire to release the Operational Guidelines with a hope that this will resolve a great deal of the uncertainty that currently exists with the implementation of the Native Vegetation Framework. It is recognised that uncertainty exists but MCAVic is of the view that unless the draft Operational Guidelines are redrafted to remove the complexity and inconsistencies the outcome will be that most, if not all, native vegetation clearance applications will be referred to DSE. Also, if the inconsistencies referred to above are not effectively remedied then it can be expected that VCAT will be called up very extensively to resolve the uncertainties and establish a range of precedents that will become the operational reference and relegate the Operational Guidelines to a curiosity.

Consequently, MCAVic recommends that the draft Operational Guidelines be withdrawn and rewritten. However, before rewriting it is critical that the principles of the Native Vegetation Framework are clearly delineated in a public policy sense. Once the principles are established it may then be possible to prepare a detailed operational guideline. Without clear policy any operational guideline will be ineffective, overly complex and confused. When considering the principles it is recommended that the original concepts espoused in the 2002 launch of the Native Vegetation Framework be reinstated.

The requirements of the Operational Guidelines should be flexible so as to achieve innovative outcomes, rather than complex and limiting prescriptive inputs. The flexibility could be managed through a risk management approach with a focus on outcomes (net gain) rather than prescriptive inputs.

Also, it is recommended that partnerships between Crown land managers and private land developers be encouraged to achieve net gains to our Crown land estate beyond the land manager's obligations.

The concept of permanently securing all offsets and preventing future clearing of the offsets will eventually sterilise all remaining native vegetation stands and prevent any further development in the State, even though there will be a net gain. Such an outcome will stifle economic development, particularly in regional Victoria as well as the growth corridors around Melbourne where the bulk of the offsets will be located.

When temporary land uses are involved such as exploration or mining the concept of permanent protection through a planning permit or legal agreement is difficult to envisage. It is recommended that flexibility is required to make the guideline meaningful for exploration and mining activities. Mining companies must be permitted to undertake their mining operations, rehabilitate the land (with a net gain) and move on. It is unreasonable to require a “permanent” hold by a mining company given that all of the activities and stages in the mining cycle are heavily regulated to strict standards and involve many government agencies and other stakeholders.

The draft Operational Guidelines fail to appreciate the financial surety (or bond) system applied on all minerals tenements by DPI to ensure the liability for rehabilitation, including revegetation, is achieved. It is recommended that the rehabilitation bond be recognised as an adequate mechanism to satisfy the protection required for offsets.

For the Operational Guidelines to be effective it is critical that the BushBroker scheme is operational.

MCAVic believes that it is important for effective consultation with key stakeholders to continue with the aim to deliver redrafted Operational Guidelines that achieve the stated goal of a net gain, and that are readily understood by all parties, including local Government. MCAVic is one of those key stakeholders.

The recommendations of the Victorian Competition and Efficiency Commission should be heeded and the Operational Guidelines removed and completely revised as recommended above.

Conclusions

The Operational Guidelines in their current form only serve to confuse rather than inform the implementation of Net Gain. The concept of two assessment paths only serves to create further confusion.

Government initiatives to reduce regulation and remove duplication of approval processes as espoused by the VCEC and raised by EES independent panels are unfortunately significant casualties of this new Operational Guidelines. MCAVic seeks minimum effective regulation not clumsy prescriptive overlaying regulation as proposed in the Operational Guidelines.

There must be better ways of implementing the native vegetation policy that would produce far more beneficial outcomes for the environment over time. The current arrangements seek to penalise developers for removal of native vegetation rather than reward efforts for enhancing our environment through a more holistic approach. Further, the burden of protecting the State's biodiversity, of which we all benefit, is

shifting from the community to the individual. MCAVic is of the view that DSE should identify priorities for ecosystem function and biodiversity and then seek partnerships with developers who cannot avoid the removal of native vegetation so that they are able to contribute to the implementation of those priority works. These works may include extension of the Crown estate through land acquisition, revegetation works on degraded Crown land, or maintenance activities to improve the quality of Crown land. Through the use of strategic partnerships issues of cost shifting should be avoided.

ENDS

ICMM Sustainable Development Framework:

On May 29th 2003, the International Council on Mining & Metals (ICMM) approved ICMM's Principles and resolved that ICMM corporate membership includes a commitment to measure corporate performance against these principles.

The Principles are central to ICMM's sustainable development framework. They are based on the objectives set by the minerals industry in Toronto in 2002 and draw on the landmark MMSD report. They reflect the values and the policy directions that will help ensure that the industry continually improves the sustainability of its operations. They will also guide the design of the industry's performance measurement processes in conjunction with the Global Reporting Initiative.

ICMM Principles

As members of ICMM or as companies that have otherwise agreed to take on the same performance obligations as ICMM members, we seek continual improvement in our performance and contribution to sustainable development so as to enhance shareholder value. In striving to achieve this, we will:

1. Implement and maintain ethical business practices and sound systems of corporate governance.
2. Integrate sustainable development considerations within the corporate decision-making process.
3. Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.
4. Implement risk management strategies based on valid data and sound science.
5. Seek continual improvement of our health and safety performance.
6. Seek continual improvement of our environmental performance.
7. Contribute to conservation of biodiversity and integrated approaches to land use planning.
8. Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products.
9. Contribute to the social, economic and institutional development of the communities in which we operate.
10. Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders.

ICMM corporate membership includes a commitment to measure corporate performance against these principles.