

8.5 Renewable Energy Planning Agreement Policy - Post Public Exhibition

REPORT BY THE ECONOMIC DEVELOPMENT COORDINATOR
TO 21 FEBRUARY 2024 ORDINARY MEETING
GOV400105, LAN900113

RECOMMENDATION

That Council:

1. **receive the report by the Economic Development Coordinator on the Renewable Energy Planning Agreement Policy;**
2. **receive all public submissions to the Renewable Energy Planning Agreement Policy; and**
3. **do not adopt the Renewable Energy Planning Agreement Policy in current form.**

Executive summary

The Renewable Energy Planning Agreement Policy was drafted as a set of guidelines that Council could use to regulate the negotiation, approval, and implementation of Renewable Energy Planning Agreement's (REPA's) and to provide guidance to proponents of Renewable Energy projects in the region. This policy would apply to all renewable energy generation and transmission projects (and associated infrastructure) that would impact the Mid-Western Local Government Area. This extends to wind farms, solar farms, pumped hydro, battery energy storage systems (BESS), hydrogen generation, transmission lines or any other form of renewable energy project or infrastructure.

The Draft Policy was supported at the April 2023 Mid-Western Regional Council meeting and placed on 28 days public exhibition.

Two submissions were received during the public exhibition period and are attached to this report for consideration.

The NSW Government has recently commenced work on developing Guidelines for Wind and Solar Farms in regards to benefit sharing that include the use of VPAs.

It is recommended to not adopt the proposed Renewable Energy Planning Agreement Policy in current form and to revisit this post the finalisation of the Benefit Sharing Guidelines by the NSW Government.

Disclosure of Interest

Nil

Detailed report

In the absence of any guidelines from the NSW Government, a Renewable Energy Planning Agreement Draft Policy was supported at the April 2023 Mid-Western Regional Council meeting and placed on 28 days public exhibition.

Two submissions were received during the public exhibition period:

(1) **RES Australia**

The key concerns of RES Australia are below:

- **Mandatory requirement:** RES Australia states that the Draft Policy contradicts the voluntary nature of planning agreements under the EP&A Act by imposing a mandatory payment requirement on proponents, instead of allowing for voluntary arrangements.
- **Lack of flexibility:** They highlight the lack of flexibility in the policy, both in terms of funding contributions and the requirement for a planning agreement. They believe that a rigid approach may not be suitable for all renewable energy projects and that a case-by-case consideration is necessary.
- **Calculation of funding contributions:** RES Australia questions the use of Capital Investment Value (CIV) as the sole basis for funding contributions. They argue that this approach may not accurately reflect the impacts of renewable energy projects, particularly considering their remote locations and limited long-term impact on infrastructure and services.
- **Inconsistency with DPE Guidelines:** They state that the Draft Policy is inconsistent with various DPE guidelines, including the Large-Scale Solar Energy Guideline and the Social Impact Assessment Guidelines, which provide specific content for infrastructure contributions, benefit sharing, and private agreements in large solar projects.
- **Non-compliance with DPE's VPA Practice Note:** RES Australia raises concerns about the Draft Policy's alignment with the DPIE's Planning Agreements - Practice Note. They believe that the fixed, CIV-based contribution calculation lacks flexibility, does not consider public interest and probity considerations, and may not meet the objectives for planning agreements.

(2) **Burrendong SOS**

Burrendong SOS Group raised concerns with the proposed policy and state that the proposed payment distribution is unfair. They note that while the entire population of Mid-Western LGA will benefit financially from the wind farm, those directly affected by the project, including Burrendong SOS members, will receive no compensation or recognition for their sacrifices.

Specifically, Burrendong SOS suggests directing the funds towards the grading and maintenance of Crown Roads, rate reductions for non-host landowners within 8km of wind turbines, increased back-burning bush fire management practices around the wind farm, and council assistance/funding for feral animal and noxious weed control.

It is noted that Council does not believe that a Renewable Energy Planning Agreement would replace or remove the need for other funding contributions to local community including Neighbour Agreements (for those immediately and directly impacted by projects as highlighted by Burrendong SOS submission) and Community Group/Fund activities.

In regards to the RES Australia submission, the Policy provided guidelines for staff to negotiate a Renewable Energy Planning Agreement, it did not create a mandatory payment as the voluntary nature of a planning agreement is recognised in the EP&A Act. Concerns regarding a lack of flexibility and calculation of funding are noted however this position was one that has been adopted by all Central West and Orana Renewable Energy Zone Councils and provided consistency across projects and regions. Council remained able to negotiate amendments with individual proponents if or where appropriate.

Since the exhibition of this Draft Policy, the NSW Government has exhibited a number of Draft Guidelines to assist community, proponents and Councils in the delivery of major renewable energy projects.

These guidelines include:

- Draft Benefit-Sharing Guideline
- Draft Wind Energy Guideline – with technical supplements and Wind Energy Decommissioning Calculator
- Draft Transmission Guideline
- Large-Scale Solar Energy Guideline (Adopted in 2022) – now with Solar Energy Decommissioning Calculator
- Private Agreement Guideline

Whilst the Draft Benefit-Sharing Guidelines do not consider all of Council’s concerns, including guidelines around Community Benefits and VPAs for BESS and Pumped Hydro projects, they form the basis to commence a more formal position from Council with proponents.

As these guidelines are in development, it is recommended Council does not adopt the Renewable Energy Planning Agreement Policy as exhibited at this point in time and reconsider this once guidelines are finalised from the NSW Government.

Community Plan implications

Theme	Building a Strong Local Economy
Goal	An attractive business and economic environment
Strategy	Support the expansion of essential infrastructure and services to match business and industry development in the region

Strategic implications

Council Strategies

Towards 2040 Community Plan
 Regional Economic Development Strategy (REDS)

Council Policies

Not Applicable

Legislation

Environmental Planning and Assessment Act, 1979
 Environmental Planning and Assessment Regulation 2021
 Mid-Western Regional Council Local Environment Plan 2012
 Electricity Infrastructure Investment Act 2020 (NSW) (EII Act)
 Protection of the Environment Operations Act 1997

Financial implications

The adoption of a future policy may lead to increased funding to Council to support a range of initiatives on behalf of the community.

Associated Risks

There are potential risks associated with this policy if adopted in its current form, in particular if it is not in line with published guidelines from the NSW Government there is a high risk that proponents will not enter an agreement with Council for future funding and there may be inadequate consideration of environmental and social impacts that could arise from development activities, which could have long-term consequences for the community.

LISA PENSON
ECONOMIC DEVELOPMENT COORDINATOR

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DIRECTOR DEVELOPMENT

1 June 2023

Attachments: 1. Public Submission - RES Australia.
2. Public Submission - Burrendong SOS.

APPROVED FOR SUBMISSION:

BRAD CAM
GENERAL MANAGER



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Mr Brad Cam
General Manager
Mid-Western Regional Council
86 Market Street
MUDGEE NSW 2850

19 May 2023

Dear Brad,

Draft Renewable Energy Planning Agreements Policy Mid-Western Council

I refer to the Draft Renewable Energy Planning Agreements Policy currently on public exhibition, where Mid-Western Council seeks comment and input from the community.

RES remains committed to progressing discussions with Council to seek to reach an agreement on the terms and contributions to be provided under a Voluntary Planning Agreement (VPA) for Tallawang Solar Farm and Barneys Reef Wind Farm. RES will be responding separately concerning our VPA negotiations in relation to Tallawang Solar Farm.

However, RES has significant concerns regarding Council's proposed Draft Policy.

This letter sets out these concerns. RES is concerned that Council's application of the Draft Policy in this circumstance is unwarranted and inappropriate for the following reasons:

1. It purports to require a mandatory payment from proponents rather than provide guidance as to the option of entering into a voluntary arrangement negotiated between two parties;
2. The calculation of the contribution and the requirement to make that payment are inflexible and not reflective of, or proportionate to, the actual impacts of the project in question. This cannot be the cumulative impacts from other projects; and
3. It fails to link the required contribution and a '*public purpose*' arising from the particular project, for which the contribution is levied.

RES notes that the Draft Policy is inconsistent with the DPE Guidelines and Practice Note and provides further reasons below.

1. The Draft Policy makes planning agreements a mandatory requirement

A fundamental requirement of planning agreements under the EP&A Act is that they are voluntarily entered into. So much is confirmed by the wording of section 7.4(1) of the EP&A Act, which provides that a planning agreement is a '*voluntary agreement*' and is further supported by section 7.7(2), which provides that a consent authority cannot refuse to grant development consent on the ground that a planning agreement has not been entered into.



The Draft Policy, however, states that a planning agreement will be required for any renewable energy project, seeking entry into a planning agreement as a mandatory requirement. This is contrary to the voluntary nature and planning objectives for planning agreements set out in the EP&A Act and arguably invalidates the Draft Policy or otherwise makes it unenforceable.

2. The Draft Policy is inflexible

The Draft Policy does not provide any flexibility in either the approach to funding contributions or the issue of whether a planning agreement will be entered into for a renewable energy project within the Mid-Western LGA. The Draft Policy states that proponents of each renewable energy project *‘will be required to enter into a Planning Agreement with Mid-Western Council’* and that *‘funding contributions are to be equivalent to 1.5% of Capital Investment Value (CIV)’*, which provides no flexibility in the approach to funding contributions.

While the *‘Review’* section of the Draft Policy states that the policy is intended to provide guidance only, this section also states that departure from the Draft Policy requires a Council resolution. The application of an administrative policy must admit the possibility of exception depending on the circumstances of a particular case (*Seiffert v Prisoners Review Board* [2011] WASCA 148 at [124]; *Plaintiff Minister for Immigration and Border Protection* (2015) 327 ALR 8 at 24).

Further, a policy must not *‘preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances relevant to the particular case in which the discretion is being exercised. If such an inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful’* (*R v Secretary of State for the Home Department; Ex parte Venables*, cited by Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277).

The Draft Policy does not align with the above legal principles. RES is concerned that the Draft Policy, in its current form, would be invalid under administrative law principles, and any decisions made in accordance with it may similarly be invalid. The current approach in the Draft Policy may also amount to an unreasonable fetter on Council’s and its delegate’s discretion to enter into planning agreements on a voluntary and case-by-case basis.

3. CIV as the sole basis for funding contributions

The Draft Policy proposes a funding contribution based solely on a % of project CIV. While there may be some developments where project CIV is reliably related to the project’s demand for additional public amenities, services and facilities, such as a residential development, which require additional open space, parking, transport infrastructure and other services, this is not usually the case for renewable energy projects.

Renewable energy projects are often located in relatively remote locations, and their impacts on services and infrastructure are usually limited, both in time (for example, during construction) and locality. Such projects also rarely require additional public services, amenities or facilities that are not otherwise imposed as conditions of consent. In particular, upgrades to existing services, such as road upgrades, electricity transmission and telecommunications, are usually dealt with by the standard conditions of the development consent for the project and are required to be carried out or funded by the proponent.



Impacts on proximate residences are also either managed through conditions of consent or dealt with by direct negotiation with the impacted residents/landowners (e.g., through neighbour agreements, leases and other financial agreements). Conditions of consent also usually require repair or replacement of public infrastructure and facilities damaged during the construction of the project (e.g., through pre and post-construction dilapidation surveys and infrastructure repair obligations).

As such, funding contributions based purely on project CIV may lack a sufficient link between the contribution and a ‘public purpose’ for which the contribution is levied and can very likely result in a contribution not proportionate to the impacts of the project in question.

Further, consideration of funding contributions solely based on project CIV may amount to consideration of an irrelevant consideration by the Council when adopting the Draft Policy and making any decisions in accordance with the Draft Policy, rendering the decision to adopt the Draft Policy and decisions made in accordance with Draft Policy invalid (*Minister for Immigration & Ethnic Affairs v Pochi* (1980) 31 ALR 666 at 689; *Minister for Immigration and Multicultural Affairs v Yusuf* (2000) 206 CLR 323 at 348).

4. The Draft Policy is inconsistent with DPE Guidelines

The DPE’s *Large-Scale Solar Energy Guideline* (August 2022), *State Significant Guidelines* (October, 2022) and the *Social Impact Assessment Guidelines* (February, 2023) provide guidance to proponents of significant projects, including SSD renewable energy projects, with respect to stakeholder and community engagement and social impact assessment. Section 5.3 of the *Large-Scale Solar Energy Guideline* includes specific content with respect to infrastructure contributions, benefit sharing and private agreements with respect to large solar projects.

The Draft Policy does not allow for consideration or compliance with the above Guidelines, in that it imposes a set CIV based contributions approach that is not tied to specific project impacts and does not allow tailored contributions, or works-in-kind, in a renewable energy project VPA, to address those impacts.

5. Non-compliance with DPE’s VPA Practice Note

RES appreciates that it is a matter for Council as to whether it adopts the Draft Policy, and it is a matter for Council as to the content of the Draft Policy. RES is, however, concerned that the Draft Policy, in its current form, may not align with the DPE’s February 2021 *Planning Agreements - Practice Note (Practice Note)*. Clause 203(7) of the *Environmental Planning and Assessment Regulation 2021 (NSW) (EP&A Regulation)* provides that a Council that is negotiating or entering into a planning agreement must consider any relevant practice notes issued by the Planning Secretary under clause 203(6) of the EP&A Regulation.

In particular:

- a. Sections 1.1 and 1.2 of the Practice Note state that VPAs are a way for planning authorities and developers to negotiate flexible outcomes in respect of development contributions. The fixed, CIV-based contribution calculation in the Draft Policy does not provide for a flexible or negotiated approach;



- b. There is a concern that imposition of a solely CIV-based approach to funding contributions for renewable energy projects does not align with the public interest and probity considerations set out in section 2.2 of the Practice Note, as CIV is not always a reliable indicator of the likely impacts of a project, its demands on or requirements for services, or the level of funding contributions appropriate for a renewable energy project;
- c. A solely CIV-based approach to contributions ignores the objectives for planning agreements set out in section 3.1 of the Practice Note, which include meeting the demands created by the development for new or augmented public infrastructure, amenities and services, securing off-site benefits to deliver a net community benefit and compensating for loss of or damage to public amenities, services, resources or assets; and
- d. The Draft Policy leaves no room for negotiation, or voluntary entry into the agreement. This is contrary to the offer and negotiation principles and procedures set out in 4.2 of the Practice Note and the relevant provisions of the EP&A Act, and particularly section 7.4, which provides that a planning agreement is '*a voluntary agreement*' between a planning authority and a developer.

Accordingly, RES objects to the Draft Policy in its current form, for the reasons set out above.

RES looks forward to progressing Tallawang Solar Farm and Barneys Reef Wind Farm with Council's continued input and support and to further discussing the proposed VPA for both projects.

We are happy to discuss the VPA, the Draft Policy, and the matters raised in this letter with you and any other relevant Council personnel. Please let us know if you would like to arrange a meeting with RES to discuss these matters further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A. Douglas'.

Andrew Douglas
Senior Development Project Manager
[REDACTED]
andrew.douglas@res-group.com

From: [Ross Pride](#)
To: [Council](#)
Subject: Renewable Energy Planning Agreements
Date: Saturday, 6 May 2023 5:06:01 PM

General Manager
Mid-Western Regional Council
Re: Renewable Energy Planning Agreements Policy

Dear Sirs

We wish to make a submission on the above draft policy.

First, some background:

Our property is situated in Yarrabin, where we stand to be directly and adversely affected by the proposed Burrendong Wind Farm.

Burrendong SOS (Save Our Surroundings) is a group of some 50 households near the wind farm. Many of us, having escaped city life to enjoy a peaceful, unpolluted rural existence, proudly live 'off the grid'. We believe Australia has slipped behind in the race to replace polluting energy sources with sustainable options, and we are not remotely affiliated with, or supporters of, the coal and gas industries.

The likely ramifications of this wind farm proposal have, however, alarmed us.

Our concerns – and the word 'concern' is wholly inadequate to express our feelings on the matter – have been and are continuing to be expressed to and through the federal and state governments, Mid-Western Regional Council councillors and officials, via public demonstrations, and most particularly to the developer, Ark Energy.

We protest at the visual degradation of our beautiful surroundings; the proven adverse health effects of turbine noise; the drastic environmental degradation and habitat destruction involved in the construction and installation of the wind turbines; the ongoing deadly consequences for local birdlife; and the reduction in property values for surrounding properties.

[Our proposal re the Renewable Energy Planning Agreement Contribution](#)

We note that Council envisages payment from renewable energy generation and transmission projects equivalent to 1.5% of the capital investment value. Resulting funds are to be directed toward roads, housing, youth groups, etc in Mid-Western's LGA. Individual community groups will not receive funding from this fund.

In other words, the entire population of Mid-Western LGA will reap the financial benefits of Burrendong Wind Farm, yet members of Burrendong SOS and many other people in the surrounding area, while bearing the above-mentioned consequences, will receive no compensation for or recognition of our enforced sacrifice.

This is inequitable, and we strongly urge Council to reconsider.

Our strong request is that a significant proportion of REPA contribution funds, from Burrendong and other future renewable energy projects, be directed towards those communities most grievously affected by their installation and operation.

In Burrendong SOS's case we would direct Council's attention to, for example:

- Grading and maintenance of Crown Roads, such as World's End Rd and Rockford Lane
- Rate reductions for non-host landowners within 8km of wind turbines
- Increased back-burning bush fire management practices around the wind farm
- Council assistance/funding for feral animal and noxious weed control

We trust Council appreciates how strongly we feel about what is happening to us and is able to provide assistance.

Thank you in advance for your consideration.

Yours sincerely

Ross and Gemma Pride
Burrendong SOS

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