

## RECENT ADVICE FROM DEPARTMENT OF PLANNING & ENVIRONMENT SUGGESTS WIND FARM HOSTS AND THEIR PROPERTIES MAY HAVE LARGE DECOMMISSIONING FINANCIAL EXPOSURE

[NOTE THIS DOCUMENT IS NOT OFFERED AS LEGAL ADVICE BUT SHARES NEW INFORMATION WHICH MAY HAVE LEGAL IMPLICATIONS FOR SOME PARTIES.]

Recent advice from the NSW Department of Planning & Environment indicates that wind farm hosts may have a large financial exposure related to the decommissioning of wind turbines on their property, which could significantly devalue those properties and affect their salability.

The recent advice conflicts with statements in the NSW Draft Wind Farm Guidelines and seems to indicate that certain consent conditions in a number of previous wind farm approvals are void. The particular consent conditions provided some financial protection to hosts in relation to decommissioning costs.

Given this recent information, hosts might reasonably want to consult their legal advisors as to whether their hosting contracts now offer them adequate legal protection from the costs of decommissioning and, if not, whether they may have been misled by any party, including the Department.

### The Apparent Position

The Department's Draft Wind Farm Guidelines and the conditions of approval for a number of NSW wind farms over the last four years would give hosts and prospective hosts a reasonable belief that they could not be liable for decommissioning costs. However, the Department has recently admitted that:

- hosts may be responsible for decommissioning costs if the operator is unable to pay for them (e.g. an insolvent company); and
- the Department has no legal ability to require operators to make financial provision in advance for decommissioning costs.

It appears the Department's draft guidelines and the rulings of the PAC have had the potential to mislead wind farm hosts about their actual exposure in relation to decommissioning. Prospective hosts may reasonably have relied on that position presented by the Department and the PAC.

### Background

The Draft NSW Wind Farm Guidelines, December 2011, say (p. 7):

**The guidelines require that the proponent/wind farm owner rather than the "host" landowner must retain responsibility for decommissioning.**

Additionally, the guidelines require applicants to include a Decommissioning and Rehabilitation Plan in their environmental assessment report. Where this is deemed to be inadequate, but the Development Application is granted consent, a condition of consent will be imposed **requiring the proponent to pay a decommissioning bond** (*emphasis added*).

The conditions of approval for the White Rock Wind Farm, issued by the Department 10 July 2012, include the following (p. 34):

G10. The Proponent shall prepare a Decommissioning and Rehabilitation Plan, which shall be submitted for the approval of the Director-General prior to the commencement of construction. The Plan shall be consistent with the requirements of the draft NSW Planning Guidelines - Wind Farms (December 2011), as updated. The plan shall be

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made publicly available. The Plan shall be updated every five years from the date of preparation, until decommissioning and rehabilitation is completed, and a copy of the updated versions provided to the Director-General and made publicly available. The plan shall include estimated costs of and funding arrangements for decommissioning, **including provision for a decommissioning bond or other funding mechanisms** (*emphasis added*), where the plan concludes that estimated costs and funding arrangements are inadequate.

Note that last sentence, where the conditions explicitly include:

provision for a decommissioning bond or other funding mechanisms, where the plan concludes that estimated costs and funding arrangements are inadequate

The consent conditions for the Collector Wind Farm, issued by the PAC on 2 December 2013, include the following condition in relation to a Decommissioning and Rehabilitation Plan (p. 35):

The updated Plan shall include estimated costs of and funding arrangements for decommissioning, including provision for a decommissioning bond or other funding mechanisms, where the Plan concludes that estimated costs and funding arrangements are inadequate.

Precisely the same words appear on page 34 of the PAC consent conditions for the Flyers Creek Wind Farm, issued on 14 March 2014.

And precisely the same words appear on page 29 of the recommended consent conditions provided by the Department to the PAC for Crookwell 3 Wind Farm in February 2015. [Note. That proposal has yet to be determined because the PAC referred the project back to the Department.]

Given the explicit statement in the draft guidelines, and the history of the Department and PAC imposing consent conditions that specifically require a

“decommissioning bond or other funding mechanisms, where the Plan concludes that estimated costs and funding arrangements are inadequate”

it would have been reasonable for a developer to say to any prospective host:

“You don’t need to worry about decommissioning costs because it is our responsibility and the Department will oblige us to make financial provision for it in advance if the Department judges it will not be met by scrap value.”

Likewise, if a prospective host consulted the draft guidelines and looked up a few recent wind farm approvals, they could reasonably have come to the same conclusion and thus that their exposure to decommissioning costs was nil and they did not need any particular protective provision in their contract with the developer.

However, recent advice from the Department contradicts that position.

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## What's Changed?

The Department has recently provided recommendations to the PAC considering the proposed Crudine Ridge Wind Farm. Not only does the Department's recommended consent conditions for Crudine Ridge, issued December 2015, fail to provide for any "Decommissioning and Rehabilitation Plan" but they do **not** include the statement:

provision for a decommissioning bond or other funding mechanisms, where the plan concludes that estimated costs and funding arrangements are inadequate

or anything like it. And in its Assessment Report to the PAC, the Department explained <sup>1</sup>:

The Department has obtained legal advice indicating that it is the proponent's obligation to cover any financial costs associated with decommissioning and rehabilitation, and that the Department does not have the capacity to impose a condition of consent which requires a bond for security for decommissioning and rehabilitation, especially on private land.

Note the second part of that statement, which was tucked away in the fine print of its recommendations:

***the Department does not have the capacity to impose a condition of consent which requires a bond for security for decommissioning and rehabilitation***, especially on private land.

So, in relation to decommissioning conditions, the statement in the draft guidelines is legally wrong and the consent conditions imposed on White Rock, Collector and Flyers Creek Wind Farms, and recommended for Crookwell 3, are apparently not legal.

The problem for hosts does not end there. In response to a question to the Department from the Jupiter Community Consultative Committee, the Department advised <sup>2</sup>:

Under the current legal framework, in the event that the owners/operators of a wind farm are unable to fulfil the decommissioning and rehabilitation obligations under a planning approval, the obligation for these works could potentially reside with the owner of the land (as the development rights and obligations apply to the land which is the subject of the application).

In letters sent by the Department to some neighbours of the proposed Jupiter Wind Farm, the Department has elaborated a little more, saying:

However, where the company becomes insolvent, the owners of the land may be required to comply with the decommissioning and rehabilitation obligations under the consent. This is because in NSW the development rights and the associated conditions <sup>3</sup> apply to the subject land (rather than to a particular person or corporate entity).

While the Department says the decommissioning obligation **may** apply to the landowner, that seems like a very definite "may", since it is hard to see who else could be responsible if the operator is unable to pay. The Department is explicit that all "development rights and obligations apply to the land which is the subject of the application" and, if the operator is

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<sup>1</sup> *State Significant Development Assessment Crudine Ridge Wind Farm (SSD-6697)*, Department of Planning & Environment, December 2015, p.60.

<sup>2</sup> *Minutes of Jupiter Wind Farm Community Consultative Committee Fifth Meeting, 2/12/2015*, p. 6-7.

<sup>3</sup> Note, this is a reference to all development conditions for the project, not just decommissioning, so may have implications for landowners in relation to other consent conditions, such as those relating to noise, turbine placement and environmental impact.

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broke and there has been no enforceable provision to cause the operator to set aside the necessary funds, then the responsibility must fall on the landowner.

## Conclusion

So the Department has now advised that:

- it has no legal power to compel wind farm operators to set aside funds for decommissioning the wind farm (and it has ceased recommending consent conditions that would have that effect);
- in the event the operator does not have funds at the end to cover decommissioning costs the responsibility to decommission the wind farm will likely fall on hosts because

“the development rights and obligations apply to the land which is the subject of the application”

The Department’s logic appears to be clear. If the “rights and obligations apply to the land”, the Department cannot require a third party to set aside funds to do something to that land. It would seem that only the host can do so through requiring those funds, or a bank guarantee, to be provided up front by the party wishing to erect structures on the host’s land. Clearly a contractual obligation to remove the turbines at end of life is meaningless if the operator can then be broke with no protected financial provision made.

This is new advice from the Department and contradicts past advice on a matter of great financial significance to hosts, affecting not just their financial position at the time of decommissioning but the value and salability of their properties now.

Epuron, an experienced wind farm developer, has estimated for its proposed Liverpool Range Wind Farm that the cost of decommissioning will be “approximately \$380,000 per turbine” and that “This estimate is on par with other wind farm developments that have recently been approved in New South Wales.”<sup>4</sup> An amount of \$380,000 would vastly exceed the expected total revenue per turbine for many hosts, thus rendering hosting into a loss making proposition for them, and for anyone else who buys those properties.

It does raise questions about the obligation of hosts attempting to sell their properties, and real estate agents, to advise prospective buyers of the decommissioning exposure they may incur.

Given the role the Department may have played in giving false assurance to hosts about the financial consequences for their properties and themselves, the Department needs to take steps to rectify any consequent misunderstanding hosts and prospective hosts have of their legal situation.

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<sup>4</sup> *Liverpool Range Wind Farm: Decommissioning & Rehabilitation Plan*, Epuron Pty Ltd, February 2014, p. 7.