

EDO Briefing Paper

# Statutory Environment Protection Policies

## Their background and their future

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**The Environment Protection Authority (EPA) is currently reviewing its statutory environment policies.**

These policies are a key component of the legal framework for protecting the Victorian environment. The Environment Defenders Office (Victoria) Ltd (**EDO**) has prepared this briefing paper to help you understand these policies, decide how they might be improved, and engage in this review.

## What are statutory environment policies?

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A statutory policy is any policy that has legal force. (Many government policies are not statutory policies and must be treated as guidelines rather than binding standards). The statutory policies under the *Environment Protection Act 1970* (Vic) (**EP Act**) are State Environment Protection Policies (**SEPPs**) and Waste Management Policies (**WMPs**). They are statutory instruments which allow the EPA to set environmental objectives, standards and requirements in a different way than the usual set of laws and regulations.

## Why are they being reviewed?

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The review will not look at individual policies, but will look more generally at the place of statutory policies in the environment protection framework. The stimulus for the review appears to be a mix of the need to review several individual policies, the complexity and inadequacy of the current regime, and a new political environment in both the Victorian Government and the EPA. This review may be the first step in a more far-reaching examination of the EP Act and Victoria's environmental law framework.

For more information on the review, see the EPA's Statutory Policy Review Discussion Paper released in June 2011, available on the [EPA website](http://www.epa.vic.gov.au/about_us/legislation/statutory-policy.asp).<sup>1</sup>

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<sup>1</sup> [http://www.epa.vic.gov.au/about\\_us/legislation/statutory-policy.asp](http://www.epa.vic.gov.au/about_us/legislation/statutory-policy.asp)

## What is in the policies?

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SEPPs generally include the following:

- **Purpose and Principles** — the overall intention and objective of the SEPP, and the principles that will guide its operation (often a restatement of the Environment Protection Principles in the EP Act).
- **Beneficial Uses** — the environmental values that we are trying to protect. For example, for the Ambient Air Quality SEPP, these include human health and wellbeing, visibility, aesthetic enjoyment and local amenity.
- **Environmental Quality Objectives and Indicators** — the technical benchmarks that must be met in order to preserve the beneficial uses. For example, for the Waters of Victoria SEPP, they include maximum levels of nutrients and toxicants, temperature, transparency, turbidity and suspended solids.
- **Attainment Programs** — set out the requirements and responsibilities for achieving those objectives and indicators. For example, the SEPP for Contaminated Land imposes various obligations on planning authorities, responsible authorities, occupiers of contaminated land and the EPA to consider or do certain things (although note that these are often aspirational rather than binding obligations).

WMPs follow a less consistent structure than SEPPs, but generally include:

- **Purpose and Principles** — in the same format as SEPPs.
- **Attainment Programs** — in the same format as SEPPs.

## What is their legal effect?

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SEPPs and WMPs are given legal effect in a variety of ways:

- **Licensing and Works Approvals** — many of the SEPP requirements will be implemented through conditions on licences and works approvals. EPA must consider all applicable policies when granting, refusing, transferring or amending these licences and works approvals.<sup>2</sup> Failure to obtain or comply with a licence is an offence.<sup>3</sup>
- **Pollution Abatement Notices** — if EPA discovers an actual or likely failure to comply with a policy, they may issue a Pollution Abatement Notice (**PAN**) requiring the person responsible to comply within a specified period of time (at least 30 days). Failure to comply with a PAN is an offence.<sup>4</sup>
- **Offences** — failure to comply with a requirement in a WMP is an offence.<sup>5</sup> The emission or discharge of waste to land, air or water must also comply with SEPP<sup>6</sup>, and failure to comply may amount to pollution of land, air or water, which is an offence.<sup>7</sup> Noise emissions must also comply with SEPP (though failure to comply is not an offence).<sup>8</sup>
- **Third party enforcement** — any person may seek review in VCAT of a licence decision made by EPA on the grounds that it is inconsistent with a SEPP.<sup>9</sup> Third parties may sometimes also seek an injunction to enforce the Act.

In addition to their legal effect, these statutory policies play an important non-legal role in informing the way EPA and other government agencies conduct themselves. In practice, the standards set in statutory policies inform a wide range of actions taken by the EPA, local councils, Catchment Management Authorities (**CMAs**), water corporations and even the Department of Sustainability and Environment (**DSE**).

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<sup>2</sup> *Environment Protection Act 1970* (Vic) s 20C.

<sup>3</sup> *Environment Protection Act 1970* (Vic) s 27.

<sup>4</sup> *Environment Protection Act 1970* (Vic) s 31A.

<sup>5</sup> *Environment Protection Act 1970* (Vic) s 27A.

<sup>6</sup> *Environment Protection Act 1970* (Vic) ss 38, 40, 44.

<sup>7</sup> *Environment Protection Act 1970* (Vic) ss 39, 41, 45.

<sup>8</sup> *Environment Protection Act 1970* (Vic) s 46.

<sup>9</sup> *Environment Protection Act 1970* (Vic) s 33B.

## What do the policies cover?

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Here is a list of the SEPPs and WMPs currently in force:

State environment protection policies (SEPPs)	Waste management policies (WMPs)
<ul style="list-style-type: none"><li>- Ambient Air Quality</li><li>- Air Quality Management</li><li>- Groundwater Management</li><li>- Prevention and Management of Contamination of Land</li><li>- Music Noise from Public Premises</li><li>- Noise from Commerce Industry and Trade</li><li>- Waters of Victoria</li></ul>	<ul style="list-style-type: none"><li>- Movement of Controlled Waste Between States and Territories</li><li>- National Pollutant Inventory</li><li>- Protection of Ozone Layer</li><li>- Waste Acid Sulfate Soils</li><li>- Ships Ballast Water</li><li>- Siting Design and Management of Landfills</li><li>- Solid Fuel Heating</li><li>- Used Packaging Materials</li></ul>

Source: EPA, *Statutory Policy Review Discussion Paper (June 2011)*

Many of these policies implement [National Environment Protection Measures \(NEPM\)](#): policies adopted by the Environment Ministers of each State and Territory through the [National Environment Protection Council](#).

## What are their strengths?

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One of the strengths of statutory policies is their standard-setting function: setting environmental quality objectives and indicators. Setting out exactly what environmental standards the government is aiming for can provide valuable clarity of purpose for environmental regulation. It can also provide business certainty, by sending a clear message about what is expected of them, and what environmental regulation will aim towards. It offers the promise of a shared community understanding of common environmental and regulatory goals.

## What are their weaknesses?

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**Statutory policies are confusing, and therefore poorly observed and enforced.** Business groups and community members alike struggle to grasp their meaning. This is a problem for the environment, because environmental laws that are hard to understand are unlikely to be complied with.

**Their legal effect is often difficult to ascertain.** As statutory instruments they are essentially regulations, but their form and content is much more like that of a policy or guidance document. They are full of long-winded statements of values and general intentions. When they do set requirements these are often vague and ambiguous; frequently failing to specify who must meet a given requirement and usually failing to specify the consequences of non-compliance. Terms like ‘must’, ‘will’ and ‘may’ are used without precision<sup>10</sup>, making it very difficult to distinguish aspirational policy commitments from binding legal obligations and criminal penalties. This makes them difficult to enforce.

**Their intersection with other regulatory regimes is unclear.** Statutory policies often allocate responsibility to planning authorities, responsible authorities and CMAs concurrently with their obligations under the planning and catchment management regulatory frameworks. However, by fragmenting responsibilities across different laws and regimes like this, they make it very hard to ascertain how their requirements fit with the requirements of intersecting regulatory regimes, if at all.<sup>11</sup>

<sup>10</sup> Stan Krpan, *Compliance and Enforcement Review*, p 61.

<sup>11</sup> The Victorian Civil and Administrative Tribunal (VCAT) has recognised this ambiguity in *SITA v Greater Dandenong City Council* [2007] VCAT 156 [53]-[60].

**They are part of a bewildering array of overlapping legal instruments.** It is very difficult for stakeholders to understand the role of the EP Act, the various EP regulations, the various SEPPs and WMPs, Protocols for Environmental Management (PEM), Best Practice Environmental Management Guidelines (BPEMS), Industry Codes of Practice, Technical Guidelines, Australian Standards, and explanatory guidance publications. Each of these instruments relates to each other differently, and has different levels of legal force. Even legal experts don't fully understand how they interact and what they require as a whole.

**There is considerable inconsistency and overlap between the various SEPPs and WMPs.** Some policies clearly are enforceable with criminal penalties<sup>12</sup>, some policies may be enforceable with criminal penalties<sup>13</sup>, and others clearly are not.<sup>14</sup> Even within SEPPs, some provisions appear readily enforceable, whereas others are so vague and aspirational that it would be difficult to regard non-compliance as a criminal offence. The tone and structure of the policies, and the degree of detail and mandatory obligations they provide, varies greatly. Certain policies cover the same subject matter, making it hard to identify the extent of the overlap, and what obligations actually apply.<sup>15</sup>

## What do other jurisdictions do?

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Victoria is not the only jurisdiction to use statutory environment protection policies. Every state of Australia has them in some shape or form, although some states have taken quite a different approach to Victoria.

**South Australia's policies are more like regulations.** Environment Protection Policies are largely concerned with imposing mandatory obligations, and are directly enforceable to the point of including offences for non-compliance. They still contain beneficial uses ('protected environmental values') and quality criteria. But mostly they contain directive, mandatory terms similar to those used in statutes and regulations.

**Western Australia's Environment Protection Policies are also directly enforceable.** Environment Protection Policies set out standards, requirements and offences, while State Environment Policies state non-binding goals and values. Interestingly, Western Australia's policies are geographically specific. Each Environment Protection Policy pertains to a particular area of the State — for example, the *Environment Protection (Goldfields Residential Area) (Sulphur Dioxide) Policy*.

**New South Wales does not use statutory policies, relying on regulations instead.** Although the Protection of the Environment Operations Act 1997 (NSW) (POEO Act) makes extensive provision for making and implementing Protection of the Environment Policies (PEPs), no such policies have been made. PEPs are specifically precluded from containing offences, drawing a clear distinction between policies and regulations.<sup>16</sup> New South Wales is also interesting in that it has separate statutory environment policies for planning — State Environment Planning Policies — which set out those environment issues that are regulated through the planning system, rather than under the POEO Act.

**No state has as many policies as Victoria.** They manage to cover the same content in a more consolidated and efficient way. South Australia, for example, has consolidated all its waste policy within one policy — the *Environment Protection (Waste to Resources) Policy 2010* (SA). Queensland has just four policies covering air, noise, water and waste.

**Tasmania automatically implements National Environment Protection Measures (NEPMs).** Once a NEPM is made it automatically becomes Tasmanian state policy, without any further measures being taken to implement them or integrate them into Tasmania's environmental laws.<sup>17</sup>

**South Australian policies include a fast-track amendment process.** The legislation allows Environment Protection Policies to specify procedures for their own amendment.<sup>18</sup> It also allows the usual processes of consultation and policy development to be bypassed when the Minister is satisfied that a draft policy incorporates an existing policy without substantial modification, or implements a NEPM.<sup>19</sup>

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<sup>12</sup> *Environment Protection Act 1970* (Vic) s 27A.

<sup>13</sup> *Environment Protection Act 1970* (Vic) ss 38, 39, 40, 41, 44, 45.

<sup>14</sup> *Environment Protection Act 1970* (Vic) s 46.

<sup>15</sup> See, for example, SEPP (Ambient Air Quality) and SEPP (Air Quality Management).

<sup>16</sup> *Protection of the Environment Operations Act 1997* (NSW) s 36.

<sup>17</sup> *State Policies and Projects Act 1993* (Tas) s 12A.

<sup>18</sup> *Environment Protection Act 1993* (SA) s 32(1)(c).

<sup>19</sup> *Environment Protection Act 1993* (SA) s 29.

# How might they be improved?

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## **They must be easier to understand and apply.**

- The legal effect of statutory policies needs to be clear and explicit.
- The number of policies needs to be reduced and consolidated.
- Overlaps and inconsistencies between and within policies need to be ironed out.
- The hierarchy of instruments (PEMs, BPEMs, etc) needs to be reduced, and their relationship to each other made simple and clear.
- The interaction between statutory policies and other areas of regulation (especially planning law) needs to be made clear.<sup>20</sup>

## **They must also be more direct and enforceable.**

- The vague and general statements in statutory policies need to be replaced with direct, mandatory provisions.
- It must be explicitly clear who has responsibility for doing things, and what the consequences of non-compliance are.
- Obligations and requirements must be enforceable through offences and/or PANs and/or third party enforcement.
- If the government is determined to include aspirational statements in statutory policies, then their aspirational and non-binding status must be made clear, and they must not detract from the binding force of the other mandatory provisions.

What amendments are necessary to achieve these improvements? The EPA discussion paper sets out four reform options:<sup>21</sup>

1. **Minor changes to statutory policy** — simplify and clarify existing statutory policies without making any substantial or structural changes to the way they work.
2. **Significant changes to statutory policy** — redefine statutory policies as the source of environmental standards, values and indicators, and transfer mandatory obligations to regulations.
3. **Regional or local approach to statutory policy** — complement state-wide environmental standards with regional environmental quality objectives and indicators.
4. **Abolish statutory policy** — rely on legislation, regulations and guidance.

EDO supports the second option. There appears to be no good reason why attainment programs cannot be put in regulations. This would make the requirements that they impose easier to understand, and easier to enforce. But by maintaining environmental values, objectives, indicators in statutory policies, we can retain the benefits that these standards provide — clarity of purpose, business certainty, and a shared understanding of community and regulatory goals.

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<sup>20</sup> Setting this out in the EP Act, as is done in Chapter 2 of the POEO Act (NSW), would be helpful.

<sup>21</sup> EPA & DSE, *Statutory Policy Review Discussion paper*, pp 23-5.

## How can you get involved?

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We want you to tell us what you want from your statutory policies! So do EPA and DSE. That's why on 26 July 2011 the EDO and Environment Victoria are co-hosting a community roundtable to discuss what you want from your statutory environment protection policies. The EPA and DSE will be there, and they want to feed your views into the review process. Find more details from the EPA website: [www.epa.vic.gov.au/about\\_us/legislation/statutory-policy.asp](http://www.epa.vic.gov.au/about_us/legislation/statutory-policy.asp).

EDO will be making a submission to the review, and we'd encourage you to do the same. Submissions are due by **Friday 19 August 2011**. If you would like to know more about making a submission, you can contact us on the details below.

## About the Environment Defenders Office (Victoria) Ltd (EDO)

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The EDO is a community legal centre specialising in public interest environment law. We support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice.

In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working collectively to protect Australia's environment through public interest planning and environmental law.

### For further information contact:

#### Environment Defenders Office (Vic) Ltd

Telephone: 03 8341 3100 (Melbourne metropolitan area)

1300 EDOVIC (1300 336842) (Local call cost for callers outside Melbourne metropolitan area)

Facsimile: 03 8341 3111

Email: [edovic@edo.org.au](mailto:edovic@edo.org.au)

Website: [www.edovic.org.au](http://www.edovic.org.au)

Post: PO Box 12123, A'Beckett Street VIC 8006

Address: Level 3, the 60L Green Building, 60 Leicester Street, Carlton

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### SEEK LEGAL ADVICE REGARDING SPECIFIC CASES

**While all care has been taken in preparing this publication, it is not a substitute for legal advice in individual cases. For any specific questions, seek legal advice.**

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