Environmental Justice Australia

Submission

in response to

Proposed Environment Protection Regulations and Environmental Reference Standards

prepared by

Environmental Justice Australia

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Environmental Justice Australia
ABN 74052124375

PO Box 12123
A'Beckett Street PO
Melbourne VIC 8006
L3, 60 Leicester St, Carlton

T (03) 8341 3100
F (03) 8341 3111
E admin@envirojustice.org.au
W www.envirojustice.org.au

About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. We are independent of government and corporate funding. Our legal team combines technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to community-based environment groups, regional and state environmental organisations, and larger environmental NGOs, representing them in court when needed. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

For further information on this submission, please contact:

Nicola Rivers, Director of Advocacy and Research, Environmental Justice Australia

T: 03 8341 3100

E: nicola.rivers@envirojustice.org.au

Submitted to: sublegreform@epa.vic.gov.au

This submission focuses on the following areas raised in the proposed *Environment Protection Act Regulations* ("Regulations") and Environmental Reference Standards ("ERS") that are being developed under the Environment Protection Act 2017 ("EP Act 2017"):

1. General comments on the regulatory instruments
2. Climate change and greenhouse gas emissions
3. Waste
4. Air pollution (including forest burning)
5. Water
6. Other

We would firstly like to acknowledge the high quality of the explanatory documents that the EPA and DELWP have prepared alongside the Regulations and ERS. They have assisted our understanding of the primary documents.

We note however that it would have been useful for submitters to have access to draft guidance documents and compliance codes etc to better understand how the EPA anticipates the new law may operate in totality. The lack of draft guidance leaves the public with only a partial insight given that the draft instruments refer to guidance documents and compliance codes.

1. GENERAL COMMENTS

1.1 Better environment plans

Operators in heavily industrial areas, like the Latrobe Valley, ought to enter into a Better Environment Plan ("BEP") (Part 8.2 of Act). The Draft Regulations do not transfer the establishment of Air Quality Control Regions ("AQCR") from the State Environment Protection Policy (Air Quality Management) ("SEPP (AQM)").[1]

The Latrobe Valley is currently identified as an AQCR, and polluters such as coal-fired power stations are required in their licences to implement a program to assess the effect of their emissions on the ability of the Latrobe Valley AQCR to comply with the State Environment Protection Policy (Ambient Air Quality) ("SEPP (AAQ)").[2]

The SEPP (AQM) also confers a discretion on EPA to develop an Air Quality Improvement Plan for AQCRs, which has not been transferred into the Draft Regulations.

Requiring operators such as those in the Latrobe Valley to enter into a BEP may address the regulatory gap left by the absence of the establishment of ACQRs and associated provisions and licence conditions. BEPs could provide an opportunity for heavy industrial polluters such as coal-fired power stations, other permit holders with less strict or pro-forma requirements but who contribute to background pollution, Councils, and the community to develop innovative ways to comply with the EP Act 2017. An opportunity to facilitate voluntary collaboration between those engaged in heavy industrial operations in a localised area will also be created.

Entering into, and needing to comply with, a BEP for heavy industrial areas may achieve a higher degree of ambient environmental health rather than relying on individual operators to adhere to their licence conditions and/or the GED, to minimise risks to human health and the environment.

For AQCR in places like Latrobe Valley, a BEP should include air pollution reduction strategies for planned burns from coupes, agriculture, and private plantations.

Recommendation: EPA must provide clarification on how it intends to ensure provisions in the SEPP (AQM) for Air Quality Control Regions be reflected in the new regulatory regime, whether through a Better Environment Plan or otherwise.

Recommendation: Polluters in regions such as Latrobe Valley should be required to enter into a BEP to develop ways to comply with the Act, minimise their collective impact on a localised geographical area, and develop innovative ways to minimise the risks their activities pose to human health and the environment.

1.2 Permission framework

1.2.1 Matter the EPA must take into account when determining a development licence

Section 69(3)(h) of the EP Act 2017 states that when determining a development licence application the EPA can take into consideration any prescribed matters. The only prescribed matters in the Regulations with respect to development licences are referrals to other agencies, and fees.

The ability or otherwise of the proponent to rehabilitate the development site, either progressively during operations, or once operations have ceased, should be included in the regulations as a prescribed matter that the EPA must consider when determining a development licence. This is

particularly important for activities that generate wastes that require specific landfills/holding ponds etc on site.

Recommendation: The ability or otherwise of the proponent to rehabilitate the development site should be included in the regulations as a prescribed matter that the EPA must consider when determining a development licence.

1.2.2 Matters the EPA must take into account when determining a permission application

Regulation 28 contains matters the EPA/Council must take into account when considering a permission application.

At present there is no requirement to consider rehabilitation plans for Scheduled landfills. Rehabilitation should be a consideration requirement at the outset because the proponent ought to be addressing this at the application stage.

There is a duty for those engaged in dealing with priority waste to pursue reuse options. Whether there is a current and realistic market for this should also be included in regulation 28 as a mandatory consideration by the EPA/Council at determination stage.

At present the availability of a market for reuse can merely be stated in a proponent's application and taken as given rather than afforded due consideration by the EPA in its determination (for example, waste ash reuse was mentioned by Australian Paper in its Waste to Energy works approval application and accepted by the EPA as a possibility without proper investigation).

If the waste hierarchy applies, and a proponent states how they're complying with it, the EPA ought to thoroughly examine those claims and include this consideration in its determination, including by way of conditions of approval.

There are a number of development proposals at present (for example the Laverton North waste to energy facility and the secondary lead smelter in Hazelwood North) that each rely on being able to dump the hazardous wastes the activities generate at Lyndhurst and other hazardous waste landfill sites. Regulation 28 should require the EPA to consider cumulative impacts of these facilities on existing landfill sites and consider whether approving these facilities complies with the GED, given the waste they generate.

There is an assumption by multiple proponents that hazardous wastes can be sent to a specific site without an assessment of whether that is actually possible given other proposed developments assuming the same thing. The EPA ought to be taking this into consideration, not least because it's likely those hazardous waste sites will need to be expanded or new ones will need to be created.

Recommendation: Regulation 28 should include a requirement for the EPA to consider whether there is a current and realistic market for reuse of priority waste.

Recommendation: Regulation 28 should include a requirement for the EPA to consider cumulative impacts of facilities that produce hazardous wastes on existing landfill sites, and consider whether approving these facilities complies with the GED, given the waste they generate.

2. CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS

2.1 Failure to regulation greenhouse gas emissions

The Independent Inquiry into the EP Act ("Independent Inquiry") made clear recommendations in relation to the regulation of greenhouse gas emissions ("GHGs").[1]

Chapter 8 of the Independent Inquiry report included the following:

> *KEY MESSAGES Climate change is the most significant environmental issue we face – its importance was a resounding theme in consultations and in submissions. The Victorian Government is committed to reducing the state's greenhouse gas emissions. The EPA's primary tool for regulating greenhouse gas emissions – the state environment protection policy (Air Quality Management) – is not effective in its current form. The EPA needs clear direction from government regarding its role in regulating greenhouse gas emissions and the settings it applies to duty holders. New statutory instruments to manage greenhouse gas emissions should be developed through a whole-of-government process that includes advice from the EPA.*
>
> RECOMMENDATION 8.1 Confirm the nature and extent of the EPA's role in regulating greenhouse gas emissions within Victoria's wider whole-of-government policy settings.
>
> RECOMMENDATION 8.2 Ensure the EPA has the appropriate statutory instruments to give effect to its role in managing greenhouse gas emissions, as determined by government and informed by advice from the EPA.

The Victorian Government responded strongly and positively to those recommendations. The Victorian Government's response to recommendations 8.1 and 8.2 was[2]:

> **Recommendation 8.1** Confirm the nature and extent of the EPA's role in regulating greenhouse gas emissions within Victoria's wider whole-of-government policy settings.
> **Response: Support**
> Government is restoring Victoria as a model for other states on climate change action. In November 2016, government introduced a Climate Change Bill into Parliament. If passed, this Bill will:
> - enshrine a long-term target for Victoria of net zero emissions by 2050
> - require five yearly interim targets to keep Victoria on track to meeting this long-term target
> - introduce new policy objectives and updated guiding principles that will provide the basis for taking climate change considerations into account in government decision-making
> - require development every five years of a Victorian Climate Change Strategy to set out how interim targets will be met and how adaptation to the impacts of climate change will be fostered
> - establish a process for government to make pledges to reduce emissions from its own operations and across the economy

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[1] Ministerial Advisory Committee, *Independent Inquiry into the Environment Protection Authority* (31 March 2016), Final Report available at http://epa-inquiry.vic.gov.au/epa-inquiry-report
[2] Government Response to the Independent Inquiry available at https://www.environment.vic.gov.au/sustainability/independent-inquiry-into-the-epa

- establish a system of periodic reporting to provide transparency, accountability and ensure the community remains informed.

In setting five yearly interim targets and developing the Victorian Climate Change Strategy, government will identify appropriate policy instruments, including determining if and when EPA regulation is appropriate.

Recommendation 8.2 Ensure the EPA has the appropriate statutory instruments to give effect to its role in managing greenhouse gas emissions, as determined by government and informed by advice from the EPA.

Response: Support

Government will ensure that the EPA has appropriate instruments and tools to give effect to any role in managing greenhouse gas emissions as required.

The Victorian Government, the EPA and DELWP have so far failed to implement these recommendations.

The definition of "environment" in the new EP Act 2017 includes climate.[3]

The definition of "waste" in the EP Act 2017 includes "greenhouse gas substance".[4]

Schedule 1 of the EP Act 2017 includes power to make regulations "regulating or prohibiting the emission or discharge of greenhouse gas substances".[5]

Despite the above, the Regulations make no mention of climate change, nor do they attempt to regulate GHG emissions. In our view, by omitting these from the regulations, the EPA is not fulfilling its obligations to regulate GHGs as a waste.

Although GHGs will fall within the GED, there is as yet no framework or guidance on how the EPA or polluters will deal with or manage this pollutant.

Recommendation: The Victorian Government and the EPA should include regulations and guidance in the ERS that set out how the EPA will manage GHGs for new facilities seeking approval, and in operating licences for new and existing facilities.

Further comments regarding the regulation of GHGs are in part 4.2 below.

2.2 Interactions with the Climate Change Act

Once the EP Act 2017 comes into force, s17 of the *Climate Change Act 2017* ("the Climate Change Act") will require decision makers to take climate change into account when making regulations, reference standards, and decisions about licences and permits. This includes consideration of both the impacts of climate change on a particular decision or instrument, and how the decision or

[3] s3 definitions Environment Protection Act 2017
[4] s3 definitions Environment Protection Act 2017
[5] s465 and Schedule 1, 8.5, Environment Protection Act 2017.

instrument will contribute to Victoria's greenhouse gas emissions. This requirement applies to the making of the regulations and ERSs that are the subject of this consultation.

The EPA and DELWP's consideration of climate change as required by s17 of the Climate Change Act is inadequate.

The RIS for the draft Regulations barely mentions climate change. It is unclear how and whether the EPA and DELWP discharged their obligations under s17 in relation to the draft Regulations. As noted above the Regulations do nothing to regulate GHGs.

In contrast, the impact assessment for the ERS does discuss climate change and how the requirements in s17 have been discharged.

In summary, it states that:

1. climate change was considered when making the SEPPs and NEPMs that the ERS relies on (i.e. it was considered many years ago when those instruments were made);

2. climate change is included in the ERS because it's a part of the air pollution reference standard via the following environmental value - "Climate systems that are consistent with human development, the life, health and well-being of humans, and the protection of ecosystems and biodiversity". However the description of this environmental value clarifies that this environmental value means - "Air quality that is not undermined, or at risk, by a warming and drying climate together with increasing population and economic growth." It should therefore be noted that this value is not about climate change per se, it is about recognising that air pollution should not be made worse by climate change.

The impact statement rightly concludes that the ERS will have very little impact on climate change. This is because the ERS in no way addresses tackling climate change or GHG emissions, and therefore the ERS will be completely ineffectual on climate change issues (apart from tangentially on climate adaptation issues).

This is a wholly inadequate response to the requirements in the Climate Change Act. The Climate Change Act is focused on getting Victoria to net zero emissions by 2050. As stated by Minister D'Ambrosio in the second reading speech for the Climate Change Act, the Act

> "…provides Victoria with a world-leading legislative framework to manage the risks climate change presents, and to maximise the opportunities that arise from decisive action, with the objective of transitioning to a net zero emissions, climate resilient community and economy."[6]

A very limited number of decisions have been singled out under s17 and Schedule 1 to require decision makers to have a specific focus on what those decisions can do to contribute to emissions reduction. The making of instruments under the EP Act 2017 is one of those.

For the EPA and DELWP to simply conclude that climate change doesn't apply to these Regulations and ERS because the Regulation and ERS do nothing to address climate change completely sidesteps the purpose of s17.

[6] Climate Change Bill 2017 Second Reading Speech, Minister D'Ambrosio, 23 November 2016

Recommendation: The EPA and DELWP should review the Climate Change Act and their obligations under s17 again, and consider how these the Regulations and ERS can actively and deliberately assist Victoria to reach net zero emissions by 2050.

Recommendation: The Victorian Government should also confirm that the EPA should to regulate climate emissions via this framework, as was committed to through the Independent Inquiry process.

3. WASTE

3.1 Resource recovery and reuse

More needs to be done to reduce reliance on landfills and encourage resource recovery and reuse. In particular, the subordinate legislation should place greater emphasis on addressing 'priority waste' for the purposes of facilitating waste reduction, resource recovery and resource efficiency.

The EP Act 2017 establishes a duty to investigate alternatives to waste disposal. Section 140 provides:

(1) A person who has the management or control of priority waste must–
  (a) take all reasonable steps to identify and assess alternatives to waste disposal for the priority waste, including—
    (i) reuse and recycling of the priority waste; and
    (ii) if the person produced or generated the priority waste, avoiding producing or generating similar priority waste in the future; and
  (b) have regard to the following in making a decision relating to management of the priority waste—
    (i) alternatives to waste disposal identified and assessed under paragraph (a);
    (ii) any guidelines issued by the Authority relating to alternatives to waste disposal for that type of priority waste;
    (iii) the objects of this Chapter.

'Priority waste' is defined in section 138 as:

> Any waste, including municipal waste and industrial waste, that is prescribed to be priority waste for the purposes of—
> (a) eliminating or reducing risks of harm to human health or the environment posed by the waste; or
> (b) ensuring the priority waste is managed in accordance with this Part; or
> (c) facilitating waste reduction, resource recovery and resource efficiency.

Wastes prescribed as priority wastes are indicated under Column 6 of Schedule 5 of the Regulations or otherwise determined by a designation issued by EPA.

The waste classifications focus almost entirely on eliminating or reducing risks of harm to human health or the environment posed by the waste, rather than facilitating waste reduction, resource recovery and resource efficiency. An exception to this is the creation of new 'Category D' which allows for alternative uses of soils with lower levels of contamination than 'Category C' thus, reducing the burden on hazardous-waste landfills.

Victoria needs to do much more to facilitate waste reduction, resource recovery and resource efficiency. This position is supported by the Independent Inquiry into the Environment Protection Authority which forecast that population growth and increases in consumption will increase the

amount of waste generated. Victoria's solid waste generation is forecast to increase by 63 per cent by 2044, from the current 12.8 million tonnes per annum to over 20 million tonnes per annum.[7]

This position is also supported by circular economy principles which aim to reduce waste generation and GHG emissions and ease pressures on the environment. A circular economy can also prompt new kinds of economic activity, generate savings for households and create new business opportunities and jobs for Victoria.

Recommendation: The subordinate legislation should focus more on facilitating waste reduction, resource recovery and resource efficiency. This could include an expansion of 'priority waste' categories for the purposes of waste reduction and resource recovery or greater specification for reducing/recovering e-waste, plastics, glass, etc.

3.2 Lawful places for industrial waste

Further measures should be introduced to ensure 'lawful places' regulated by 'declarations of use' are monitored and managed.

The Regulations prescribe how a receiver of industrial waste might be considered a 'lawful place' through licences, permits, registration or a 'declaration of use' ("DoU").[8] The DoU is a new tool proposed to support safe storage, reuse and recovery of materials derived from certain types of lower risk waste (both industrial and or priority).

We note that DoUs will not need to be submitted to the EPA. Rather, any person who makes a DoU is required to retain a copy for 2 years from the date on which the declaration was made[9] and an authorized EPA officer may ask to see a DoU to establish that a site is a 'lawful place'. However, there will be no register of DoUs per se.

This is problematic because:

1. **Insufficient data** is likely to result in operators falling outside regulatory scrutiny. This issue has been an issue for the EPA for more than twenty years, as identified in the 2010 VAGO EPA Report with respect to small operators in the Construction and Demolition ("C&D") sector[10] and by industry stakeholders during the Independent Inquiry into the Environment Protection Authority.[11]
2. While DoUs are a tool to deal with lower risk waste, there are **residual risks** associated with lower risk waste that the EPA should proactively monitor. i.e. some types of waste present lower levels of risk of environmental harm in smaller quantities, but the cumulative impacts on the environment and human health (such as through stockpiles) can be significant. As identified in the Regulatory Impact Statement: Proposed Environment Protection Regulations

[7] Ministerial Advisory Committee, *Independent Inquiry into the Environment Protection Authority* (31 March 2016), Final Report, p27 available at http://epa-inquiry.vic.gov.au/epa-inquiry-report.
[8] See Environment Protection Regulations Exposure Draft, Schedule 1 and Reg 64.
[9] Environment Protection Regulations Exposure Draft, Reg 64(7).
[10] Cited in Deloitte, Regulatory Impact Statement: Proposed Environment Protection Regulations (August 2019) 100.
[11] See Ministerial Advisory Committee, *Independent Inquiry into the Environment Protection Authority* (31 March 2016) 49.

("RIS"), such risks will not be sufficiently controlled through the GED and/or duties in the new EP legislation.[12]

Recommendation: Further measures should be introduced to ensure 'lawful places' regulated by 'declarations of use' can be monitored and managed. DoUs should be included on the public register (as a minimum) under Regulation 208 to foster transparency.

3.3 Waste management hierarchy

The subordinate legislation does not go far enough in embedding the waste management hierarchy's 'preferred' options, i.e. avoid, reuse, recycle.

We note that the EP Act 2017 includes the waste management hierarchy as a principle of environment protection.[13] An object of Chapter 6 (dealing with waste) is to minimise litter and waste disposal by encouraging the management of waste in accordance with the waste management hierarchy.[14] Since 2001, however, the old legislative framework also included the waste management hierarchy as an overarching principle[15] with limited effect.

The subordinate legislation does not go far enough in embedding the waste management hierarchy's 'preferred' options, i.e. avoid, reuse, recycle.

For example, regulation 95 provides for the requirement to recover, re-use and recycle materials and review packaging design. Namely,

> (1) A brand owner[16] must ensure that the materials used in packaging for which the brand owner is responsible are recovered at a recovery rate for a financial year of at least 70% for each category of material set out in regulation 97 that the brand owner has used.
>
> Penalty: 60 penalty units for a natural person; 300 penalty units for a body corporate.

'Recover', in relation to materials, means to separate those materials from other waste in a manner that enables them to be re-used for packaging or used for other products.[17]

As currently drafted, regulation 95 will do little to encourage the recovery, re-use and recycling of materials because the maximum penalty is considerably smaller than the cost of compliance. The maximum fine for a company (with an annual turnover in Australia of more than $5 million (see regulation 93)) is less than $50,000.[18]

This issue of maximum penalties being considerably smaller than the cost of compliance was raised in the RIS.[19] It was also highlighted in the case of the Demolition of the Corkman Irish Hotel in Carlton, in which His Honour Judge Wraight opined:

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[12] See Deloitte, Regulatory Impact Statement: Proposed Environment Protection Regulations (August 2019) 101-2.
[13] *Environment Protection Act 2017,* s 18.
[14] *Environment Protection Act 2017,* s 111(1)(a).
[15] See *Environment Protection Act 1970*, s 1I.
[16] Note, this requirement does not apply to a brand owner who has an annual turnover in Australia of not more than $5 million (see Environment Protection Regulations Exposure Draft, Regulation 93).
[17] Environment Protection Regulations Exposure Draft, Regulation 4.
[18] The current value of a penalty unit is $165.22 (as at July 2019).
[19] Deloitte, Regulatory Impact Statement: Proposed Environment Protection Regulations (August 2019) 99.

The only reasonable conclusion that can be drawn from their decision [to demolish the Corkman Hotel] is that they made a commercial calculation. That is, they weighed up the potential penalties that they would face as result of the deliberate breach of the law, with the potential profit that would result from development of the site, before going ahead.[20]

Recommendation: The subordinate legislation go further to embed the waste management hierarchy's 'preferred' options, i.e. avoid, reuse, recycle.

Recommendation: Penalties under regulation 95 should be significantly increased to encourage the recovery, re-use and recycling of materials.

4. AIR POLLUTION

The Act and the Regulations represent a significant change in direction for the regulation of air pollution in Victoria. Under the old regime, licence limits were treated as the upper limit of what an entitlement to pollute. The '*best practice*' and '*continuous improvement*' provisions of the SEPP (AQM) were a demonstrable failure.

EJA is cautiously optimistic that the EPA's reliance on the GED has the potential to reduce air pollution in Victoria, in particular from large point sources. However, we outline several areas of concern below.

4.1 Licence limits and the GED

The Regulations do not contain emission limits for stationary sources as previously existed in Schedule D and Schedule E of the SEPP (AQM) ("Emission Limits"). Previously the Emission Limits informed the EPA when setting licence limits for individual stationary sources.

In the absence of Emission Limits, it is unclear how and on what basis the EPA will set emission limits for stationary sources licences.

Under the *Environment Protection Act 1970* and its subordinate instruments, licence limits were treated as an entitlement to pollute up to the licence limit.

If licence limits operate the same way under the new regime then an important opportunity will have been lost. Further, reliance on the GED to drive ongoing reductions in emissions to air will require the EPA to ensure compliance with the GED.

EJA is concerned that the EPA is not currently adequately resourced to ensure compliance with the GED.

In these circumstances, the EPA should reinstate Emission Limits into the Regulations.

Emission Limits should be set consistently with international best practice and by reference to the Industrial Emissions Directive (2010/75/EU) ("the IED"). The Regulations should also clarify that

[20] *Shaqiri, Kutlesovski v City of Melbourne* [2019] VCC 1430 [55].

compliance with Emission Limits and by extension licence limits, does not equate to compliance with the GED, but rather sets the absolute permissible ceiling.

We note that the IED represents the current state of knowledge amongst regulators and generators of emissions from large combustion plants. It is difficult to foresee how emission limits above those found in the IED could be found to be compliant with the GED.

We consider that by setting Emission Limits that are consistent with the minimum current state of knowledge, the goals of the GED will be largely met by compliance with those Emission Limits, but that the GED will have some work to do in specific, project specific instances.

In the absence of the EPA setting Emission Limits consistent with the minimum state of knowledge, we consider that the GED is unlikely to have a significant impact on emissions to air, particularly large stationary sources without intervention.

In the absence of a significant increase in EPA resourcing, that intervention is likely to be civil litigation and the associated uncertainty and cost that litigation inevitably creates.

Recommendation: Emission Limits consistent with the Industrial Emissions Directive 2010/75/EU should be included in the Regulations for the purpose of informing licence limits in permissions.

Recommendation: It should be clarified that compliance with prescribed Emission Limits in licences will not be deemed compliance for the purposes of section 54(2)(a) of the EP Act 2017.

4.2 Carbon dioxide and GHGs

EJA supports the inclusion of climate systems consistent with human development, the life, health and well-being of humans and the protection of the ecosystems and biodiversity as an environmental value of the ambient air in the draft ERS.

While EJA is supportive of the inclusion, the inclusion of climate systems is meaningless without the corresponding indicator and objective for ambient air.

Prescribing carbon dioxide as an indicator and including objectives for ambient air within the ERS should not be controversial. GHGs and carbon dioxide in particular are widely and commonly distributed air pollutants which may threaten the beneficial uses of both local and regional environments and as such sits comfortably within the meaning of Class 1 Substances.

Further, Victoria has a policy of reducing GHG emissions to zero by 2050. Victoria supports the Paris Agreement on climate change.[21] Victoria therefore recognises that atmospheric carbon dioxide needs to be limited to a ppm concentration consistent with the Paris Agreement targets in order to

[21] Independent Expert Panel on Interim Emissions Reduction Targets for Victoria (2021-2025, 2026-2030). *Interim Emission Reduction Targets* March 2019 at [6].

maintain climate systems consistent with environmental value stated in the Environmental Reference Standard.

The ERS prescribes indicators which are stated to collectively support the environmental values.[22] Carbon dioxide is the primary measure of climate system and not including it as an indicator and prescribing an objective is inconsistent with the stated purpose of the ERS and treats the climate system inconsistently with other environmental values in the ERS.

While not EJA's preferred approach, we note that fees for the annual load of carbon dioxide could continue to be avoided by continuing to not prescribe licence limits for GHGs in individual operator's permissions.

Recommendation: GHGs should be a prescribed as Class 1 Substances in the Regulations.

Recommendation: Carbon dioxide should be added as an indicator in the ERS.

Recommendation: The ERS should include an environmental objective for carbon dioxide. The objective should be consistent with Victoria's stated support of the Paris Agreement.

4.3 Objectives for Particles as $PM_{2.5}$

Both the NEPM (AAQ) *and* the SEPP (AAQ) include a more stringent 2025 environmental quality objective.

The more stringent standard has not been included in the ERS. No explanation has been provided for the exclusion. The 2025 objective should be included the ERS.

Recommendation: The 2025 objective for Particles as $PM_{2.5}$ contained in the National Environment Protection (Ambient Air Quality) Measure and the State Environment Protection Policy (Ambient Air Quality) should be included in the ERS.

4.4 Forest burns

In this submission we use the term "forest burns" to refer to both VicForests and private plantation burning of post-logging waste.

The EPA failed to use the current regulatory scheme to management air pollution from forest burns, despite it being a significant source of air pollution that impacts on the health and amenity of many communities in Victoria each year, especially Gippsland and the Latrobe Valley. In particular, the SEPP (AQM) contains a clause that requires the EPA, in partnership with relevant Government agencies,

[22] ERS Regulatory Impact Statement at [39]

fire authorities, protection agencies and other stakeholders develop a Protocol for Environmental Management ("PEM"), which the EPA did not do.

The proposed regulations and ERS do not include provisions for how air pollution from logging practices will be regulated, managed, and enforced, and therefore air pollution from logging burns will continue to be a regulatory gap.

The SEPP (AQM)'s explicit provisions for mitigating the impact of forest burns on human and environment health could have been brought into the new Regulations, but EPA and DELWP have not brought this requirement over into the new legal regime.

The RIS identifies the impacts on air pollution from forest burns on both human and environmental health,[23] and identifies planned burns as a non-natural source of air pollution.[24] However, it fails to consider "planned burns" in its assessment of residual risk, despite identifying forest burns as a non-natural source of pollution that ought otherwise be permitted or regulated for in the new laws.

The new laws provide several mechanisms that are appropriate for regulating air pollution from forest burns, in order to achieve the policy and legal goals of the new laws to prevent and minimise risks of harm to human health and the environment and minimise those risks as far as reasonably practicable. We provide some suggestions of how this should be done.

1. Through the new permissions regime.

   The new laws create a permissions system ranging from the registration of activities that have a lower risk of causing harm to human health and the environment, through to activities which must comply with strict licence obligations in order to operate.

   Like the current Environment Protection (Scheduled Premises) Regulations 2017, forestry operations (private or public land) are not explicitly provided for in the Draft Regulations.[25]

   The Draft Regulations identify premises or activities that discharge or emit a certain amount of air pollution as "prescribed development activities" and "prescribed operating activities". This means that activities that emit more than 100kg per day of certain air pollutants are required to adhere to the conditions of a permit, the Regulations, and more broadly, the GED.

   Failure to obtain an operating licence for a prescribed operating activity is an offence, unless an exemption of that activity is in place.

[23] Deloitte Access Economics, Regulatory Impact Statement: Proposed Environment Protection Regulations, DELWP and EPA, August 2019, 165-166.
[24] Deloitte Access Economics, Regulatory Impact Statement: Proposed Environment Protection Regulations, DELWP and EPA., August 2019, 161
[25] See: Environment Protection Regulations Exposure Draft, Schedule 1 – Prescribed permissions activities, exemptions and fees.

Forests burns are likely to emit air pollution in amounts that meet or exceed the daily limits identified as "prescribed operating activities" in the Draft Regulations. Forest burns should therefore require a permission in order to be conducted, so that the risks to human health and the environment are thoroughly accounted for and minimised as far as reasonably practicable.

Such permissions should require those who undertake forest burns to review burning practices to minimise human and environmental health risks, and be subject to guidelines and compliance codes that detail how compliance with the GED can be achieved.

2. In the Regulations.

Regulations made under the new laws may prescribe matters that are necessary to give effect to the EP Act 2017, such as by regulating the way in which duties or obligations are to be performed and how compliance with the GED can be achieved. This includes matters that are listed in Schedule 1 of the EP Act 2017, which identifies several air pollution matters that can be regulated, including regulating or prohibiting emissions into the environment of any substance or matter, imposing monitoring or observation obligations for emissions, and prescribing emissions standards and standards of maximum permissible concentration for emissions.

Part 5.2 of the Draft Regulations contains several divisions that prescribe the way in which certain air pollution matters must be regulated in order to give effect to the Act including prescriptions regarding solid fuel heaters, protection of the ozone, Class 3 substances, and the National Pollutant Inventory.

Planned burns ought to be included as a specific division, with prescriptions on enforceable management and compliance obligations on forest burn activities.

3. Through the GED.

As the GED imposes an obligation on everyone in Victoria who is engaged in an activity that poses a risk to human health and the environment to minimise that risk so far as reasonably practicable, the GED will apply to air pollution from forest burns where other regulatory tools are not imposed on forest burn operators. For some types of pollution, the EPA will use compliance codes and guidelines to outline how the polluter can comply with the GED (which have not yet been released).

It is well established that forest burns take place under certain meteorological conditions including when low wind is forecast. When these fires start, regions such as the Latrobe Valley can become a pollution sink and the absence of wind often means that air pollution from forest burns sits in the Latrobe Valley for days. During this time people are exposed to toxic air pollution which compromises their health. Visibility is also reduced, compromising road safety.

Requiring fires to be lit on low wind days is at odds with minimising the risk of harm from pollution, because those same conditions contribute to high pollution levels. The EPA, DELWP, local Councils who permit forest burns and other agencies should prepare a compliance code that sets out how forest burns should (or shouldn't) be carried out to achieve the objectives of the new laws and adhere to the GED in a meaningful way.

Failure to regulate air pollution from forest burns continues to be a regulatory gap that poses risks to the environment and human health.

Recommendation: DELWP and the EPA should use the new laws to their greatest extent to fill a regulatory gap in a way that will have a significant positive impact on Victorian communities.

4.5 National Pollutant Inventory

The contents of the *Waste Management Policy (National Pollutant Inventory)* have been largely transposed into the Regulations. Regulation 107 provides a process whereby reportable entities are able to make an application to the EPA to permit a claim for reportable information to be treated as commercially sensitive information. This is in response to clause 24 of the National Environment Protection Measure (National Pollutant Inventory) ("NEPM (NPI)") which allows reporting entities to claim that their report should be excluded from public reporting due to confidentiality.

The purpose of the National Pollution Inventory ("NPI") is to track pollution across Australia and to ensure that the community has access to information about the emission and transfer of toxic substances which may affect them locally.[26] It was specifically designed as a community right to know tool.

As a starting point, we do not see that there is ever a situation in which a polluter should be allowed to claim an exemption from having its emissions included in the NPI. To do so significantly corrupts the purpose and integrity of the scheme.

The Regulations, provide no mechanism to allow for public notification of an application for information to be treated as commercially sensitive information. There is also no mechanism to ensure that the public are notified of the outcome of an application for information to be treated as commercially sensitive.

The determination of a claim for commercial confidentiality will be based on the explanation provided by the entity claiming that the information is commercially confidential. The EPA is then required to make its determination based on that explanation and weighing the public interest against the interests of the entity claiming the confidentiality.

[26] http://www.npi.gov.au/about-npi <Accessed 28 October 2019>

The determination is necessarily an exercise of discretion and weighing competing interests. The final determination is a question on which reasonable minds may reach different conclusions.

The Regulation also requires the EPA to provide a statement of reasons in the event that an application is refused.

The EPA's decision will subject to Judicial Review, by both applicants and third parties with appropriate standing. However, in the absence of notice of an application for a determination that information is commercially confidential, third parties will be unable to exercise review rights or request statement so reasons either through the Freedom of Information process or pursuant to section 8 of the *Administrative Law Act 1978.*

In order to open the determination of commercially confidential information to proper scrutiny, the EPA should provide public notice of an application under regulation 107 of the Regulations.

Recommendation: The EPA should not grant exemptions to reporting entities from their emissions being publicly reporting in the NPI.

Recommendation: Regulation 107 should be amended to require the EPA to provide the public notice of an application for information to be considered commercially confident via the public register.

Recommendation: Regulation 107 should be amended to require the EPA to provide the public notice when a determination for information to be considered commercially confident has been made via the public register.

4.6 Solid fuel heaters

The Regulations as currently drafted prohibit the manufacture and supply of wood heaters unless the wood heater is in compliance with AS/NZS 4012 or AS/NZS 4013.

Supply is not a defined term in the regulations. The Macquarie Dictionary defines supply as '*to furnish (a person, establishment, place etc.) with what is lacking or requisite.*' We consider that the definition of supply is not broad enough to prohibit installation of non-compliant wood heaters.

The lack of coverage of installation of wood heaters leaves open the possibility of individuals purchasing wood heaters from manufacturers or suppliers outside of Victoria direct and having them shipped into Victoria for installation.

Recommendation: The scope of regulation 110 should be expanded to prohibit installation of non-compliant wood heaters.

5. WATER

5.1 Waters and the nature of pollution

The RIS correctly identifies, that Victorian waters face substantial challenges. While there are uncertainties with data, trends in Victorian waters are reasonably clear: a substantial proportion of waters (inland and coastal) are not in a good way and trends are, at best, stable, and in key cases, declining (e.g. turbidity, poor ambient water quality).

Water management issues to which the EP Act 2017 is intended to apply are in the nature of discharges rather than, for example, extraction, diversions or storage of water. Both water resources management and environmental protection regimes do however, in the broadest sense, overlap in terms of interferences in hydrological systems.

The amended EP Act 2017 regime includes the dismantling of the current SEPP model and disaggregation of SEPP content and translation to other subordinate instruments or, in the absence of such translation, management of matters to which a SEPP now responds through the operation of the GED.

As the RIS explains the management of water quality issues is intended to be achieved primarily through the GED.[27] The GED is intended to protect (via a preventative approach) waters from harms that include harms to the environmental and to human health.

In respect of waters the scope of these protections encompasses the natural environment and human physical health, but in addition, we submit, an overlapping object of human health which lies in the psycho-social health of human interactions with healthy water ecosystems.[28]

In our view, specific guidance or policy on how the GED addresses this consideration should be prepared.

Other important considerations are the nature and character of receiving waters, such as whether those waters are of high conservation value or susceptible to trajectories of decline or improvement in ecological terms.

Water quality issues can and still do arise from point source pollution events. The application of the GED to these types of pollution sources is in principle relatively straightforward and the so-called residual risk can be managed via regulatory instruments. Application of the GED in respect of point source pollution can be augmented in effect by direct regulation, such as via permissioning, as the specific, identifiable and limited nature of point source pollution contributors (sources of risk) mirrors the manner in which licensing occurs now.

Arguably, the bigger challenge is in ensuring the EP Act 2017 regime achieves real gains in the environmental protection of waters in relation to non-point source pollution. This assumes the effectiveness of regulatory and administrative controls over point source pollution.

Non-point source pollution impacts on waters is as much if not more significant in terms of harms to waters. Non-point source impacts include for example urban stormwater, runoff from rural lands

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[27] RIS, p 187

[28] See also Minister for Health and Minister for Energy, Environment and Climate Change *Victorian Memorandum and Health and Nature* (2017), https://www.environment.vic.gov.au/biodiversity/victorian-memorandum-for-health-and-nature; DELWP *Protecting Victoria's Environment - Biodiversity 2037*, https://www.environment.vic.gov.au/biodiversity/biodiversity-plan

(including agricultural runoff), vessel discharges, waterway dredging, or salinization. Some of these impacts, for example vessel discharges, can be managed via regulatory instruments.

Non-point source pollution highlights the problem of cumulative harms and risks to the environment and to human health, especially from a multitude of harmful sources, some of which may be the consequence of specific, intentional or even careless human actions, others being the consequence of indirect factors such as urban design or infrastructure planning.

While the GED will have an important role to play in protecting Victorian waters, we question whether there is too great a reliance on and deference to this mechanism. We are unable to make a concluded submission on that point in the current absence of details as to other instruments likely to be prepared, notably guidance under the GED and OMLI orders.

5.2 The new framework

This transition applies to the management of pollution and waste in relation to water currently functioning under *State Environment Protection Policy (Waters of Victoria)* ("SEPP (Waters)"). We understand that in part the review and revision of the SEPP (Waters) was drafted with the transition to the EP Act 2017 regime in mind and therefore, for example, the drafting of certain content in the language of risk and risk minimisation.

Bearing the above in mind, our current understanding of the translation of SEPP (Waters) into the new scheme includes:

1. Translation of content currently descriptive of beneficial uses to the new ERS;

2. Translation of some rule-based content to Regulations

3. Translation of some rule-based content to Orders for OMLIs;

4. Translation of some rules-based content to guidance applicable to the GED or where no such translation occurs the GED generally steps into that space.

To date, only regulatory outcomes deriving from (a) and (b) above seem to be on public exhibition, in which case it remains uncertain as to what outcomes suggested under (c) and (d) will include and what those specific measures will look like. This uncertainty is problematic, if expected, given the scope of reforms.

5.3 Removal of explanatory notes

Explanatory notes currently accompanying particular clauses of the SEPP (Waters) are removed from new instruments. The notes provided useful guidance to the intention and operation of those clauses. It would be valuable for that content to be captured, where it remains relevant (such as in relation to rule-based provisions), in guidance to new instruments.

5.4 Translation of content to ERS

For the most part the substance of the descriptive schedules to the SEPP (Waters) appears to be translated to the ERS. In this manner, among other things, the ERS related to water will form part of

the ‘state of knowledge’ applicable to duty-holders obligations under the GED. We take it this content will represent a form of baseline and new and available knowledge (for example, new scientific knowledge as relevant) may amend and expand the ‘state of knowledge’ in any particular case.

The main gap in terms of translation appears to lie in N and P load targets for designated waters currently under Schedule 4 of the SEPP (Waters). Baseline values and timeframes for the achievement of targets have not been translated into the ERS.

At a minimum, fixed timeframes for the achievement of load targets must be translated over. Target-setting is of limited value or effectiveness without time-bound operation including, for example, in the accountability of target-setting and design and deliver of programs intended to achieve targets.

Similarly, pollutant load targets for Port Phillip Bay under cl 4 to Schedule 4 have only been partially translated to the ERS. Insofar as pollutant target load-setting is partially a matter of descriptive content and partially rule- or standard-setting it is our view that the standard- or rule-setting elements of the current clauses are translated in substance into OMLIs and/or into instruments informing the GED.

It should be made clear how institutional and public behaviour (e.g. conduct and actions relevant to constraining and reducing pollutant loads in catchments) is to be governed under the new arrangements. This issue appears to one where the GED, if it is to be a key tool in environmental protection, needs to be adapted to cumulative and widespread risks (non-point source pollution), where impacts and harms are to waters as classic ‘public good’.

Recommendation: Publication of guidance to GED obligations relating to water and relevant draft OMLI Orders must occur as soon as possible.

5.5 Areas of high conservation value

Schedule 5 of the SEPP (Waters), concerning description of areas of high conservation value appears not to have been translated into the ERS. This omission is particularly problematic.

We are led to understand that this omission relates to Federal responsibility for certain categories of waters and wetlands described in Schedule, such as RAMSAR Sites and wetland habitat of treaty-protected migratory bird species. This approach is unacceptable for a number of reasons:

1. At least some content under Schedule 5 is not the subject of Federal responsibility (paragraph (b)(v));

2. Federal protection and controls, in particular operating under the *Environment Protection and Biodiversity Conservation Act 1999* (“the EPBC Act), in our opinion are likely to provide lesser protection than the standards currently operating under the SEPP (Waters).

   For example, approval by the Federal Minister of actions including discharges to these waters under sections 133 and 138 of that Act can include some degree of impairment to environmental values to the degree ecological condition is maintained (RAMSAR). In our experience approval of this type of ‘action’ is likely.

   By contrast, discharges under clause 25 of the SEPP (Waters) would require protective and potentially outcomes overall *beneficial* to receiving waters.

The current Victorian regulation in effect is likely to provide a higher standard of protection for high value, sensitive waters, both legally and in practice.

3. The Schedule 5 areas and their environmental values presumably would be included in any 'state of knowledge' test in operation of the GED, in which case inclusion of this content in the ERS is useful for purposes of clarity and transparency.

5.6 Stormwater provisions

Substantial parts of cl 34 of the SEPP (Waters) concerning stormwater management is to be translated into transitional regulations. It appears this is the case with sub clauses (3) and (4). Sub-clauses (1) and (2) are not so translated. Sub-clause (1) in the SEPP (Waters) appears to be drafted with the language of the GED in mind. Nevertheless specific direction or guidance on the relationship of stormwater management and the GED is preferable. As noted elsewhere in these submissions that may be an approach to be taken but clarification would be valuable.

In any case, it is fair to say that stormwater management is a critical element of water quality protection and improvement, especially in urban areas.[29] It has features of both point source and non-point source pollution. To that end, it is important to consider how best it is to be managed through law and policy and heavy reliance on the GED may not be sufficient.

In relation to sub-clause (2) it may be that the intention here is to translate this provision into OMLI orders applying to Councils as responsible authorities. Clarification is needed. The further qualifying paragraphs under that sub-clause – concerning retention of stormwater on property and retention nor use as close as possible to its source, and minimisation of pollution of stormwater – are key, strategic controls on stormwater management. It is important they are translated into appropriate instrument(s).

Clarity is needed on the interaction of or inter-operability of environmental protection, land-use planning and water resources rules and policies. Currently, there are specific ways in which environmental protection and planning laws interact in stormwater management.[30] While the coverage of those laws maybe insufficient for effective outcomes,[31] there are regulatory rules for interaction.

Reliance solely on the GED will not be sufficient to account for the interactions of environmental protection and planning law, for example how the GED will intersect with planning permits and their drafting, taking into account proponents' obligations under the GED.

In our view, specific rules-based provisions are required to govern the functioning of the intent of the GED and the current clause 34 in planning decisions. This may occur in the form of an OMLI order. If so, in addition to any other relevant considerations (such as consistency with any new BPEM guidelines) permit decisions should have to demonstrate consistency with the preventative model of the GED.

We acknowledge that revision and replacement of the BPEM Guidelines for Urban Stormwater is likely to proceed under the EP Act 2017 regime, which will inform the drafting of future stormwater

[29] RIS, p 188
[30] E.g. SEPP (Waters), cl 32; Victorian Planning Provisions, cl 14.02-1S
[31] For example, limited coverage of contaminants under BPEM Guidelines for Urban Stormwater and failure of relevant planning controls over stormwater to deal with land uses such as roads or public infrastructure.

controls. The revision must account for and incorporate the subsequent 20 years of science and practice in this space. Best practice stormwater management will include:

1. Retention and/or infiltration of stormwater on-site or on nearby lands, prior to entering waterways, for the large majority of flows (up to 90%);

2. Extensive protection and/or rehabilitation of riparian zone vegetation;

3. Comprehensive application of stormwater treatments to land surfaces, regardless of function or purpose;

4. Treatment of stormwater as a water resource as well as a form of discharge.

A strategic evolution, or leap, in stormwater management rules is feasible within the EP Act 2017 regime and this outcome will be one of the most powerful outcomes in terms of protection of the environmental values of waters in urban areas.

Recommendation: Stormwater provisions should wholly be brought within the regulatory regime or alternatively within the permissioning framework. Concurrently or in the further alternative, consequential amendments need to be made to Victoria Planning Provisions in order to harmonise clearly enable the operation of stormwater management standards functioning under the GED or other EP Act 2017 regulation and planning.

5.7 Omitted content in translation to new subordinate instruments

As noted substantial rule-based content appears to be omitted in the translation from SEPPs to new instruments. It is crucial in our view that the specific measures provided for in these clauses are not lost in preparation of the new regime and that clear and effective measures are not diminished or obscured.

Additionally, much of the definitions clause is also not translated. The fate of those terms will be important to future regulation.

While most omitted content appears to be consistent with how we assume the GED and OMLIs will function (and therefore emerge in other regulatory spaces), certain clauses do not appear to fit neatly into that process.

For example, clause 31 requiring property owners to connect to sewerage systems is one example. The fate of this provision should be made clear.

Specifically, clauses in the SEPP (Waters) omitted include: 20-27, 31-33, 34 (in part), 35 (in part), 36, 38-50, 55-58.

5.8 Omission of Clause 22(3) and 25 of the SEPP (Waters)

Clauses 22(3) of the SEPP (Waters) prohibits the EPA from approving a discharge to certain aquatic reserves, waters of high conservation value and wetland and estuary segments of surface waters unless the discharge could be demonstrated to provide water for the environment consistently with clause 25 of the SEPP (Waters).

As discussed above Schedule 5 describes areas of high conservation values, which includes, for example, RAMSAR Listed wetlands.

We understand that the EPA/ DELWP consider that waters of high conservation value had been excluded from the ERS because they were covered by Commonwealth legislation and therefore to avoid duplication of regulation. The problems with this approach are discussed above.

The failure to include clauses 22(3), clause 25 and a Schedule 5 prescription of high conservation waters has significant ramifications on protection of those waters.

For instance, under the current regime discharges to high conservation waters may only be approved if an authority is satisfied this would protect beneficial uses and is satisfied that the discharge is consistent with environmental flow requirements.

Under the new regime, discharges into high conservation aquatic reserves and the wetland and estuary segments appear to be subject only to the GED.

We are not convinced that federal law is sufficient to protect waters of high conservation value (Protected Matters) to the level that they were protected under the SEPP (Waters). Not all Schedule 5 waters are waters protected by federal law in any case.

Recommendation: Clauses 22(3) and 25 of the SEPP (Waters) together with Schedule 5 definitions of high conservation waters should be incorporated to the Regulations to ensure that the protection of those waters is not lessened under the new regime.

6. OTHER

6.1 Financial assurances

The EP Act 2017 imposes an obligation on EPA to establish and maintain a public register.

Section 456 of the EP Act 2017 outlines the information that must be kept in the public register.

This includes licences and details about licence conditions.

The requirement that information regarding financial assurances for those licence or permit holders who are required to maintain a financial assurance for their activities in their licence or permit, is not explicitly referenced. The public register should contain details about financial assurances, including their manner, form, and amount.

The Victorian community has a right to know the degree to which it is financially protected from bearing the costs of rehabilitation for premises that require a financial assurance. Moreover the amount of financial assurance should be included for review when licence reviews are undertaken.

Recommendation: The manner, form and amount of financial assurances imposed as licence conditions should be included on the Public Register.