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Ms Suzy Neilan
Executive Director Strategy
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Dear Ms Neilan

REGULATORY IMPACT STATEMENT FOR REHOUSING THE OBLIGATIONS OF THE STATE ENVIRONMENT PROTECTION POLICIES (WATERS) SAVED CLAUSES

I would like to thank your staff at the Environment Protection Authority (EPA) for working with the team at Better Regulation Victoria on the preparation of the Regulatory Impact Statement (RIS) for rehousing the obligations of the State Environment Protection Policies (Waters) saved clauses.

As you know, the Commissioner for Better Regulation is required to provide independent advice on the adequacy of the analysis provided in all RISs in Victoria. A RIS is deemed to be adequate when it contains analysis that is logical, draws on relevant evidence, is transparent about any assumptions made, and is proportionate to the proposal's expected effects. The RIS also needs to be clearly written so that it can be a suitable basis for public consultation.

I am pleased to advise that the final version of the RIS received by us on 31 March 2023 meets the adequacy requirements set out in the *Subordinate Legislation Act 1994*.

Background

Following the 2016 Independent Inquiry into the Environment Protection Authority Victoria (EPA), the *Environment Protection Act 2017* (EP Act) replaced the previous legislative framework under the *Environment Protection Act 1970* (EP Act 1970), which was supported by the State Environment Protection Policies (SEPPs). The EPA explains that SEPPs were intended to express in law Victorians' expectations about the use and protection of the environment. There were six SEPPs, including one for Victorian waters.

The obligations of the SEPPs have largely been replaced by new duties in the EP Act, such as the general environmental duty (GED), which requires that all Victorians reduce environmental harm from their activities, or have been incorporated into other

legislative and regulatory tools. The entities which hold responsibilities under SEPP (Waters) include:

- Councils, which develop plans to identify and minimise risks from on-site wastewater management systems (OWMS, e.g., septic tanks). They also own and manage public stormwater assets;
- Water corporations, which deliver 'urban' water services, including supplying drinking and recycled water, and the removal and treatment of sewage and trade waste;
- Owners and managers of public stormwater assets – councils and Melbourne Water; and
- Catchment Management Authorities (CMAs), who are responsible for the integrated planning and coordination of land, water and biodiversity management.

When the SEPP clauses were revoked with the introduction of the new EP Act, 17 clauses and schedules from the SEPP (Waters) were 'saved' and placed in the Environment Protection Transitional Regulations 2021 (the current Regulations), which support the EP Act. The saved clauses relate to four key themes, which are:

1. On-site wastewater management systems;
2. Urban stormwater management plans and asset maintenance;
3. Managing saline discharges and irrigation drainage; and
4. Managing pollutant load targets.

The EPA explains that these clauses were saved because additional time was required to allow for changes in government processes and, at the time, it was unclear whether a replacement instrument was required. The current Regulations, including the obligations from the SEPP (Waters), will sunset on 30 June 2023.

Problem analysis

The EPA explains that if the SEPP (Waters) saved clauses were to expire, there may be inadequate risk controls in place to address the risks of harm to human health, the environment and community amenity.

The EPA has assessed the residual risk if these clauses were to expire, incorporating input from stakeholders and the Department of Environment, Land, Water and Planning (DELWP). It determined that five of the 17 clauses and schedules were not covered by existing tools or regulations (e.g., the GED). These clauses are:

1. Clause 29 – Domestic wastewater management plans;
2. Clause 30 – Sewerage planning;
3. Clause 34(3) – Stormwater asset management;
4. Clause 34(4) – Stormwater management plans; and
5. Clause 37(3) – Irrigation activity management.

For Clauses 29 and 30, there is a concern that without explicit requirements for local councils to develop these plans, and for water corporations to respond to them, the risk of poor long-term planning and coordination among stakeholders will increase. This may impose significant legacy costs over time and may also lead to wastewater leaking beyond boundaries, which can increase the likelihood of illness following contact with wastewater.

For Clause 34(3), there is a concern that without explicit requirements for councils and Melbourne Water to minimise risks associated with public stormwater infrastructure, the environmental protection elements of this infrastructure will not be appropriately inspected, maintained, renewed or replaced. This may lead to long-term environmental damage.

For Clause 34(4), there is a concern that without explicit requirements to develop these plans, there is a risk that smaller councils, particularly those that are resource constrained, will not continue to do so, which may decrease cooperation between councils and other authorities. This may lead to an increased risk of harm from urban stormwater, suboptimal long-term planning, and opportunities for improvement being missed.

For Clause 37(3), there is a concern that without explicit requirements to develop and publish land and water management plans that identify environmental risk and the actions required to minimise this risk, CMAs will not adequately resource or prioritise the development of such plans. This may lead to suboptimal long-term planning.

Options and analysis

To rehouse the obligations for the five clauses, the EPA considered the use of three instruments, which are:

1. **Guidance**, which provides duty holders with information to understand their obligations, approaches to addressing risks and practical measures to minimise harms. This instrument does not impose compliance obligations;
2. **Orders for Managers of Land or Infrastructure (OMLIs)**, which are legislative instruments that outline specific requirements for how land or infrastructure must be planned, managed, operated or controlled. The EPA explains that an OMLI is best suited to assign responsibilities beyond the GED to entities that have a strategic role in controlling or managing land or infrastructure. An OMLI may be enforced via a notice, which imposes penalties for non-compliance and is enforceable in court; and
3. **Statements of Obligation (SoOs)**, which outline specific standards for water corporations and CMAs, but cannot be applied to councils. Compliance is mandatory, with SoOs requiring that non-compliance be identified to the relevant Minister and addressed by the non-compliant entity.

The EPA analyses the following options for each of the five clauses.

1. Clause 29 – an OMLI;
2. Clause 30 – a SoO or an OMLI;
3. Clause 34(3) – guidance or an OMLI;
4. Clause 34(4) – guidance or an OMLI; and
5. Clause 37(3) – a SoO or OMLI.

The EPA explains in the RIS why certain types of instruments were not analysed for some clauses.

- For clause 29, OMLIs were the only option analysed, as SoOs cannot be applied to councils and there is existing guidance published by the Municipal Association of Victoria.
- For clauses 30 and 37(3), guidance currently exists, or is already in development by DELWP, so was not analysed as an option.
- For clauses 34(3) and 34(4), SoOs were not analysed as they cannot be applied to councils.

The options are assessed using a Multi-Criteria Analysis (MCA). The criteria and weights are as follows:

- Addressing risks to human health and the environment (40 per cent)
- Providing clarity of expectations for duty holders (10 per cent)
- Cost to the EPA/DELWP (25 per cent)
- Cost to duty holders (25 per cent).

For each of the five clauses, an OMLI has the highest score in the MCA and, hence, is the EPA's preferred option. The EPA explains that relative to the base case, all options considered are expected to improve environmental and human health outcomes. The options also provide somewhat greater clarity for duty holders.

When comparing SoOs and OMLIs to rehouse clauses 30 and 37(3), the EPA explains that:

- OMLIs are expected to generate greater compliance as they impose stronger penalties via notice, which leads to a greater reduction in risk to human health and the environment.
- As OMLIs are legislative instruments with a broader scope than SoOs, they provide clearer expectations, and avoid duplication of the intent or impact of existing tools.
- However, the higher rates of compliance resulting from OMLIs are expected to impose slightly higher direct costs for both duty holders and the EPA/DELWP.

When comparing SoOs and OMLIs to rehouse clauses 34(3) and 34(4), the EPA explains that:

- OMLIs create an explicit obligation with an enforcement pathway via notice, which leads to a greater reduction in risk to human health and the environment. This assessment was supported by stakeholders during consultation.

- Although developing additional guidance imposes fewer costs to the EPA, DELWP and duty holders, the difference in costs is marginal when compared to the costs imposed by issuing OMLIs.

Implementation and Evaluation

The OMLI will be made as soon as practicable following the expiry of the current Regulations. In the RIS, the EPA explains that it will develop communication materials that explain the changes for stakeholders via a range of channels. To support the OMLIs, the EPA explains additional guidance will be developed, and that existing EPA and DELWP guidance will be updated. To support compliance, the EPA has identified key areas where initial compliance efforts may be focused.

The EPA explains in the RIS that the options will be evaluated through its assessments of the management plans required by the OMLI. It notes that it may also conduct a separate evaluation of the effectiveness of OMLIs. The EPA states that it will assess whether duty holders are aware of and are compliant with obligations when it evaluates management plans. It also notes that it may review the effectiveness of OMLIs three years after implementation.

Should you wish to discuss any issues raised in this letter, please do not hesitate to contact my office on (03) 7005 9772.

Yours sincerely



Anna Cronin
Commissioner for Better Regulation