

## REFORM OF VICTORIA'S SUBORDINATE ENVIRONMENT LEGISLATION

### SIGNIFICANT CHANGES

The breadth of priority waste attracting a waste levy has been substantially expanded by:

- increasing the number of contaminants with threshold criteria prescribed
- lowering all upper limit contaminant concentrations of non-priority waste by orders of magnitude<sup>1</sup>
- removing upper limit contaminant concentrations of non-priority waste for many contaminants

Lowering or removing allowable chemical concentrations in solid organic products, including soils, mulches, composts and soil conditions fundamentally undermining organic recycling in Victoria.

Substantially increasing the breadth of priority waste (soil) on which a waste levy is paid by:

- more than doubling the number of contaminants with threshold criteria prescribed
- introducing a lower Category D (soil) between Category C and Fill Material

Increasing the cost of site remediation by:

- limiting onsite retention of Category D (soil) to 5yrs
- tracking and reporting of Fill Material as industrial waste by waste code N122
- requiring Fill Material to be disposed to a licensed landfill
- deleting waste acid sulfate soil such that landfill disposal is necessary

Licensing landfills post closure, with ongoing obligations for financial assurance.

All landfills irrespective of capacity will be required to operate a weighbridge.

Waste and resource recovery facilities will require permission to operate with financial assurance above 4,000 tonnes per month or 10,000 tonnes stored onsite.

Significant expansion of activities requiring a permission, with permits and registrations limited to a 5yr duration, substantially undermining the feasibility for investment for these activities (e.g. Waste and resource recovery below 4,000 tonnes per month).

Requiring customers and water corporations to track and report priority waste disposed to sewer as trade waste.

Expanding the waste codes, including M270 (PFAS).

Introducing a qualitative objective for ambient air quality that may never be met – “an air environment that is free from offensive odours from commercial, industrial, trade and domestic activities”.

### Introduction

On Monday, 2 September 2019 the Victorian State Government released for public comment draft subordinate legislation forming the next component of the reform scheduled to commence from 1 July 2020.

Please refer to RK Alert – [‘Reform of Victoria’s Environment Legislation’](#) concerning the *Environment Protection Amendment Act 2018 (Vic) (Amendment Act)*, *Environment Protection Act 2017 (Vic) (New Act)* and the *Environment Protection Act 1970 (Vic) (Current Act)*.

<sup>1</sup> Fluoride is the only parameter increased

These RK Alerts provide commentary and references to the New Act on and from the commencement date scheduled for 1 July 2020 with an absolute commencement of 1 December 2020, if the scheduled date is not met (**Reformed Act**).

On Monday, 16 September 2019 the Victorian State Government released an exposure draft subordinate instrument concerning consultation.

The Victorian State Government has now released through Engage Victoria the following exposure draft subordinate legislation to commence under the Reformed Act:

- Exposure Draft – Environment Protection Regulations (**Substantive Regulations**)
- Exposure Draft – Environment Protection Transitional Regulations (**Transitional Regulations**)
- Exposure Draft – Environment Reference Standard (**Standard**)
- Draft Charter of Consultation (**Charter**)<sup>2</sup>
- Draft Waste Classification Assessment Protocol (**Protocol – Waste Classification**)<sup>3</sup>
- Draft Waste Disposal Categorisation – Characteristics and Thresholds (**Thresholds Table**)<sup>4</sup>
- Draft Protocol for Calculating Monetary Benefits (**Protocol – Monetary Benefits**)<sup>5</sup>
- Draft Noise Limit and Assessment Protocol for the control of noise from commercial, industrial and trade premises and entertainment venues (**Protocol – Noise**)<sup>6</sup>

*Please note on the Engage Victoria website to gain access to the protocols the 'see more' field must be accessed.*

Concurrent consultation processes are operating through Engage Victoria:

*Consultation period for Substantive Regulations, Transitional Regulations and Standard:*

**2 September 2019 to 31 October 2019**

*Consultation period for Charter:*

**16 September 2019 to 10 November 2019**

In support of this exposure draft subordinate legislation the State Government published:

- 'Impact Assessment - Proposed Environment Reference Standard', dated 2019, prepared by the Department of Environment, Land, Water and Planning (**Department**) and the Environment Protection Authority (**EPA**) (**Standard Impact Assessment**);
- 'Regulatory Impact Statement: Proposed Environment Protection Regulations – DELWP and EPA', dated August 2019, prepared by Deloitte (**Regulatory Impact Statement**);
- 'Guide to the proposed Environment Reference Standard', publication 1752, dated September 2019, prepared by the EPA (**Publication 1752**);
- 'Guide to the proposed Environment Protection Regulations', publication 1753, dated September 2019, prepared by the EPA (**Publication 1753**);
- 'Overview of the subordinate instruments proposed under the new environment protection legislation', publication 1754, dated September 2019, prepared by the EPA (**Publication 1754**);
- 'Summary of proposed waste framework', publication 1756, dated September 2019, prepared by the EPA (**Publication 1756**);

<sup>2</sup> Reformed Act, s 53

<sup>3</sup> Substantive Regulations, r 4, 61, 66 and Table of Applied, Adopted or Incorporated Matter

<sup>4</sup> Substantive Regulations, r 4, 62, Schedule 6 and Table of Applied, Adopted or Incorporated Matter

<sup>5</sup> Reformed Act, s 329, Substantive Regulations, r 165 and Table of Applied, Adopted or Incorporated Matter

<sup>6</sup> Substantive Regulations, r 4, Part 5.3 and Table of Applied, Adopted or Incorporated Matter

- 'Summary of proposed noise framework', publication 1757, dated September 2019, prepared by the EPA (**Publication 1757**); and
- 'ESMP Data Manual 1992: Engine speed at maximum power and noise test engines speeds for vehicles 1970 to 2005' publication 317.2, dated September 2019, prepared by the EPA.

The exposure draft subordinate legislation will have a significant impact on the interests of local government, water corporations, landowners, property developers, manufacturing industry and waste/resource recovery/advanced technology industries in Victoria.

The detail of this exposure draft subordinate legislation and the changes made are significant and in almost all areas include a variation, in some instances substantive in others subtle, requiring a careful and considered assessment having regard to an entities interests, assets and liabilities.

The 8½ week consultation period necessitates an immediate allocation of resources for an entity to lodge an informed submission.

In our opinion, the consultation period is inadequate having regard to the extent of changes introduced with further substantive detail not yet released preventing a complete understanding of the reform.

## Overview of draft subordinate legislation

Publication 1754 outlines the four forms of subordinate legislation under the Reformed Act. We note that two of the four forms of identified subordinate legislation have not been prepared in draft or released for public comment, specifically orders identifying 'obligations of managers of land or infrastructure',<sup>7</sup> 'orders relating to environmentally hazardous substances',<sup>8</sup> and compliance codes.<sup>9</sup>

We note that other forms of subordinate legislation are also provided under the Reformed Act, which are not mentioned in Publication 1754, including Position Statements,<sup>10</sup> Protocol - Monetary Benefit,<sup>11</sup> and the Charter.<sup>12</sup>

The incomplete extent of draft subordinate legislation is acknowledged by the EPA and the Department in Publication 1753 identifying the objects of the public consultation for the Substantive Regulations is to:

- acknowledge and seek to fill gaps in knowledge;
- test assumptions and conclusions;
- reach a broader range of stakeholders;
- pick up on issues that may have been missed;
- validate and improve on implementation planning and the design of the evaluation strategy.<sup>13</sup>

No consultation draft Orders, Compliance Codes<sup>14</sup> or Position Statements,<sup>15</sup> have been released.<sup>16</sup>

Publication 1754 identifies that provisions of the *State Environment Protection Policy (Waters)* may translate to an order prescribing 'obligations for managers of land or infrastructure' on further consultation between the Department, the EPA and water corporations.<sup>17</sup>

Publication 1754 identifies that components of the existing State Environment Protection Policies and Waste Management Policies will carry through to the Substantive Regulations and Standard.

The structure and content of the Substantive Regulations are informed by and carry forward parts of the existing State Environment Protection Policies, Waste Management Policies and Regulations. Examination of the existing subordinate legislation assists in understanding the structure and content of the Substantive Regulations and is a useful starting point to understanding the State Government's approach. Please see Annexure A.

We note that current policies relating to waste acid sulfate soils and ozone depleting substances have not been carried forward.

<sup>7</sup> Reformed Act, s 156 (Part 7.3 – obligations of managers of land or infrastructure)

<sup>8</sup> Reformed Act, s 154 (Part 7.2 – environmentally hazardous substances)

<sup>9</sup> Reformed Act, s 100

<sup>10</sup> Reformed Act, s 105

<sup>11</sup> Reformed Act, s 329

<sup>12</sup> Reformed Act, s 53

<sup>13</sup> Publication 1753, pg 5

<sup>14</sup> Reformed Act, s 100

<sup>15</sup> Reformed Act, s 105

<sup>16</sup> Substantive Regulations, r 4

<sup>17</sup> Publication 1754, pg 6

## SUBSTANTIVE REGULATIONS

Publication 1753 provides an overview of the Substantive Regulations

- contaminated land;
- permissions;
- waste;
- environmental management (air, noise, water, plastic shopping bags);
- motor vehicle emissions;
- environmental audits and financial assurance;
- enforcement; and
- fees.

### Contaminated land

The Reformed Act at Part 3.5 – ‘Duties relating to contaminated land’<sup>18</sup> sets out the core provisions governing contaminated land in Victoria from the commencement date.

These core provisions include definitions of ‘contaminated’ land,<sup>19</sup> ‘land’,<sup>20</sup> and ‘notifiable contamination’ of land.<sup>21</sup>

These definitions inform the duty to notify of contaminated land<sup>22</sup> and the duty to manage contaminated land.<sup>23</sup>

The RK Alert – [‘Reform of Victoria’s Environment Legislation’](#) explores the definitions, including importantly here the definition of ‘land’ expanded from the Current Act to include buildings and structures permanently affixed to the land and groundwater.

The Standard provides a definition of ‘land environment’ which carries forward the previous elements of the definition of ‘land’ under the Current Act and State Environment Protection Policy (Prevention and Management of Contamination of Land) to include:

- soil, fill, rock, weathered rock and sand;
- the vapour and liquids within the interstitial space in the unsaturated zone; and
- sub-aqueous sediment.<sup>24</sup>

The Substantive Regulations prescribe ‘notifiable contamination’ of land separated into:

- soil;<sup>25</sup>
- asbestos in or on soil;<sup>26</sup>
- groundwater or surface water;<sup>27</sup> and
- vapours.<sup>28</sup>

Each prescribed ‘notifiable contamination’ of ‘land’ is further broken down into categories with varying criteria.

The Substantive Regulations seek to introduce an exemption from notifiable contamination to cover any contaminant, waste or chemical substance not specified in section 6, Schedule B1 of the NEPM (ASC) which would appear to render the second arm of

<sup>18</sup> Reformed Act, s 35 – 42

<sup>19</sup> Reformed Act, s 35(1)

<sup>20</sup> Reformed Act, s 6

<sup>21</sup> Reformed Act, s 37

<sup>22</sup> Reformed Act, s 40

<sup>23</sup> Reformed Act, s 39

<sup>24</sup> Standard, cl 4

<sup>25</sup> Substantive Regulation, r 8

<sup>26</sup> Substantive Regulation, r 9

<sup>27</sup> Substantive Regulation, r 10

<sup>28</sup> Substantive Regulation, r 11

the definition under the Reformed Act adopting \$50,000 as inoperative. This second arm may have work to do in the future on the sunset of the Substantive Regulations.

It is important to recognise for the interpretation of these Substantive Regulations that the starting point must be the purpose and provisions of the Reformed Act with the Substantive Regulations being subordinate and filling in the detail.

The Reformed Act provides '*notifiable contamination*' of '*land*' and includes:

- matters prescribed under regulations; or
- where the regulations do not apply, then circumstances where the substance (chemical or prescribed), contamination or waste exceeds a reasonable cost of action to remediate exceeding \$50,000 or any other prescribed amount.

The Substantive Regulations do not prescribe an increased amount.

It is not clear if an increased quantum will be introduced in the future noting the low threshold in relation to the significant costs of site investigation, remediation, ongoing management and aftercare, including, where appropriate, rehabilitation.

The duty to manage contaminated land<sup>29</sup> and the duty to notify of contaminated land<sup>30</sup> each apply to '*land under the management or control*' of an entity. The confines of these duties to '*land under the management or control*' of an entity is important in interpreting the Substantive Regulations.

Prescribed '*notifiable contamination*' of '*land*' for soil addresses three categories:<sup>31</sup>

- 1 soil contamination on '*land under the management or control*' where a person has been exposed or is likely to be exposed to contamination and the concentration of the contaminant is or likely remains above the average threshold for that contaminant or localised elevated values;<sup>32</sup>
- 2 soil contamination on land adjacent to the '*land under the management or control*' where the contamination has entered from the '*land under the management or control*' and the contamination exceeds the average threshold for contaminants or localised elevated values;<sup>33</sup>
- 3 identical to the circumstances above except where the contamination has not yet migrated but it is likely to migrate beyond '*land under the management or control*'.<sup>34</sup>

The criteria for the categories of '*notifiable contamination*' of '*land*' from soil where '*contamination*' has migrated offsite as compared to where it is likely to migrate off site are different with reference to threshold for contaminants and elevated localised values applying to the former, and reference to health investigation levels and health screening levels under the *National Environment Protection Measure (Assessment of Site Contamination (2009, as amended 2013) (NEPM (ASC))* applying to the latter.

Separately, soil containing friable asbestos where human exposure to airborne fibres exceeding 0.01 fibres per millilitre by means of inhalation is prescribed '*notifiable contamination*'.<sup>35</sup>

Prescribed '*notifiable contamination*' of '*land*' for soil contained on site adopts soil contaminant concentration criteria on which vapour intrusion with a 95% upper confidence limit of the health screening level under Section 6, Schedule B of the NEPM (ASC) is calculated.<sup>36</sup>

Prescribed '*notifiable contamination*' of '*land*' for surface water and groundwater does not distinguish between the source of the contamination (onsite or offsite) and adopts the Australian Drinking Water Guidelines published by the National Health and Medical Research Council in 2011 and Australian and New Zealand Guidelines for Fresh and Marine Water Quality published by the Australian and New Zealand Governments and the Australian State and Territory Governments in 2018.

Prescribed '*notifiable contamination*' of '*land*' also extends to soil vapour specifying criteria for chlorinated compounds, soil vapour health screening levels, soil health screening levels and groundwater health screening levels, each divided on the basis of a 95% upper confidence limit across the arithmetic average of multiple samples or 250% on an individual soil vapour sample. For each of these categories the contaminant concentration must remain on the land and a person has been or is likely to be exposed to the contaminant or any by-product.<sup>37</sup> This prescription distinguishes between circumstances where the exposure pathway is complete (i.e. basement levels of a building) and scenarios where the exposure pathway is incomplete (i.e. slab on ground building with groundwater contamination at depth).

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<sup>29</sup> Reformed Act, s 39

<sup>30</sup> Reformed Act, s 40

<sup>31</sup> Substantive Regulations, r 8

<sup>32</sup> Substantive Regulations, r 8(a)

<sup>33</sup> Substantive Regulations, r 8(b)

<sup>34</sup> Substantive Regulations, r 8(c)

<sup>35</sup> Substantive Regulations, r 9

<sup>36</sup> Substantive Regulations, r 12

<sup>37</sup> Substantive Regulations, r 11(2)

The previous clean-up provisions under the *State Environment Protection Policy (Waters) 2018* requiring clean-up of non-aqueous phase liquids are transferred requiring clean-up of non-aqueous phase liquid and if the source of the non-aqueous phase liquid is located on 'land under management or control' then removal of the source or control of the source.<sup>38</sup>

Exemptions from a prescribed '*notifiable contamination*' include:<sup>39</sup>

- stockpile of industrial waste where authorised to receive that waste;
- land contamination addressed by remedial notices under the Current Act as at 1 July 2020 or revoked prior to that date where there was no material change in the condition of the land after the date the notice was revoked;
- contamination of land identified in a certificate of environmental audit or a statement of environmental audit where no subsequent activity has caused contamination of the land; and
- contamination for particular contaminants not listed in schedule B1 of the NEPM (ASC) such as emerging contaminants.

The Reformed Act<sup>40</sup> provides that a person in management or control of '*land*' has a duty to notify of '*notifiable contamination*' disclosing to the extent of the persons knowledge or possession of information:

- location of the land;
- activity resulting or suspected of resulting in the contamination;
- the nature and extent of the contamination;
- the nature and risk of harm to human health and the environment from the contamination; and
- the management response or proposed management response to the notifiable contamination.<sup>41</sup>

The Substantive Regulations provide no information on how the notification will be recorded by the EPA, how the information will be maintained, whether it will be publicly disclosed or searchable by payment of a fee (similar to the Priority Sites Register) and whether there is an ongoing duty to disclose updated information as monitoring, remediation and site works are undertaken.

The Independent Inquiry recommended that:

"The Department of Environment, Land, Water and Planning develop a comprehensive statewide database of sites that pose a high risk to the community because of their past use, which should link to other relevant government data sources including information held by the EPA."<sup>42</sup>

Anything short of a database for no fee would appear to fall short of the Independent Inquiry's recommendation and represent a poor outcome in terms of public awareness and protection of human health where knowledge is the critical foundation from which proportionate measures may be imposed. A database accessible only by the EPA, such as the current remedial notice system, would present a compromised outcome and in our opinion should be avoided. This would place the EPA in a position where it is obliged to act in almost every circumstance whether that be imposing obligations or disclosing information. Any time delay and administrative burden associated with such a configuration would be an unacceptable outcome.

The Substantive Regulation provides no detail on how the EPA will respond to any notification with the Regulatory Impact Statement indicating the EPA will either advise or intervene.<sup>43</sup>

While this discretion allows a proportionate response in relation to individual lot owners (i.e. mums and dads) and large land holdings (i.e. developers), this has not been applied consistently under the Current Act.

For example in relation to closed landfills, municipal councils have been consistently and exhaustively targeted, while the State Government has been left largely unregulated. For example in relation to closed landfills, municipal Councils have been consistently and exhaustively targeted, while the State Government has been largely unregulated. Both levels of Government '*land under the management or control*' containing closed landfills across both metropolitan, regional centres and rural Victoria.

Other important reforms in relation to contaminated land include the expansion of the prescribed activity A05a (Landfills – excluding municipal landfills servicing < 5,000 people) to now include waste containment and management operations after the landfill has ceased accepting new waste.<sup>44</sup>

<sup>38</sup> Substantive Regulations, r 15

<sup>39</sup> Substantive Regulations, r 13

<sup>40</sup> Reformed Act, s 41(2)

<sup>41</sup> Substantive Regulation, r 14

<sup>42</sup> Independent Inquiry, pg XXV, Chapter 14, Recommendation 14.1

<sup>43</sup> Regulatory Impact Statement, pg 83

<sup>44</sup> Substantive Regulations, Schedule 1, Item 7

This does not apply to landfills, which have surrendered a licence prior to the commencement date.<sup>45</sup>

Under the Reformed Act, landfills closed after the commencement date will continue to be regulated under an operating licence with a financial assurance and will require a development licence for any buildings and works or development.

This is a substantial departure from the Current Act with likely significant consequences for end use master planning and divestment strategies by landfill operators and acquisition strategies for speculative development proposals of closed landfills. This change will also impact strategic planning and statutory planning for closed landfills until presumably the operating licence expires.

The Threshold Table, an incorporated document under the Substantive Regulations, substantially varies the contaminant concentration thresholds and leachability parameter for contaminated soil. Significant changes include:

- increasing the suite of contaminants from 33 to 78 for soil;
- omitting upper limits for fill material for most contaminants classifying any concentration of the contaminant into a priority waste;
- creating four categories of priority waste – Category A / Category B / Category C / Category D (soil);
- substantially altering contaminant concentrations and leachability parameters; and
- conflating categories for particular contaminants where the category to be adopted is unclear.

The impact of the changes introduced by the Threshold Table is difficult to identify, however in our opinion it is likely that more soil generated from activity will become a priority waste attracting the waste levy, requiring tracking and reporting with restrictions on reuse and placement.

Category D (soil) is distinct from and separate to Category C, where Category D (soil) is the lowest level of priority waste immediately exceeding '*fill material*' criteria.<sup>46</sup>

A new '*prescribed activity*' (former scheduled premises) requiring a permit is A17 (Containment of Category D Waste Soil).<sup>47</sup> This will be relevant for onsite retention of contaminated soil during remediation. This prescribed activity requires a permit. A permit will expire after 5 years if not sooner rendering the onsite retention of Category D (soil) a temporary proposition or a matter that requires renewal every 5 years.<sup>48</sup> This has significant ramifications for site remediation strategies involving onsite retention of contaminated soil and how this obligation is carried forward into the future if this practice is allowed at all into the future.

Further in relation to remediation of '*notifiable contamination*' of '*land*', waste codes:

- N120 (Soils contaminated with hazardous substances, including asbestos and/or priority waste);<sup>49</sup> and
- N122 (Excavated material or engineered fill, including fill material);<sup>50</sup>

are identified in Schedule 5 – 'Waste classification' of the Substantive Regulations.

The Current Act provides no waste code for fill material indicating a change in tracking and reporting of soil classified as fill material under the substantive regulations. It is not clear what purpose the waste code for fill material will fulfil, although we anticipate as a minimum it will involve reporting and tracking of consignments. This is presently an unregulated practice in Victoria with significant ramification for fill material sites forming part of major civil infrastructure projects.

The EPA expressed orally that fill material is an industrial waste, this has always been the situation, and may only be disposed of to landfill.<sup>51</sup> This fundamentally inconsistent with industry practice and EPA's guidance documents many of which were developed in consultation with industry associations such as the Civil Contractors Federation. For example publication 1438 titled 'Fact Sheet - Industrial Waste, Fill material management' dated February 2012.

The impact of these changes needs to be fully documented and disclosed by the EPA in relation to site remediation in Victoria. The explanatory documentation provides no insight to the intention of the substantive reforms in relation to civil works and site remediation.

<sup>45</sup> Substantive Regulations, Schedule 1

<sup>46</sup> Substantive Regulations, Schedule 6

<sup>47</sup> Substantive Regulations, Schedule 1, Item 25

<sup>48</sup> Substantive Regulations, r 30(c)

<sup>49</sup> Substantive Regulations, Schedule 5, Item 85

<sup>50</sup> Substantive Regulations, Schedule 5, Item 86

<sup>51</sup> 'Australian Environment Business Network' forum on Friday, 20 September 2019

Further in relation to remediation of 'notifiable contamination' of 'land', waste code M270 (Per- and poly- fluoroalkyl substances (PFAS) contaminated materials, including PFAS- containing wastes, waste products and contaminated containers) is a significant addition to what will become reportable priority waste.<sup>52</sup>

## Permissions

The Reformed Act at Part 4 – 'Permissions' sets out that prescribed activities<sup>53</sup> will be controlled by development licences,<sup>54</sup> operating licences,<sup>55</sup> permits<sup>56</sup> and registrations.<sup>57</sup>

This extends the current permission framework beyond works approvals and licences.

Permits and registrations extend the types of prescribed activities previously identified and regulated as scheduled premises. Permits and registrations each have a maximum duration of 5 years unless prescribed by regulation. The Substantive Regulations prescribe varying durations from 1 year, 3 years or 5 years for various prescribed activities requiring a permit.<sup>58</sup>

This limited duration substantially undermines the business case for the substantial investment in infrastructure and ongoing operating costs.

Permissions all expire under the Reformed Act.

- interstate transport permits must not exceed 1 year in duration;
- temporary onsite waste treatment permits must not exceed 3 years in duration; and
- permits for prescribed activities,<sup>59</sup> including A13b (Waste and resource recovery – medium) must not exceed 5 years in duration.

This limited duration will undermine investment in municipal infrastructure for the delivery of waste services providing community benefit.

Part 3.5 – 'Exemptions from certain permission activities' of the Substantive Regulations provides limited exemptions which appear generally consistent with the Current Act and subordinate regulations.

The expansion of prescribed activities requiring permission, the expiry of that permission and the prescribed conditions requires careful examination.

This may not directly impact some entities, but is likely to have indirect impacts on more entities if the waste and essential service providers adopt a more conservative and restrictive operational practice (i.e. discharge of trade waste to sewer).

Schedule 1 of the Substantive Regulations lays out in a table format consistent with schedule 1 of the *Environment Protection (Scheduled Premises) Regulations 2017* the activities which are prescribed as development activity, operating activity, permitted activity or registration activity.

Changes from the current regulations in relation to works approvals and licences, now translated to development licence and operating licence, together with the extension for permits and registrations are detailed in Table 1 below.

**Table 1**

| Prescribed Activity  | Change   |
|--|--|
| A02a (Other waste treatment – incineration)                              | Incineration including immobilising and thermally degrading or incinerating waste no longer has a 500tpa threshold. This threshold has been removed. |
| A02b (Other waste treatment – e-waste >500tpa)                           | Requires a development licence and operating licence.  |
| A02c (Other waste treatment – e-waste 500tpa or less)                    | Requires a registration.   |
| A05a (Landfills - excluding municipal landfills servicing <5,000 people) | Requires a development licence and operating licence after closure for an undefined period where the landfill closes after the commencement date.    |

<sup>52</sup> Substantive Regulations, Schedule 5, Item 81

<sup>53</sup> Substantive Regulations, schedule 1

<sup>54</sup> Substantive Regulations, s 44

<sup>55</sup> Substantive Regulations, s 45

<sup>56</sup> Substantive Regulations, s 46

<sup>57</sup> Substantive Regulations, s 47

<sup>58</sup> Substantive Regulations, r 30

<sup>59</sup> Substantive Regulations, r 36



| Prescribed Activity   | Change   |
|---|--|
| A05b (Municipal landfills servicing <5,000 people)                    | Requires a development licence and permit.   |
| A07a (Organic waste processing – large)                               | Excludes operations processing organic waste generated on site where the processed organic waste remains on site.  |
| A07b (Organic waste processing – small)                               | Creates a new prescribed activity below the previous threshold now requires a registration.<br>Eliminates an existing competitive advantage for multiple rural locations operating below the current threshold.  |
| A09b (Waste tyre storage – small)                                     | Requires registration.   |
| A13a, b and c (Waste and resource recovery – large, medium and small) | Large facilities require development licence and operating licence with tonnage thresholds expressed in receivables per month or total storage.<br>Medium facilities require a development licence and permit.<br>Small activities require registration.   |
| A14 (Wastewater supply or use)  | Requires a permit for both the supply and use of wastewater other than on a licensed site A03 (Sewage treatment) or D01 (Abattoirs).<br>This will capture reuse schemes operated by water corporations on private land or public land not under the control of the water corporation (e.g. public golf course).<br>A permit is required.   |
| A15 (Biosolids supply or use)   | Requires a permit for the supply or reuse of biosolids other than on licensed premises for A03 (Sewage treatment).<br>A permit is required.<br>Replaces existing environment improvement plans for land application.   |
| A16 (Supply or use of reportable priority waste)                      | Requires a permit.<br>Together with 'declaration of uses' <sup>60</sup> this appears to replace the previous regime of direct beneficial reuse and secondary beneficial reuse.   |
| A17 (Containment of Category D waste soil)                            | Requires a permit.   |
| A 18 (Discharge of waste to aquifer)                                  | Requires a permit.<br>Exclusions include remediation works and greenhouse geo-sequestration. This is likely to cover recharge schemes.   |
| A19 (Temporary on-site waste treatment)                               | Requires a permit.<br>This may include mobile incinerators, shredders and other sorting plant.   |
| A21 (Temporary storage – biomedical waste)                            | Requires registration.   |
| A22 (Temporary storage of asbestos)                                   | Requires registration.<br>Allows temporary storage of not less than 10 cubic metres of double wrap non friable asbestos not generated at the premises for a period not more than 60 days.<br>This is intended to facilitate utility and infrastructure managers responding to maintenance and emergency discharge scenarios for failed infrastructure with asbestos containing material. |
| A23 (Temporary storage – designated waste)                            | Requires registration.<br>Allows temporary storage of not less than 1,000 litres or less of designated waste not generated at the premises for a period not more than 60 days.   |
| B02a (Livestock saleyards or holding pens – waste solely to land)     | Requires a permit.   |
| E01 (Textiles)  | Expanded from manufacturing 'and' processing of textiles to manufacturing 'or' processing of textiles.   |
| F03 (Paper pulp mills)  | Currently exempt from licensing if processing less than 30,000tpa. Will require an operating licence.  |
| H05a (Glass works – manufacturing)                                    | 10,000tpa threshold removed so that all activities require a development licence and operating licence.  |
| H05b (Glass works – small reprocessing)                               | Capacity less than 10,000tpa requires registration.  |

<sup>60</sup> Substantive Regulations, r 63 and 64

| Prescribed Activity                             | Change   |
|---|--|
| I05 (Can and drum coating)                      | Operating licence exemption for emission of volatile organic compounds less than 100kg per day removed.                                      |
| K01 (Power generation)                          | Exemption from licensing natural gas turbines with a capacity less than 20 megawatts is removed.   |
| L04 (Contaminated site – Long-term containment) | Removed as a scheduled activity.<br>It is anticipated that site management orders at s 275 of the Act will replace the permissions function. |
| L05 (Operation outside of hours)                | Requires a permit for outdoor entertainment venues or events and the basis of noise emissions.   |
| L06 (Conduction more than six outdoor concerts) | Requires a permit.   |
| L08 (Dry cleaning)                              | Commercial dry cleaning activities now requires registration.  |

## Application for permissions

The Substantive Regulations prescribe matters that must be detailed in an application for any permission. Prescribed information, includes whether the applicant has been found guilty of an environmental offence, declared a bankrupt or insolvent and in this instance held property in a testamentary trust or previous held an environmental permission which has been suspended or cancelled.<sup>61</sup>

The period for environmental offences under the Current Act is 10 years, whereas under the Substantive Regulations no time limit applies.

Whether an applicant has previously been bankrupt, insolvent or holds property in a testamentary trust is a new requirement likely directed towards the ability to recover funds in circumstances of abandonment of waste or contamination.

An application for a permission involving a wastewater discharge to surface waters in the special water catchment must be refused.<sup>62</sup>

Prescribed conditions for permissions relating to the landfills include:<sup>63</sup>

- prohibition on acceptance of radioactive substances;
- avoiding exceedance of methane gas action levels detailed in schedule 3;
- ensure the depth of leachate in any landfill cell does not exceed 300 mm above the base liner;
- any landfill gas flare or thermal oxidising unit achieves complete combustion of landfill gas; and
- landfills servicing 5,000 people or more must operate a weighbridge.

These are new prescribed requirements that will have significant capital and operational costs for regional landfills requiring installation and operation of a weighbridge.

Landfills that close after 1 July 2020 will require an operating licence and will be subject to these conditions. We anticipate that this will present significant difficulties for landfills with a range of cell design and construction compliant with the evolution of legislative standards over decades. This retrospective application of operating licence conditions will be subject to challenge.

The Substantive Regulations allow the EPA to request further information. The application remains incomplete until that information is provided.<sup>64</sup> The consequence of this provision is that the statutory timeframe does not commence until the further information is supplied irrespective of the date of submission which is different to the existing situation where a notice requesting information merely stops the statutory time clock.<sup>65</sup>

This may be exploited by the EPA by requesting further information after a substantive period of the statutory period has expired resetting the assessment period.

This leaves the statutory process open to abuse by the EPA with no apparent recourse for an applicant.

<sup>61</sup> Substantive Regulations, r 17

<sup>62</sup> Substantive Regulations, r 19

<sup>63</sup> Substantive Regulations, r 20

<sup>64</sup> Substantive Regulations, r 21

<sup>65</sup> Current Act, s 22

The referral agencies for development licence applications appear consistent with the Current Act in terms of:

- municipal councils in their capacity as a responsible authority;
- for extractive industries the relevant Minister;
- the Department of Health and Human Services for 'significant development licence applications' which is a defined term with significant public health implications; and
- any other agency the EPA considers appropriate in the circumstances.<sup>66</sup>

Referral agencies have 15 business days to lodge an objection and advise if permission is required under other legislation and 32 business days to provide comments or information.

An application for an operating licence for a landfill must be refused where the application seeks disposal of:<sup>67</sup>

- liquid waste;
- pneumatic tyres not shredded to a size less than 25 mm;
- waste prohibited for disposal;
- e-waste;
- used oil filters; and
- large containers contaminated with hazardous residues.

## **Waste categorisation and classification**

The Reformed Act continues the definition of 'waste' and 'municipal waste'.

The Reformed Act amends the definition of 'industrial waste' to include waste prescribed to be industrial waste for the purpose of this definition.

The Substantive Regulations expand the definition of 'industrial waste' beyond waste arising from commercial, industrial or trade activities or laboratories to include any waste received at a facility for resource recovery, storage, transport, consignment or disposal and any waste transported for fee or reward.

The Substantive Regulations identify a subset of 'industrial waste' as 'priority waste'. A further subset of 'industrial waste' and 'priority waste' is 'reportable priority waste'.

Transcending all subcategories of 'industrial waste' is 'trade waste', which is waste discharged to a water corporation sewerage system by agreement. Discharge of trade waste to sewer is identified as a 'authorised to receive industrial waste' activity.<sup>68</sup>

While this resolves any prescribed activity permission requirement for the acceptance and discharge of industrial waste, priority waste or reportable priority waste, it is not clear if the producer of the industrial waste, priority waste or reportable priority waste remains liable to disclosing to the EPA the volume/tonnage discharged to sewer as 'trade waste'.

This is a divergence from the existing legislative framework where 'trade waste' is excluded from the definition of 'prescribed industrial waste' by Schedule 2 of the *Environment Protection (Industrial Waste Resource) Regulations 2009*.

This will be a significant change with the EPA presently exercising no oversight or control of wastes discharged to sewer as trade waste. These matters are left for negotiation between water corporations and their customers with water corporations determining acceptance criteria and customer specific acceptance criteria having regard to the load and site specific capacity for individual wastewater treatment plants and the receiving environments (biosolids, recycled water reuse schemes or surface waters).

Examination of the prescribed activities reveals the EPA's desire to more closely regulate reclaimed water reuse schemes and biosolids reuse by land application.

The Substantive Regulations create waste codes including waste codes M270 (PFAS wastes) and T330 (Leachate from waste disposal) which are likely discharged to sewer across Victoria at site specific concentrations prescribed by customer specific

<sup>66</sup> Substantive Regulations, r 22

<sup>67</sup> Substantive Regulations, r 23

<sup>68</sup> Substantive Regulations, r 63

acceptance criteria. The presence of PFAS in wastewater management facilities is a matter identified by the EPA in publication 1669.2 titled 'Interim Position Statement on PFAS' dated August 2018.

These changes may result in water corporations adopting a more conservative and restricted position for trade waste services creating further difficulties in relation to the treatment and disposal of priority wastes in Victoria.

Priority waste that should also be considered in this context includes K410 (Septic tank waste). It is not clear if the intention is that this priority waste be tracked and reported by water corporations on the receipt of K410 at wastewater treatment plants.

Schedule 6 of the Substantive Regulations provide the categories of priority waste, including:

- Category A waste;
- Category B waste;
- Category C waste;
- Category D waste (soil);
- soil containing asbestos only;
- packaged asbestos.

The Industrial Waste Guidelines (Government Gazette, 6 August 2009) adopt varying contaminants and contaminant concentration thresholds for soil and solid industrial waste. This presents scenarios of debate as to which criteria to apply in certain circumstances where the industrial waste is generated from a treatment process and the physical substance of the waste is derived from a soil product alum sludge for example.

The Threshold Table dispenses with the distinction between soil and solid industrial waste by applying uniform contaminant concentration thresholds and leachability parameters for Category A, Category B and Category C industrial wastes, with contaminated soil a subset.

An additional category, Category D (soil) is created. Category D (soil) does not apply to industrial waste other than soil.<sup>69</sup>

Industrial waste below the Category D (soil) contaminant concentration thresholds and leachability parameters where specified is characterised as '*fill material*'.

Industrial waste excluding soil, beneath the Category C contaminant concentration thresholds and leachability parameters constitutes '*industrial waste*'.

The Threshold Table merges all contaminants from both the soil and solid industrial waste tables to apply a complete suite of 78 contaminants. For industrial waste excluding soil this includes an increase on the current 68 contaminants required for analysis.

The Threshold Table makes no distinction at Category D applies to soil only, leaving the reader under the misapprehension that Category D (soil) also applies to industrial waste excluding soil. This is incorrect.

The upper limits for industrial waste have been significantly lowered or removed entirely for all but one contaminant (fluoride). This will substantially increase the industrial waste other than soil categorised as Category C priority waste, which attracts the waste levy.

The financial implication of this significant change is not disclosed in the Regulatory Impact Statement.

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<sup>69</sup> Substantive Regulations, Schedule 6, definition of 'Category D Waste'

**Figure A**

|               |                  |
|---------------|------------------|
| A             | A                |
| B             | B                |
| C             | C                |
| D             | INDUSTRIAL WASTE |
| FILL MATERIAL |                  |

The financial impact of lowering or removing the upper limits of contaminant concentrations for industrial waste will also be incurred in terms of waste volume requiring transport by permitted vehicles, reporting under the waste transport certificate system and listing of facilities permitted to accept waste.

We anticipate the increase in the upper limit for industrial waste for fluoride relates to alum sludge derived from potable water treatment plants produced by water corporations.

**Table 2**

| Waste Description                           | Waste Levy Rate         |
|---|-------------------------|
| Waste asbestos including soil with asbestos | 2.06 fee units / tonne  |
| Category B                                  | 17.15 fee units / tonne |
| Category C                                  | 4.8 fee units / tonne   |
| Category D                                  | 4.8 fee units / tonne   |
| Fill material                               | No waste levy           |
| Industrial waste                            | No waste levy           |

There is no prescribed activity for the placement of fill material.

This is consistent with the Current Act and we do not anticipate the EPA would seek to regulate the placement of fill material as a prescribed activity under the landfill prescribed activities (A05a or A05b). This would introduce absurd outcomes for fill material in terms of landfill construction (liners, cell construction etc).

We note the EPA stated position that disposal of fill material must be to a landfill with an operating licence on the basis that it is industrial waste.<sup>70</sup>

In our experience, this is inconsistent with current practice and we anticipate is a matter requiring further consideration by the EPA.

The Protocol – Waste Classification identifies waste classification criteria for waste code K230-NH (processed solid organic waste that meets specifications acceptable to the Authority) to include:

- fully pasteurised as demonstrated through pathogen and plant propagule reduction performance standards; and
- demonstrated to be within chemical and physical contaminant limits specified in EPA guidance.

The footnote to EPA guidance is not populated. We note the contaminant concentration thresholds for industrial waste Category C as detailed in the Thresholds Table are substantially lower in many instances than the product criteria detailed in publication 1588.1 titled 'Designing, constructing and operating composting facilities' dated June 2017. The consequence being that compost presently recognised as a product in compliance with EPA's guideline would now be a priority waste Category C in relation to many contaminant concentration criteria, including for instance Selenium.

<sup>70</sup> Australian Environment Business Network presentation, Friday, 20 September 2019

## Waste codes

A significant area of reform is the classification, tracking, management, recycling, recovery, reuse, waste to energy and disposal of waste in Victoria.

This reform responds to an increase in illegal waste dumping/abandonment, failures of the resource recovery sector and stockpiling.

The Current Act imposes classification, tracking, reporting and management obligations on prescribed industrial waste.

The Reformed Act expands this control to 'industrial waste' with a subset identified as 'priority waste' and a further subset as 'reportable priority waste'.

Presently waste codes for tracking and reporting purposes are confined to prescribed industrial waste. The Substantive Regulations propose to introduce substantive changes to the waste codes, which will apply to all industrial waste, including priority waste and reportable priority waste.

The introduction of waste codes for 'industrial waste' will be utilised in permissions, creating significant tracking and reporting obligations.

All waste codes are now identified as either a 'Mirror Code' or a 'Pre-classified Code'.

The Protocol – Waste Classification provides that a 'Mirror Code' is simply a code that has been split into two components – a 'hazardous' component denoted by "- H" and a 'non-hazardous' component denoted by "NH". This requires an evaluation or assessment of the industrial waste by the duty holder to select the correct code.

For example:

**T130 – H** (Item 103)

Sludges or slurries including drilling muds containing hazardous substances including priority waste.

**T130 – NH** (Item 104)

Sludges or slurries, including drilling muds other than item 103 in this Table.

Pre-classified Codes require no evaluation and have been set by the EPA irrespective of contaminant levels.

For example:

**M270** (Item 81)

Per- poly- fluoroalkyl substances (PFAS) contaminated materials, including PFAS-containing wastes, waste products and waste containers.

Industrial Waste Guideline 822.3 titled 'Waste Codes' dated November 2016 details the existing waste codes for prescribed industrial waste.

Set out below are the changes to these waste codes proposed to apply to priority waste, including reportable priority waste, waste codes that have been deleted and waste codes that have been inserted for priority waste, including reportable priority waste.

**Table 3**

| Waste Code     | Waste Description  | Change   |
|----------------|--|--|
| A100           | Cyanide from surface treatment                                 | Subset of previous code A100.  |
| A110           | Cyanide from heat treatment                                    | Subset of previous code A100.  |
| A130           | Cyanide inorganic  | Subset of previous code A100.  |
| <del>N/A</del> | <del>Equipment and articles containing mercury</del>           | <del>Not translated – previous code D121.</del>                                    |
| <del>N/A</del> | <del>Cannery waste containing chromium</del>                   | <del>Not translated – previous code D141.</del>                                    |
| <del>N/A</del> | <del>Waste containing silver from photographic chemicals</del> | <del>Not translated – previous code D216.</del>                                    |
| D250           | Tellurium  | Added, rare earth metal used in manufacture of solar panels and computer hardware. |

| Waste Code | Waste Description   | Change   |
|------------|---|--|
| D270       | Vanadium  | Added, metal used in steel manufacturing, lithium batteries and catalyst for sulphuric acid manufacturer.  |
| D340       | Perchlorates  | Added, salts used for food packaging.  |
| D350       | Chlorates   | Salts used in food processing and fireworks.   |
| N/A        | <del>Highly reactive chemicals</del>  | <del>Not translated – previous code E130.</del>  |
| N/A        | <del>Dry cleaning wastes</del>  | <del>Not translated – previous code G130.</del>  |
| H120       | Organochlorine pesticides   | Added for agricultural and domestic application.   |
| N/A        | Mixed pesticide residue   | Not translated – previous code H160.   |
| H170       | Waste from wood preserving  | Expanded waste code H170 beyond copper chrome arsenic.   |
| N/A        | <del>Waste hydrocarbons</del>   | <del>Not translated – previous code J110.</del>  |
| N/A        | <del>Cutting oils and soluble oils</del>  | <del>Not translated – previous code J150.</del>  |
| K110       | Grease trap waste   | Modified code previously K120.   |
| K190       | Wool scouring   | Added.   |
| K230 – H   | Process solid organic waste that does not meet EPA specification including unpasteurised or contaminated material | Added, addressing compost and other organic products that do not meet specification.<br>Significant expansion regulating compost beyond AS4454 criteria. |
| K310 – H   | Timber treated with hazardous substances including sawdust  | Added, addresses copper chrome arsenic and other treated timber.<br>Significant for construction and demolition waste and resource recovery operations.  |
| K400 – H   | Treated sewage, solids and sludge that does not meet permit conditions (A15 – biosolids supply)                   | Added.   |
| K400 – NH  | Biosolids that satisfy permit conditions (A15 - bio solids supply or reuse)                                       | Added.   |
| K10        | Septic tank   | Added, diffuse source typically discharged to water corporations.  |
| N/A        | <del>Solvents containing PCBs less than 50mg/kg</del>   | <del>Not translated – previous code M110.</del>  |
| M270       | PFAS material   | Added, emerging contaminant with diffuse sources.  |
| N120       | Soils contaminated with hazardous substances including asbestos and priority wastes                               | Consolidation of previous codes N119 (Category A), N120 (Category B) and N121 (Category C).  |
| N160       | Encapsulating chemically fixed, solidified or polymerised hazardous waste   | Consolidation of N160, N170 and N180.  |
| N205       | Residues from treatment and disposal including digestate, bottom ash and char                                     | Added.   |
| N/A        | <del>Ion exchange column residue</del>  | <del>Not translated – previous code N200.</del>  |
| T130       | Sludges, slurries, drilling muds  | Split into H (Hazardous) and NH (Non Hazardous) both priority wastes.  |
| T140       | Tyres   | Added priority waste.  |
| N/A        | <del>Foundry sands</del>  | <del>Not translated – previous code T160.</del>  |
| T170       | Household chemicals consolidated under Victorian Government program   | Amended to household origin only whereas previously included any origin i.e. farmers.  |
| T200       | Explosive waste not regulated   | Amended, previously E120.  |
| T300       | E-waste   | Added.   |
| T320       | Shredder flock  | Added, residual from metal recycling.  |
| T330       | Leachate from waste treatment and disposal operations   | Added, landfills and other waste treatment and disposal activities.  |

Set out below are waste codes introduced for 'industrial waste'. Waste codes do not currently apply to industrial waste under the Current Act.

**Table 4**

| <b>Waste Code</b> | <b>Waste Description</b>  |
|-------------------|---|
| K210              | Solid commercial food waste.  |
| K220              | Manure and biodegradable animal bedding including mixture.                                    |
| K230 – NH         | Process solid organic waste satisfying EPA specification.                                     |
| K300              | Commercial garden and landscaping organics do not contain physical or chemical contamination. |
| K310 – NH         | Untreated timber including sawdust.   |
| N122              | Excavated material, engineered fill including fill material.                                  |
| X100              | Textiles.   |
| X200              | Leather and rubber other than tyres.  |
| Y100              | Concrete.   |
| Y110              | Bricks.   |
| Y120              | Rubble including non-hazardous foundry sands.   |
| Y130              | Plasterboard and cement sheeting.   |
| Y140              | Asphalt.  |
| Z100              | Glass.  |
| Z300              | Steel.  |
| Z310              | Aluminium.  |
| Z320              | Non-ferrous metals other than aluminium.  |
| Z400              | Cardboard.  |
| Z410              | Liquid paperboard.  |
| Z420              | Newsprint and magazines.  |
| Z430              | Office paper.   |
| Z500              | Plastics PIC #1 - #7.   |

Many of these forms of industrial waste have been subject to voluntary reporting requirements for Federal programs, however these appear to be new obligations at State level in so far as reporting to EPA which have not been disclosed and will become apparent through permissions.

Examination of these changes reveals significant consequences for water corporations and their customers in relation to biosolids, sewage sludge, septic tank waste and leachate. Emerging contaminants such as PFAS are now captured with significant consequences across industry.

Material of an inert nature captured for recycling from both construction and demolition and commercial and industrial sources will now be tracked and reported. PFAS will also be an issue in this sector.

## **Financial Assurance**

The Reformed Act at Part 8.4 – 'Financial assurances'<sup>71</sup> sets out provisions regulating the provision of financial assurance from the commencement date. This has consistently been and will remain a contentious aspect of regulation for duty holders.

Financial assurance may be required by:<sup>72</sup>

- a permission for a prescribed activity;
- a site management order (applies ongoing requirements of environmental audits);
- an environmental action notice;<sup>73</sup> and

<sup>71</sup> Reformed Act, ss 218 - 234

<sup>72</sup> Reformed Act, s 219



- an Order relating to environmentally hazardous substances<sup>74</sup> (none published to date).

The Substantive Regulations require a financial assurance for the following prescribed activities:

- A01 – (Reportable priority waste management)
- A05a – (Landfills – excluding municipal landfills servicing <500 people)
- A13a – (Waste and resource recovery – large)
- G04 – (Bulk storage)
- L02 – (Contaminated sites – on-site soil contamination)

This is a significant change for large waste and resource recovery facilities, which may have flow on impacts for industry reliant on these facilities, particularly in regional Victoria.

This change is likely to have ramifications for Regional Waste and Resource Recovery Implementation Plans and the State-wide Waste and Resource Recovery Infrastructure Plan.

Financial assurance will no longer be required for prescribed activities G05 – (Container washing).

## Environmental audits

The Substantive Regulations introduce provisions allowing the EPA to prescribe functions of environmental audits. This will regularise what is already an existing practice that in some instances sits awkwardly with Part IXD of the Current Act.

The expanded role of environmental audits will be significant noting:<sup>75</sup>

- verification of matters required by:
  - improvement notices, prohibition notices, notices to investigate;<sup>76</sup>
  - site management orders;<sup>77</sup>
  - permissions;<sup>78</sup> and
  - guidelines published by the EPA;
- independent assessment of financial assurance;<sup>79</sup>
- any function under a legislative instrument (i.e. Order, Compliance Code, Standard, Regulation etc); and
- any function approved by the EPA under the Substantive Regulations (must be published in the Victorian Government Gazette).

This will have significant consequences for duty holders in terms of operational costs (and on auditor recommendations capital costs), budget estimates and forward planning to schedule works.

The availability of auditors will be a significant constraint for some duty holders and this may become exacerbated with the EPA's continued move toward rotating auditors through functions to prevent the same auditor performing periodic audits on a facility over an extended period. This is not addressed in the Substantive Regulations.

## Infringement Notices – fine by administrative EPA decision

The Substantive Regulations list offences for which the EPA may issue infringement notices imposing a financial penalty by an administrative decision.<sup>80</sup> Failure to pay the infringement notice activates a discretion of the EPA to withdraw an infringement notice and commence proceedings in court.

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<sup>73</sup> Reformed Act, s 274

<sup>74</sup> Reformed Act, s 154 (part 7.2 – environmentally hazardous substances)

<sup>75</sup> Substantive Regulations, r 159 and 160

<sup>76</sup> Reformed Act, ss 271 – 273

<sup>77</sup> Reformed Act, s 275

<sup>78</sup> Reformed Act, chapter 4

<sup>79</sup> Reformed Act, s 222

Notably infringement notices may be issued for non-compliance with a prescribed condition of a permission, breach of notice (excluding non-disturbance notice, improvement notice, or prohibition notice), audit and preliminary risk screen assessment disclosures, motor vehicle offences, noise offences, litter offences, non-compliance with information production notices, failure to report under improvement notices and prohibition notices and reporting and distribution offences relating to plastic bags, packaging material and national pollution inventory.

Infringements for production, transport, receipt of industrial waste, priority waste and controlled waste.

Notably infringement notices are not available for offences relating to breach of duty. Any of the breaches of duty concerning wastes, contaminated land or the general environmental duty may only be actioned by the prosecution.

An important change is the ability to issue an infringement notice for non-compliance with an information production notice which under the Current Act may only be dealt with by prosecution. In practice this is an important change where officer practice has been to set time frames for the production of information that are unrealistic and cannot be complied with.

## Calculating monetary benefits

The Protocol – Monetary Benefits prescribes matters for the purpose of court proceedings for environmental offences under the Reformed Act, which adopts the framework consistent with New South Wales.

The Protocol – Monetary Benefits prescribes the principles and methodology for determining the monetary benefit derived from offending for the purpose of submissions on sentencing and evidence.

## ENVIRONMENT REFERENCE STANDARD

The Standard translates components of the existing State Environment Protection Policies setting out environmental values of the ambient air, acoustic, land and water environments in Victoria which are the objectives to be achieved by the legislative framework and various instruments.

There appears no change to the content relating to the land environment and water environment (groundwater, surface water – freshwater and marine).

This is sensible noting the *State Environment Protection Policy (Waters)* was introduced in 2018 and the *State Environment Protection Policy (Prevention and Management of Contamination of Land)* has been subject to continual review and scrutiny as part of the environmental audit system.

In relation to the ambient air environment the indicators and objectives remain consistent with the *State Environment Protection Policy (Ambient Air Quality)* with the exception that particles as PM<sub>2.5</sub> (maximum concentration) are inserted and a qualitative indicator for odour with the objective stated as:

“An air environment that is free from offensive odours from commercial, industrial, trade or domestic activities”<sup>81</sup>

This may be an unachievable value depending on how and where it is applied.

The Standard merges the noise subordinate legislation which currently adopts different processes for Metropolitan Melbourne and the balance of Victoria. Environmental values of the acoustic environment are defined together with land use categories for noise again drawing upon components of the previous framework. The protocol noise provides the detail of assessment methodologies criteria and parameters necessary to assess noise emissions in Victoria.

## TRANSITIONAL REGULATIONS

The Transitional Regulations provide for a discrete and confined number of matters.

Prescribed industrial waste classifications have been issued to specific entities and/or specific premises. There is no public register of specific classifications and the number issued is not publicly available. The Transitional Regulations allow for specific prescribed industrial waste classifications to continue in force after the commencement of the Reformed Act. These specific classifications will cease on 30 June 2021 or earlier if the classification expires or the EPA revokes the classification.

The Transitional Regulations also perform a similar function for motor vehicle testers appointed under the Current Act and certificates of compliance issued by approved testers for motor vehicles under the Current Act. These matters continue to apply under the Reformed Act until the Transitional Regulations are revoked on 30 June 2022.

The final component of the Transitional Regulations saves seven clauses of the *State Environment Protection Policy (Waters)* relating to subdivision and onsite wastewater management, domestic wastewater management plans, sewerage planning,

<sup>80</sup> Substantive Regulations, r 164 and schedule 10

<sup>81</sup> Standard, Table 2

infrastructure management for urban stormwater protection and irrigation, saline discharges and groundwater pumping, responsibilities of protection agencies for irrigation drains and pollutant load targets for marine and estuarine waters (Lake Wellington, Corner Inlet, Port Phillip Bay and Western Port).

## **Conclusion**

The exposure draft subordinate regulations introduce significant changes. The full consequence of these changes cannot be determined in the absence of further exposure draft subordinate instruments, including the Protocol, Waste Disposal Categorisation – Characteristics and Thresholds, Orders and Compliance Codes.

In the absence of these instruments the substance of the consultation is significantly constrained undermining its value. The 8 ½ week consultation period appears inadequate noting the significance of the reforms.

This paper provides an overview of the major changes introduced by the exposure draft subordinate instruments from a local government, water corporation, waste and resource recovery and property development perspective.

We recommend that entities commit resources to examination and evaluation of the exposure draft subordinate instruments having regard to its interests, assets and liabilities.

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## **APPENDIX A**

*Environment Protection (Scheduled Premises) Regulations 2017*

*Environment Protection (Industrial Waste Resource) Regulations 2009*

*Environment Protection (Fees) Regulations 2012*

*Environment Protection (Distribution of Landfill Levy) Regulations 2010*

*Environment Protection (Residential Noise) Regulations 2018*

*Environment Protection (Vehicle Emissions) Regulations 2013*

*State Environment Protection Policy (Ambient Air Quality)*

*State Environment Protection Policy (Air Quality Management)*

*State Environment Protection Policy (Prevention and Management of Contamination of Land)*

*State Environment Protection Policy (Control of Music Noise from Public Premises)*

*State Environment Protection Policy (Control of Noise from Commerce, Industry and Trade)*

*State Environment Protection Policy (Waters)*

*Industrial Waste Management Policy (Protection of the Ozone Layer)*

*Waste Management Policy (Solid Fuel Heating)*

*Industrial Waste Management Policy (Waste Acid Sulfate Soils)*

*Waste Management Policy (Combustible Recyclable and Waste Materials)*

*Waste Management Policy (Movement of Controlled Waste between States and Territories)*

*Waste Management Policy (National Pollutant Inventory)*

*Waste Management Policy (E-waste)*

*Waste Management Policy (Siting, Design and Management of Landfills)*

*Waste Management Policy (Used Packaging Materials)*

*Notifiable Chemical Order – Arsenic and Arsenic Compounds*

*Notifiable Chemical Order – Chlorine Compounds*

*Notifiable Chemical Order – Organotin Antifouling Paint*

*Notifiable Chemical Order – Polychlorinated Biphenyls*

*Industrial Waste Guidelines*

*Best Practice Environmental Management – Siting, Design, Operation and Rehabilitation of Landfills*

*Prescribed Industrial Waste Classification – Transformers*

*Prescribed Industrial Waste Classification – Fire Fighting Chemicals*

*Prescribed Industrial Waste Classification – Arsenic Sand, Rock and Tailings*

*Prescribed Industrial Waste Classification – Contaminated Soil*

*Prescribed Industrial Waste Classification – Unused Cooking Oils*

*Prescribed Industrial Waste Classification – Drilling Mud*

*Prescribed Industrial Waste Classification – Packaging Waste*

*Prescribed Industrial Waste Classification – Ceramic Waste Fibres*

*Prescribed Industrial Waste Classification – Animal Effluent*

*Prescribed Industrial Waste Classification – Absorbent Material*

*Prescribed Industrial Waste Classification – Architectural and Decorative Paints*