

The new Victorian environment protection legislation - further EPA Guidance released

The Environment Protection Amendment Act 2018 (new Act) commenced this week on 1 July 2021. From that date, the existing Environment Protection Act 1970 will be repealed, and the Amendment Act will become part of and known as the Environment Protection Act 2017. Once the new Act commences the current Environment Protection Regulations (second exposure draft) and the Environmental Reference Standards will come into effect.

Since our last update on the new Act published on 7 June 2021,¹ the Environment Protection Authority (EPA), has continued to release relevant guidance to assist business to interpret and apply the duties and obligations in the new Act. Business with operations or properties in Victoria should be well on the way to preparing sites and environmental management systems and plans for the commencement and operation of Victoria's new environmental laws.

As a reminder, the three priority areas of focus detailed in our 7 June update are the environment protection duties, waste duties and permissions.

- The **environment protection duties** include the General Environmental Duty (GED), pollution duties and contaminated land duties. There is also the transitional duty which requires a person not to engage in conduct that results in material harm to human health and the environment from pollution or waste.
- The **waste duties** apply to all industrial waste, with greater obligations on duty holders for priority and reportable priority waste. Duties require the classification of waste, ensuring that waste is transported properly and sent to a lawful place.
- Scheduled activities require a **permission**. Existing permissions under the former Act will transition to new permissions. If you have existing operations that did not require a permission but are now a scheduled activity,² you must apply for the requisite permission. The EPA has provided for a grace period which, depending on the type of activity, is 3 months (to the 1 October 2021).³

In our 7 June update we included an annexure with the key guidance documents released by the EPA up to 3 June 2021. Since that update, EPA has released new guidance publications daily. This guidance provides some useful practical insights into interpretation and compliance with the duties and requirements of the new Act. In this update, we have provided an updated Annexure listing the key guidance documents released by the EPA and a summary of some of the more important and relevant information below.

Additional EPA Guidance

The key new guidance documents released since we published our 7 June update are:

- The Statement of Regulatory Intent (publication 1965)
- Responding to harm caused by pollution (publication 1991)
- Assessing and controlling contaminated land risks: a guide to meeting the duty to manage for those in management or control of land (publication 1977)
- Fit and proper person policy (publication 1838)
- Declaration of Use form (publication F1022)
- How to read and comply with waste determination (publication 2005)
- Notifiable contamination guideline: Duty to notify of contaminated land (publication 2008)
- Using SEPPs and WMPs in the new environment protection framework guide (publication 1994)

A short outline of these some of these new guidelines is provided below and the new publications are listed in the Annexure (highlighted in blue).

Statement of Regulatory Intent

The Statement of Regulatory Intent (publication 1965) emphasises EPA's approach to work with business to understand obligations, ensure the correct permissions are in place, make information available during on-site visits, and provide seminars and workshops to support risk management and clarify expectations. EPA's compliance approach will be proportionate, however, demands full business compliance of obligations that have transitioned from the former Act.⁴

The EPA has also published a range of industry guides on the new duties and the common risks within these industries.⁵ In the Statement of Regulatory Intent, EPA recommends business review industry guidance as it provides detailed examples of how to meet the new duties in relevant sectors. The information in this guidance will also be considered in determining compliance and state of knowledge in assessing the GED. The obligations on business increases depending on the size. For example:

- For small business, EPA officers undertaking a compliance inspection are likely to ask what hazards and risks you have considered and the controls put in place.

1. See KWM update 'The new Victorian environment protection legislation – are you ready for 1 July?' at <https://www.kwm.com/en/au/knowledge/insights/the-new-victorian-environment-protection-legislation-20210607>

2. See Schedule 1 - prescribed permission activities and fees in the Environment Protection Regulation.

3. See *Environment Protection Regulations 2021*, reg 222-224

4. EPA Publication 1965: Statement of Regulatory Intent (10 June 2021) <https://www.epa.vic.gov.au/about-epa/publications/1965>

5. See Annexure – summary of EPA guidance publications

- For medium business, EPA officers are likely to ask you to explain the hazards and risks you are managing in your business and the 'risk controls' you have implemented and assess their effectiveness. This will likely adhere to the risk controls described within the relevant industry guidance.
- For large business, EPA officers will expect you are familiar with the controls outlined in your industry sector guide and focus on obvious hazards and risks. EPA will also expect business to be aware of the new laws and relevant obligations and understand requirements for permissions. You can also expect EPA to look at the integrity of environmental management systems.

Management and control of contaminated land

Publication 1977 *Assessing and controlling contaminated land risks: a guide to meeting the duty to manage for those in management or control of land* clarifies the scope of the duty to manage contaminated land (section 39) and sets out guidance for the assessment and management of contaminated land. The new guideline sits within the framework of contaminated land including Publications 1940 and 1936. Further guidance has now also been published on the duty to notify (Publication 2008) which is briefly summarised below.

The contaminated land duties apply to persons in management and control of land⁶ and, depending on the circumstances, multiple people can have duties concurrently on the same land. For example, the publication 1977 outlines that:

- The scope of a person's duty is limited by their level of management or control. For example, a tenants duty to manage where the tenant is only permitted under the lease to undertake repairs inside buildings on the contaminated site would be limited to managing contamination inside the building.
- In some circumstances a person in management or control of land can discharge their duty by negotiating with another person to undertake risk management measures. The guidelines give the example of limiting a tenants level of control by prohibiting the use of a basement as a habitable space where there is a risk of soil vapour if occupied.
- Management or control of land can be assigned to a contractor. This does not delegate the duty to manage but means that the contractor assists in discharging the duty on your behalf.

EPA recommends that where there are multiple people in management or control, parties should discuss and agree on how contamination will be managed.

Responding to harm caused by a pollution incident

The GED requires the risk of harm to human health and the environment to be minimised as far as reasonably practicable. If harm does occur, then under the pollution duties you are under an obligation to respond to the pollution incident and, if it threatens to cause material harm, to report to the EPA (section 32). A pollution incident is defined as *"an incident or set of circumstances that causes a leak, spill or other unintended or unauthorised deposit or escape of a substance and, as a result of which, pollution has occurred or is occurring"* (other than solely involving the emission of noise) (section 29).

The responsibility to take action to respond to a pollution incident applies regardless of whether you undertake activities at one or multiple locations or whether the incident impacts the land or property of others. The duty to respond to a pollution incident applies regardless of the seriousness of the incident.

You are under an obligation to act, respond and pay the costs of clean up and restoration. This could include contacting emergency services or water corporations to shut down transmission pathways. The duty requires duty-holders to, so far as reasonably practicable, restore the affected area to its previous state before the incident occurred (section 31).

EPA publication 1991 *Responding to harm caused by pollution* provides guidance on the scope of this duty to restore and factors to consider in relation to what is reasonably practicable in complying with this duty:

1. Whether you can eliminate the harm and restore the affected areas to their previous state.
2. The likelihood of harm from the pollution incident continuing to occur or changing.
3. The severity of harm to human health and the environment.
4. Knowledge about the harm arising consequential to the pollution incident and the availability of technology, processes or equipment to mitigate or eliminate the harm.
5. Costs of controls compared to the effectivity in reducing the impacts and restoring the affected area.

Duty to notify of contaminated land

EPA Publication 2008: Notable Contamination Guideline: *Duty to Notify of Contaminated Land* (29 June 2021) provides detailed guidance on assessing who has the obligation to notify contaminated land under section 40, what is notifiable contamination (including technical details on the 'prescribed notifiable contamination' in the Environment Protection Regulations), the application of exemptions and the form and content for notification to the EPA.

Importantly, the notification form and this guideline requires the person notifying to notify the EPA of your management response and how you will comply with the duty to manage (section 39). The guideline also provides details for notification of multiple sites.⁷

Next steps

The EPA commented in a recent industry presentation:

*"As the new laws and duties take effect our focus over the next 5 years will be on establishing the new legislative framework and supporting duty holders to comply with the new laws whilst maintaining our effort on prevention of existing priority harms and improving our ability to address risks and emerging threats"*⁸

Given the delay in commencement of the new Act due COVID-19, as we stated in our 7 June update, we consider the EPA will expect business to be prepared and ready to comply with the new Act. The EPA has also acknowledged that in the early stages of the operation of the new legislation, EPA will be checking on and supporting business to comply, but it will

6. Management or control of land is a person who holds a legal interest in the land, such as, a landowner and tenant or someone who has access or use of the land

7. EPA Publication 2008: Notable Contamination Guideline: Duty to Notify of Contaminated Land (29 June 2021) <https://www.epa.vic.gov.au/about-epa/publications/2008>.

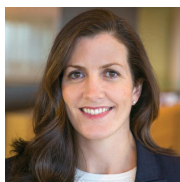
8. EPA Publication 1800.1: Regulatory Strategy 2020-2025 draft (June 2020) <https://www.epa.vic.gov.au/about-epa/publications/1800-1> and quoted by Dan Hunt (Director of Regulatory Programs at EPA) EPA Seminar 8 June 2021 'Waste Framework Overview.

expect business to be well informed. This includes staying up to date with the recent guidance released by the EPA and ensuring that this guidance and the legislative obligations are implemented in environmental management systems and plans. If you have any questions on the operation of the new Act and its application to your business or properties in Victoria, please contact us.



Mark Beaufoy

Partner | Environment, Planning & Native Title
Melbourne
T +61 3 9643 4111
M +61 409 797 364
mark.beaufoy@au.kwm.com



Bridget Phelan

Special Counsel | Environment, Planning & Native Title
Melbourne
T +61 3 9643 4426
M +61 437 836 125
bridget.phelan@au.kwm.com

Annexure – summary of new EPA guidance publications

Below is the table from our 7 June update annexure. We have included the new guidance released from 3 June 2021 highlighted in blue.

EPA Publication	Release date
1851.1: Implementing the general environmental duty: a guide for License Holders (replaces 1851 released March 2020)	26 November 2020
1741.1: Industry Guidance: Support for GED Compliance	26 October 2020
1884: Site planning and management	22 September 2020
Pollution Duties	
1991: Responding to harm caused by pollution	10 June 2021
Noise Duties	
1996: Noise guideline - assessing low frequency noise	23 June 2021
1757.2: Summary of noise framework	27 May 2021
1254.2: Noise control guidelines	20 May 2021
1826.4 Noise limit and assessment protocol for control of noise from commercial, industrial and trade premises and entertainment venues (replaces 1826.3 released March 2021)	17 March 2021
Waste Duties	
F1022: Declaration of Use Form	25 June 2021
2005: How to read and comply with waste determination	25 June 2021
1946.1: How to establish lawful place (replaces 1946 from 30 March 2020)	24 June 2021
F1020: Waste record template for drivers and receivers	21 June 2021
1967.2: Waste code transition to Environment Protection Regulations 2021 (replaces 1967.1 from 4 May 2021)	11 June 2021
1941.1: Accredited consigner application guidance	3 June 2021
1941.1: Accredited consigner application guidance	22 April 2021
1968: Guide to classifying industrial waste	3 March 2021
1756.2 Summary of proposed waste framework (replaces 1756.1 released in December 2020)	27 May 2020
1827.2 Waste classification assessment protocol (replaces the draft version published September 2019 on the Engage Victoria website)	17 March 2021
1828.2 Waste disposal categories – characteristics and thresholds (replaces the draft version published September 2019 on the Engage Victoria website)	17 March 2021
1927: Regulating litter and other waste: toolkit	17 December 2020
1946: How to establish lawful place	30 March 2020
Contamination Duties	
2008: Notifiable contamination guideline: Duty to notify of contaminated land	29 June 2021
1977: Assessing and controlling contaminated land risks: A guide to meeting the duty to manage for those in management or control of land	3 June 2021
1915 Contaminated land policy	22 February 2021
1936: Proposed methodology for deriving background level concentration when assessing potentially contaminated land	23 February 2021
1940 Contaminated land: understanding s 35 of the Environment Protection Act 2017	22 February 2021

EPA Publication	Release date
Permissions	
1995: Permissions proposal pathway guideline	24 June 2021
F1021: Permission pathway form	24 June 2021
1838: Fit and Proper Person Policy	17 June 2021
1984: Changes to permissions in the waste and resource recovery sector	9 June 2021
F1018: Prohibited person questionnaire	4 June 2021
F1017: Fit and proper person questionnaire	4 June 2021
1799.1: Permissions scheme – draft policy	5 June 2020
1982: Registration requirements for dry cleaners Environment Protection	1 June 2021
1850.1: Guidance for Operating Licences (replaces 1850 released March 2020)	26 November 2020
Compliance and Enforcement	
1998: Compliance Code for Victoria's Big Build Projects	22 June 2021
1965: Statement of Regulatory Intent	10 June 2021
1798.1: Compliance and enforcement - Draft policy	5 June 2020
1418.5: Remedial notices policy	3 May 2021
1727.2: Protocol for calculating monetary benefits	17 March 2021
Review Rights	
1928: Charter of Consultation	15 June 2021
1531.4: Remedial notice review policy (replaces 1531.3 released May 2021)	12 May 2021
Industry Guidance	
2006: How to comply with the livestock manure and effluent determination	25 June 2021
1821.1: Local government - guide to preventing harm to people and the environment	4 June 2021
1993: Administering your powers under the Environment Protection Act 2017 - Guide for local government and litter authorities	9 June 2021
1978: Transition guidance for environmental auditors	3 June 2021
1974: Regulating onsite wastewater management systems: local government toolkit	14 May 2021
1812.1: Self-assessment tool for small business	30 October 2020
1819 Agriculture – guide to preventing harm to people and the environment	2 October 2020
1820 Construction – guide to preventing harm to people and the environment	2 October 2020
1822 Manufacturing – guide to preventing harm to people and the environment	2 October 2020
1823 Mining and quarrying – guide to preventing harm to people and the environment	2 October 2020
1825: Waste and recycling - guide to preventing harm to people and the environment	2 October 2020
1824: Retail - guide to preventing harm to people and the environment	2 October 2020