Environment Protection Regulations & Environment Reference Standard

Nillumbik Shire Council

Draft Submission

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COVER PAGE

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Nillumbik Shire Council (NSC) wishes to submit comments in relation to the proposed Environmental Protection regulations.

NSC recognizes and acknowledges the need for reform in Environmental Protection legislation and have participated where possible with representation at working groups and consultation opportunities.

The following submission addresses the 7 key areas of concern for Council:

1. Onsite Wastewater Management
2. Noise Control
3. Litter
4. Contaminated Land
5. General Environmental Duty
6. Waste
7. Light Spillage

1. ONSITE WASTEWATER MANAGEMENT SYSTEM (SEPTIC TANK SYSTEMS)

As recently as June 2019, Nillumbik Shire Council adopted a Domestic Wastewater Management Plan (2019-2023), which considered the recently adopted 2018 SEPP Waters and the findings of the 2018 Victorian Auditor General's report on the management of domestic wastewater. As such, the plan put in place actions to be implemented over a 5 year period to enable Council to identify high risk properties for connection to reticulated sewer where possible. In order to identify these properties a monitoring and maintenance program has been slated for implementation beginning in 2019. Council has invested resources to the review and implementation of the plan and employment of staff to carry out the DWMP actions over the life of the plan.

The Regulatory Impact Statement (RIS) makes reference to the recommendations made by the Victorian Auditor General report *Managing the Environmental Impacts of Domestic Wastewater (September 2018)*, however fails to address the recommendations specific to the EPA and DELWP, in particular:

> *In consultation with councils, water authorities and other key stakeholders review and address issues and gaps in the regulatory framework including:*
> - *Lack of clarity around roles and responsibilities*
> - *Pre-1988 systems permitted to discharge off-site*
> - *The overlapping and cumbersome approval system*
> - *Governance and approval processes for alternative service options*
> - *On-going Permits for the Use of onsite systems*
>
> *In consultation with councils:*

- *Develop a standard risk assessment framework based on the relevant Australian Standards to assess Land Capability, environmental factors and on-going OWMS performance.*
- *Implement an accredited third-party approval system for undertaking LCAs and installation/on-going maintenance of on-site domestic systems.*
- *Review the model DWMP, ensuring that it is based upon better practice risk assessment methodology outlined in the Australian Standards*
- *Evaluate and implement a better practice model for the on-going maintenance of onsite systems*

Council notes that the RIS specifically identifies in the Multi Criteria Analysis (MCA) summary that Option 1 is the preferred option, despite it being less effective in addressing harms to human health and the environment caused by existing onsite wastewater systems that are not being properly maintained, are failing, or have not been installed appropriately.
This is particularly of concern to Council as the RIS has also noted that the General Environment Duty (GED) would apply, however not to all persons – only those conducting a business or undertaking. Considering that the vast majority of onsite wastewater systems are not owned by a business or undertaking, this represents a considerable issue as the GED would not apply to domestic wastewater, and there does not appear to be any proposed controls in place for domestic systems.

Despite the recommendations of the RIS, Option 1 has been chosen over Option 2. In Councils view, Option 2 is preferable as it would allow Council to assess and manage the risk of any onsite wastewater system within the municipality.

If Option 1 were to be adopted, which would be to retain the current status quo, NSC sees this as a missed opportunity to improve the management of poor performing and legacy onsite systems.

For a shire such as Nillumbik, with limited ongoing development in outer rural areas of the Shire, and with approximately 5900 properties with onsite wastewater system and an average of 50 new installations per annum, the ongoing monitoring and maintenance of existing and legacy systems is a major consideration.

Regulation 191

- A capped variable Permit Application Fee has been set at 25.9 fee units with additional fees available for lengthy applications (4.1hrs has been prescribed to assess an Application).
- It is noted that the proposed fees have been set below the low range of the current average construction permit, as identified in the RIS, and does not come close to full cost recovery, creating an additional cost burden to Council, particularly in the current environment of rate capping.
- Adding the additional fee amount for installations that take more than 4 hours will be an administrative burden for Councils as the fee will not be able to be determined

until *after* the completion of the installation. This would be unacceptable to Plumbers who usually quote on the cost of an installation including the related Council fees. It also leaves Council in a position of having to chase outstanding fees for services already rendered.

- This would also reduce fee transparency and consistency for plumbers and property owners.

Regulation 30(d)

- The Permit period has been increased to 5 years. Currently the permit period for construction is two years, in line with other Council permits such as building and planning permits. Increasing the length of time would create a backlog of outstanding septic installations, particularly for developments where only an alteration to a dwelling/building has occurred, as these developments do not require a Building Occupancy Certificate, (which cannot be obtained in a new development without the onsite wastewater addressed, either via a Report and Consent as per s81 of the Building Regulations or a valid Certificate to Use).
- Failure to make onsite wastewater system permits renewable eliminates Council's ability to monitor failing, poor performing or legacy systems without a permit.

Section 25 (GED) of the EP Act and Regulation 28

- It is noted that application/principles of the GED have been restricted for councils and cannot be applied to domestic onsite wastewater management systems (only commercial), whereas this has been left broad/unrestricted for the EPA.
- Domestic onsite wastewater systems make up the majority of existing systems within municipalities. In all of the On-site Wastewater EP Reform consultation so far, including the first on-site Wastewater RIS Steering Committee meeting, the GED has been highlighted as a **primary vehicle** for driving the correct use and maintenance of onsite wastewater management systems.
- Without specific legislation or delegation, Local Government is left without a means to adequately address the ongoing issues surrounding unmaintained, failing and older legacy onsite wastewater management systems.

Transitional regulations

- The future of the Domestic Wastewater Management Plans (DWMP), as required in Clause 29 of the SEPP (Waters) which commenced in October 2018, has been left unclear. Currently there is no indication on the future relevance of DWMP, particularly as the Environment Reference Standard **(**ERS), which is expected to replace the SEPP in two years, does not address onsite wastewater management.
- According to the RIS, during this time DELWP and EPA will consult with stakeholders on whether these clauses warrant being 'rehoused' in another subordinate instrument. This implies that there is a potential that the clauses may not be 'rehoused', leaving councils with a DWMP that no longer has State Government support.

- Councils have applied both time and resources in developing, reviewing and updating DWMPs to ensure they are meeting their duty to identify, assess and manage the risks of domestic wastewater systems, including those that are failing.

General

- A uniform risk-based approach/framework (intended to inform all on-site wastewater assessment across agencies/stakeholders) advocated throughout the Reform consultation period has not been included or referred to in any of the new legislation for on-site wastewater, including the ERS.
- The recommendations of the *VAGO Report: Managing the Environmental Impacts of Domestic Wastewater (September 2018)*, and the impact on local government, do not appear to have been considered

Feedback on Environment Reference Standard (ERS)

The single proposed ERS produced to date contains no specific standard or further explanation of onsite wastewater management systems issues.

The only reference to the ERS in the onsite wastewater management systems in the Draft EP Regulations is under r32(3)(b)(ii) *Prescribed matters for on-site wastewater management systems permit exemptions*, where it refers in part to; any environmental values identified in any relevant environment reference standard.

It is unclear if the Environmental Reference Standard is intended to replace the existing EPA *Code of practice – onsite wastewater management, Publication 891.4*

Council proposes:

Council would like to propose alternatively to the preferred option;

- Permits to Install/Alter are given a period of 2 years, in line with other Council permits such as planning and building permits
- Certificates to Use are renewed within 10 years, to reduce the cost burden of a five year renewal, and reducing an opened permit which fails to assess maintenance. 10 years is also closer to the expected life expectancy of an onsite wastewater system.
- Provision within the regulations to enable Council officers the ability to direct that failing or under preforming systems are maintained at an acceptable standard.

As outlined above, Nillumbik Shire Council does have concerns that the proposed legislation does not adequately address the ongoing maintenance issues surrounding the management of onsite wastewater management systems. These systems are primarily owned and operated by residents and once installed there is often little to no long term maintenance, resulting in underperforming and failing systems. The

proposed legislation both shifts the responsibility and increases the cost burden to Councils, without clear provisions to do so adequately manage this responsibility.

2. NOISE

Council officers regularly attend to noise complaints, ranging from construction noise to music noise from parties. Traditionally officers have found it difficult to define what is unreasonable noise and has often had to rely on the nuisance provisions of the *Public Health and Wellbeing Act 2008*, to achieve compliance.

Nillumbik Shire Council welcomed the changes in the 2018 Residential Noise regulations, in particular the inclusion of an exemption for air conditioners on heat health alert days.

The new regulations are less specific than the SEPP N-1 and N-2, and are likely to create confusion in interpretation and enforcement. The issue with the General Environmental Duty is that determining what level of noise is unreasonable continues to be subjective. The new regulations are less specific than the SEPP, and will be difficult to interpret, implement, and enforce.

The new regulations omit noise on construction sites, with no regulation on times and days that work can occur. This limits the ability to enforce management of noise and activity on construction sites. Council considers the General Environmental Duty will not be enough. It is not clear where the Environment Protection (Residential Noise) Regulations 2018 for management of development sites during construction will sit.

Council can manage potential adverse amenity impact from new land uses through a planning permit condition which stipulates that the use cannot adversely affect the amenity of an area. This will continue, as the regulations are not adequate to deal with this. Whilst amenity impacts could come under the General Environmental Duty, the GED is not specific enough and is subjective. The 'test' of assessing whether the amenity impact is unreasonable will continue to be subjective, and will continue to fall back to an assessment against the Public Health and Wellbeing Act. This test is reliant upon their being an 'unreasonable' impact on health, the test for which is significant and quite burdensome on affected parties and Council to prove and enforce.

Definitions – Noise sensitive areas, unreasonable and aggravated noise

Council notes that the definition of 'noise sensitive areas' has been extended to within 10 metres of a residential dwelling. When assessing noise complaints, Council currently considers if the noise can be heard from *inside* a habitable room. By extending the noise sensitive area, Council will be forced to consider all manner of noise complaints from people *outside* their dwellings. This will dramatically increase

the number of residential noise complaints that Council officers will be required to manage. It is also contributing to noise intolerant communities.

Council's ability to manage complaints will also be hindered by the vague definition of 'unreasonable noise' and 'aggravated noise'. There is a lack of clarity around *how* to determine if noise is unreasonable or aggravated, as there is no clear methodology for measuring and establishing noise limits. Such ambiguity will increase the burden of evidence on Council to determine if unreasonable or aggravated noise is occurring and how to then enforce the regulations.

The result will be that the Environmental Protection Act continues to be ineffective for Councils to manage noise complaints and have to rely on alternate legislation such as the Public Health and Wellbeing Act 2008 to manage complaints.

Council proposes:

That the new EPA Act and regulations should fill the existing known gaps between the Public Health and Wellbeing Act, and the Planning and Environment Act, but the changes generally do not achieve this, and in fact appear to put further pressure on these two other acts to take action in all but the most serious cases, increasing the workload on Council for enforcement of noise complaints.

3. LITTER

The new legislation introduces increased penalties, and provisions and offences that are expected to be easier to administer and enforce. New volume-based litter offences, available to local government and Litter Enforcement Officers, will provide offences and penalties that are commensurate to the impact and the volume of waste. Additionally, a new dangerous littering offence will apply to persons who litter certain dangerous items (e.g. glass or syringes).

Council proposes:

Council welcomes increased penalties and administratively simpler enforcement for litter offences and proposes that the Landfill Levy (now Waste Levy) should be used to resource Litter Enforcement capability for each municipality.

4. CONTAMINATED LAND

Council welcomes the new regulations around the issues related to Potentially Contaminated Land.

The change from the previous model of doing either an Environmental Site Assessment (which has no defined structure or qualified review mechanism, and is largely unregulated) or a full Environmental Audit (which is expensive, time-

consuming and cumbersome if there is little or no contamination found, and often resisted by developers and owners) to a more robust and stringent staged approach is welcome.

Initial Comments:

When the new format planning schemes were introduced, many of the sites that had potential contamination but the actual status of contamination was unknown, were not included in the EAO. There remains a gap in the planning scheme between sites of known contamination (which are included in the EAO) and potentially contaminated (previously identified in the old format planning schemes but are now not included). The state holds significant records of information related to former mining leases across the state that are held in microfiche archives, that are not yet shown on VicPlan. Nillumbik fortunately have some of the information held separately in its own records, but it is not known how complete our information is, so there may remain a risk that a Preliminary Risk Assessment, and/or Environmental Audit is not completed where they should be.

Former mining leases should be rolled out into the VicPlan database to ensure Councils are able to assess risk of land use and development and the need to assess potentially contaminated land as it is required to do.

Clearer framework for the process Council requires to confirm whether a site is suitable for a new use, and what needs to be done to prepare the site for that use.

More transparent for future owners to understand the process which occurred, as both the PRS and Environmental Audit will be publically available on the EPA website. It is not clear is SMO's will also be on the website.

Dealing with existing contamination:

Where known previous land uses have potentially contaminated the site, the staged risk assessment process is a significant improvement. The staged level of assessment undertaken under the supervision of a qualified Auditor is designed to stage the level of examination depending on whether a site is contaminated, and then determine the extent and amount of contamination, and the necessary remediation required to ameliorate the risk depending on the current and future use. The changes provide a clearer framework at the various levels. This relies on an Auditor signing off at particular stages.

Council's view is that the staged approach (PRS, EA then SMO) will replace the previous practice of Council requiring an Environmental Risk Assessment in some cases before a full Environmental Audit is required. The cost will be borne by the owner, however may result in delays if the level of work required to be overseen by Auditors is increased in the way that Council believes will happen.

Future land uses - new three stage approach –

Preliminary Risk Screen (PRS) Assessment:

- First stage is the Preliminary Risk Screen Assessment - a desktop assessment which includes:
  - Review of historic aerial photography to understand and determine previous land uses;
  - Review of state and local historic documentation to understand and determine previous land uses;
  - Properly considered approach to legacy contamination;

The PRS is aimed at lower risk sites, to identify whether there is contamination, what the contamination source was, to develop a remediation program. The PRS is aimed at low risk contamination, and is ideal for formulating a plan to dealing with sites such as the former mining sites found in Nillumbik. It does include a requirement for a qualified EPA-appointed auditor to review and sign off on the findings, which introduces a higher standard than the existing Environmental Site Assessment needs to reach.

As an EPA auditor signs off, the PRS removes the subjectivity and interpretation required, which currently falls on Council to do, and removes the pressure and cost for Council to have to obtain Peer reviews of submitted ESA's, as the Auditor will perform this review function

This new process is likely to be cheaper for owners and Council as the staged process enables exit points depending on the findings at each stage. However there may be time delays depending on the capacity and the number of auditors available.

Scoped (Scaled) Environmental Audit

- The second stage is a scoped Environmental Audit which is a full audit process. The PRS is not designed to be used on high risk sites, a full Audit will be needed on these. However an Audit can be required after a PRS is done, on the recommendation and statement of the Auditor.
- The Environmental Audit will include all of the detail that a PRS would include, then builds on this to develop recommendations and a full remediation plan commensurate with the end land use.
- Council can just require an Environmental Audit to be conducted and bypass the Preliminary Risk Screen Assessment, where a known or likely contamination exists, and remediation is likely to enable a new use to commence.

Site Management Orders

- It is unclear how this connects to the *Planning and Environment Act 1987*, or whether there is even any ability to tie a Site Management Order to a planning permit. Can an SMO only come after an Environmental Audit, or can an SMO be developed separately? These changes appear to require an amendment to the Environmental Audit Overlay to introduce the changes to the Act, and

the various levels of regulations, including the PRS, Environmental Audit and SMO.

Summary:

- The new regulations are a significant improvement to the existing process of identifying, managing, remediating, and determining what the most appropriate final use of contaminated sites can be. The PRS and staged Audit approach to staged knowledge and data gathering is better. The regulations need to ensure the responsibility is with the Auditor as the qualified expert to provide a clear point at which the process can be exited.

- The current Ministerial Direction No 1 for potentially contaminated land only relates to amendments to the planning scheme. It does not assist in the situation where a contamination is identified after the amendment and where a permit application is being considered, unless there is an EAO. The regulations need to ensure that even where an EAO does not apply, that regard to the requirement for a Preliminary Risk Assessment and Environmental Audit is required, where information is available that there is potential for contamination.

- The **Duty to Manage Contaminated Land and a Duty to Notify on Contaminated Land** is written into the Act. The notification is to the EPA. It is not clear how the regulations require Council to be a part of this notification process. Where there is contamination, the duty is on the landowner to identify, manage and notify affected parties of any contamination that is known or that they should reasonably know about. However, the regulations require this to be notified to the EPA, and provides no reporting or notification mechanism to Council, leaving a risk of a gap in knowledge held by the State to Local government

- Council is concerned that the levels of contamination and costs required to meet the **Duty to Manage and Duty to Notify thresholds** are high, and the levels found on sites such as the former mines in Nillumbik, such as that at 50 Fraser Street and Collard Drive would not qualify. However there have been real and confirmed health impacts, which would slip through the Duty to Manage requirements. Therefore there remains a gap between the power the EPA has under the act, and the responsibility for Council to do this through inferior legislation such as the Planning and Environment Act.

- The regulation around **Site Management Orders**, and their applicability to planning permits and other works permits that Council's issue, and their enforceability is not clear. Also, what responsibility for Private building surveyors to give regard to the Audit and SMO is required?

  If a SMO is registered on the Certificate of Title, how does this translate to the requirements for Council to consider the SMO under the Planning and

Environment Act – is it recorded as an Encumbrance, much like a covenant – do Council have the ability to give regard to a SMO even if it is registered. The risk is that planning permits are not able to give regard to the SMO.

- The PRS is a public document, the same as the current Environmental Audits. It includes a Summary Statement, that clearly states whether a full Environmental Audit is required, or the findings of the PRS confirm that the risk is low, and no Environmental Audit is required. This follows the same structure as a full audit to identify whether the site poses a risk, and what is required to achieve this. The consistent structure and content is important for consistency, and not allowing information to be 'concealed' or 'buried' in a PRS or Audit to avoid capture and identification.

- The responsibility for enforcement is primarily with the EPA. It is important that the regulations require information to be provided to Council not just the EPA to ensure Council can action under planning, local laws or under the Local Government Act if needed.

  Council have seen as real impacts from contamination 'on the ground', which would not qualify as being notifiable under the Duty to Notify. There is no clear way forward for who is responsible for managing lower level contamination from sites such as 50 Fraser Street, except where a new land use triggers the need for an Environmental Audit (such as a residential land use). It is expected that Council will remain responsible for identifying these, through the PRS process.

- There remains a risk around inaccurate identification of what the natural background levels versus contamination is, and how this information is determined. The cost to remediate will continue to drive the current practice of underreporting or inaccurate data collection to properly determine the level of risk posed. There exists a tendency for Council's to accept 'subjective assumptions' to manipulate and establish higher background levels to avoid the remediation of land prior to a sensitive use.

5. GENERAL ENVIRONMENTAL DUTY

Where the EPA are taking action under the General Environmental Duty, how is Council informed of this, and what is the role for Council in a contributory/alignment role.

The GED imposes the responsibility on the owner. The responsibility for bringing action against an owner is with the EPA under the Act, not Council unless Council is delegated under the Act - this has not been resolved. Land use planning will be involved where sites are being used, but relies on the Council knowing what the EPA are doing. The issue continues where Council try to engage the EPA to take action,

that the current quality of response is poor - without resourcing, this will not change despite the additional powers and increased fines.

6. WASTE MANAGEMENT

The General Environment Duty and the new waste categorisation will increase and improve the regulation of a broader range of waste management activities. All generators, transporters and receivers of waste will have a responsibility to manage waste appropriately and take reasonable steps to ensure it goes to the right place. Council will have a responsibility to check that the contractors managing the waste are authorised. The EPA will provide advice on authorised contractors

This will help address issues such as stockpiling of recycling and other wastes and is welcomed.

The implications for Council may be:

- A greater focus on management of contamination in waste streams to support facilities compliance with EPA authorisation.
- That costs relating to waste disposal may increase as businesses respond to the new regulatory environment.

The Landfill Levy (renamed waste levy) remains and continues to be subject to annual indexation. While no longer referring specifically to landfill, the levy applies to waste deposited onto land and for Nillumbik this means waste delivered to a landfill. No change is expected.

Council's former licensed landfills at Plenty and Kangaroo Ground are subject to post closure Pollution Abatement Notices and the rehabilitation and aftercare management plans are compliant with the EPA's Best Practice Environmental Management publication *Siting, design, operation and rehabilitation of landfills*.

Whether the General Environmental Duty may require Council to further address legacy landfills or other contaminated land such as the former municipal landfill at Alistair Knox Park is unclear.

7. LIGHT POLLUTION

Nillumbik Shire Council is dissected by the urban growth boundary and is a Green Wedge Shire, as a result illumination from businesses and backyards which create light pollution or 'spillage' into neighbouring properties is particularly noticeable in the semi-rural areas on the urban fringe.

Council is often called upon to manage complaints about light spillage. The default is to rely on the *Public Health and Wellbeing Act 2008* nuisance provisions and try to enforce the Australian Standard AS4282 Control of the Obtrusive Effects of Outdoor

Lighting. However this only addresses lighting for new construction in commercial areas only, and does not address resident area nuisance lighting.

It also does not apply to adverting signs, lighting systems that are cyclic or flashing or floodlighting of buildings and facilities.

The AS4282 is written for lighting engineers not for planners, regulators or the general public. The ACT and Queensland refer to their Environmental Protection Acts, however Victoria does not address this issue at all within the Acts or the proposed legislation and Regulations. This is leaving a gap in the area of regulating the complaints associated with light spillage.

Council proposes that light pollution is specifically addressed in the Regulations or ERS to assist with the management of complaints from the general public