VICTORIAN WATER
INDUSTRY ASSOCIATION INC.

Scheduled Premises Regulations Review Discussion Paper

VICWATER SUBMISSION

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Introduction

- The Scheduled Premises Regulations are a key regulatory instrument for the Victorian water industry. The water industry represents 1/3 of licences. Licence compliance activities are a significant cost for the water industry.

- The water industry commends the EPA's intention to apply more risk-based regulation via this review. There is an opportunity to remove approvals and reporting processes that make no meaningful contribution to reducing risk, or protecting the environment. However, the path to risk-based regulation must be collaboratively developed to give the EPA, and community confidence that the environment is being protected, whilst generating genuine efficiencies for licence holders.

- Unfortunately, past attempts to implement 'risk-based regulation' via alternative (supposedly streamlined) approval pathways for benign activities have resulted in additional regulatory burden for government-owned regulated entities and higher water bills for communities. Such has been water corporations experience with the accredited licence program and the works approval exemption (the works approval exemption is itself an onerous approval pathway). Further tweaks to existing up-front approvals, or creating new categories of up-front approvals under the banner of "earned autonomy" risks a similar result to previous failed attempts.

- The VicWater submission on the State Environmental Protection Policy (Waters of Victoria) identified that by adopting inflexible approvals and output-based regulations, costs can be saved by the resource-constrained EPA. However, these savings are illusory since significantly higher costs are incurred by water corporations via consultant fees and construction delays. These costs are ultimately borne by water corporation customers. It is critical that the Regulatory Impact Statement uncovers these details and considers the total community cost and environmental benefit of the new regulation.

- In VicWater's submission to the EPA Inquiry, the concept of 'contribution story' was discussed. The NSW Department of Premier and Cabinet use this concept in its *Guidance for regulators to implement outcomes and risk-based regulation* (2014). The 'contribution story' is a statement about how regulatory interventions are associated with outcomes (p29). This VicWater submission will tell a brief 'contribution story' for elements of the Scheduled Premises Regulations that (1) should be retained, (2) should be tweaked, or (3) those that serve no purpose and should be discarded.

Genuine risk-based regulation (Q11)

- The EPA currently applies a 'risk-based' compliance regime, whereby high performing licence holders (including water corporations) are subject to fewer inspections and less oversight of facilities. Water corporations generally support this approach which is to be enhanced under the earned autonomy pilot program. However, water corporations continue to face stringent, costly and time consuming approval processes for relatively benign activities such as minor wastewater treatment plant upgrades.

- This review must enable the EPA to apply a genuine risk-based approach to scheduled premises regulation, including removing the requirement for statutory approvals for benign activities and targeting the largest overall environmental risks as opposed to compliance risks.

- Victoria does not lack regulatory instruments to ensure water corporation compliance with environment and community obligations. Existing regulatory instruments include but are not limited to: the *Water Act* 1989, the Water Minister's Statement of Obligations, and water

corporations Annual Performance Statement (APS) to the EPA. Within this rigorous regulatory framework, many existing EPA approvals do little other than stymie innovation and add red tape.

- Section 19A of the EP Act, gives the EPA power to grant exemptions to licence holders performing certain works including "construction, installation or modification of plant, equipment or process" by issuing a "notice" to water corporations. As far as is possible, the new Scheduled Premises regulation must codify actual exemptions, based on risk and 'contribution story' rather than create new approval pathways – even under the guise of the earned autonomy program.

Licensing wastewater treatment plants and commencement works approvals (Q1)

- The water industry supports the licence regime as it applies to wastewater treatment plants. The licences underpin a robust reporting framework, including the APS. The 'contribution story' for licensing wastewater treatment plants is positive.
- Commencement works approvals generally also serve a useful purpose. However, the claim (on page 3 of the Discussion Paper) that works approvals "drive good design" and "help prevent risks from eventuating" is not necessarily borne out in practice. EPA is insufficiently resourced to participate effectively in a process to optimise the initial design, detailed design and construction phases – specialist skills are more likely to be held by the water corporations and their consultants. Consequently, the adoption of innovations, process improvements and savings during construction is often prevented or delayed because EPA are unable to efficiently process the necessary works approval modifications. A higher level commencement works approval (that,

together with the licence application, is more targeted to outcomes rather than plant specifications) would be more a more efficient and effective instrument.

Licence compliance inspections (Q2, Q6)

- The existing licensed site inspections regime is not efficient for either party. Water corporations are hopeful that under earned autonomy, a genuine risk-based regime is adopted, including zero inspections for high performing facilities with compliance monitoring done via targeted auditing of the existing APS instrument. Since all water corporations are reporting licence compliance on an annual basis (via the APS), many are engaging independent auditors to support their internal APS processes and no water corporations have a history of recalcitrant non-compliance, in most cases the 'contribution story' of inspections is effectively nil.

- Water corporations would support a codified exemption from licence compliance inspections where an independent audit is already taking place, reported through the APS and subject to a targeted review by the EPA. EPA would retain a mechanism to remove the exemption for under-performance. However, EPA should avoid mandating that the independent audit is conducted by an EPA appointed auditor. This would add significant cost to the service for little benefit.

Modification works approvals (Q2, Q4, Q6, Q11)

- The 'contribution story' of modification works approvals is effectively nil. Since water corporations must annually demonstrate that licence conditions are being met, (under EP Act Section 31D and face sanctions if conditions are not met) there is no chance that a water corporation would modify a plant into non-compliance. Furthermore, the envisaged role of the modification works approvals to "drive good design" and "help prevent risks from eventuating" is not realised in practice since the EPA is insufficiently resourced to participate efficiently and effectively in the design process.

- In one recent case, a water corporation construction contractor suggested a set of windows be added to a building design to improve airflow and replace the fans in the original works approval specifications – thus reducing electricity use. EPA rejected the change on the basis that it was a 'modification of process' and required a separate works approval. Luckily the contractor went ahead an included the windows in the design (in addition to the fans). However, the windows were closed and the fans operated until a modification works approval was granted, now the fans lie idle.

- The modification works approval process is plagued with inefficiencies and barriers to innovation. Although EPA must nominally process approvals within a statutory timeframe, in practice this rarely occurs. Staff movements and queries about details will cause the statutory clock to be stopped for indefinite periods. Although a processing delay is of little concern to the EPA, it can result in significant project management cost and construction risk for water corporations. Water corporations look forward to the opportunity to detail these costs during the RIS process.

- The requirement for modification works approvals for wastewater treatment plants have no logical basis in risk. The overall licence conditions are annually reported against, and the overall management regime is under the oversight of a Board, a Minister and at least two acts of Parliament.

- EPA has previously acknowledged that modification works approvals serve limited purpose and in response created the works approval exemption. However, this alternate approval pathway process for an exemption is also too onerous. The works approval exemption can be almost

equal in regulatory burden to the works approval. In one recent case, it took EPA five months to authorise a works approval exemption (compared to the 2 week statutory timeframe).

- The above examples illustrates the EPA's strong preference for controlling inputs and outputs as their primary regulatory tool. Whereas contemporary risk-based regulation (including the 'contribution story' approach) places a stronger emphasis on targeting desired outcomes:

  > *The contribution story's focus is therefore not to demonstrate a singular causal link between* (regulatory) *initiatives and outcomes. Rather, the focus should be to holistically consider evidence to determine the* (regulatory) *initiative's degree of contribution to the outcome.*

  A consistent theme of water industry submissions to the EPA Inquiry and SEPP WoV Review has been that the best 'contribution story' regulation (together with the lowest cost community and environmental outcomes) is realised by setting clear outcomes and providing flexibility as to how they are achieved.

- EPA's preference for setting rigid inputs and outputs (and controlling those via approvals) may be appropriate in very high risk environments with recalcitrant licence holders who are seeking to avoid their obligations. That is hardly the case in the government-owned water industry.

- Following the completion of the licence and (high level) commencement works approval, water corporations must be authorised to make design changes and upgrades to the plant. Such innovations will never undermine the achievement of the licence conditions (because these will still be reported against in the APS and can be subject to a Pollution Abatement Notice), but can deliver process improvements and savings.

- As previously discussed, Section 19A of the EP Act, gives the EPA power to grant exemptions to licence holders performing certain works. As far as is possible, the new Scheduled Premises regulation must codify actual exemptions, for example "no works approval is required to modify plant, equipment or process in a licensed wastewater treatment plant". The EPA and the Scheduled Premises Regulations must avoid creating new approval pathways – even under the guise of the earned autonomy program.

- It is more efficient and effective to apply a blanket exemption (for low risk activities like upgrading a wastewater treatment plant) and retain a mechanism to remove the exemption if it is misused, rather than rely on a complicated and time consuming upfront approval processes.

- EPA has identified one benefit of the modification works approval as to necessitate community consultation on the proposed changes. However, community consultation is contextual and must be proportionate to the activities being undertaken. In the vast majority of cases, external parties are oblivious to wastewater treatment plant upgrades. Furthermore, the water industry has repeatedly demonstrated high standards of community engagement, in line with the requirements and expectations of the Water Act, Environment Protection Act and Water Minister's Statement of Obligations. A far more efficient and effective mechanism to ensure appropriate community consultation is to retain the right to remove the exemption from licence holders that fail to demonstrate proper and proportionate consultation.

- Water corporations note that works approvals are a revenue source for EPA. Reliance on such revenue streams can drive inefficient regulator behaviour, such as retaining approval processes that have nil 'contribution story'. Water corporations have previously advocated for a review of the EPA funding model in the submission to the EPA Inquiry.

Licensing the sewerage network (Q2, Q4)

- During the EPA Water Industry Reference Group meeting on 7 December 2015, EPA informally raised the prospect of licensing the sewerage network.

- Water corporations note that the sewerage network is licensed in other States. Despite licensing the sewerage network, other States apply far less stringent management standards to the sewerage network than Victoria does under SEPP WoV (up to a 4 in 1 containment standard, rather than 1 in 5). Water corporations further note that licensing the sewerage network would generate additional fees for the EPA.

- Water corporations oppose the expansion of the licence regime to the sewerage network during his review. The sewerage network is already regulated under other instruments, including SEPP WoV. The 'contribution story' of licensing the sewerage network is effectively nil.

- Water corporations would welcome further discussion with EPA regarding the management of sewerage networks. This discussion would start with an invitation for the EPA to respond to the results of the Water Plan 2 Statutory Audits. EPA included in the Water Plan 2 General Guidance a requirement for water corporations to conduct a statutory audit of sewerage systems management plans. Statutory Audit findings were overall positive, identifying robust systems including asset risk management models for renewals. When water corporations presented the information to the EPA there were no follow up actions.

Potable Water Treatment Plants (Q2)

- Potable water treatment plants are listed as Scheduled Premises (K03) on the basis they house chemicals for water treatment they may potentially spill to the environment. Management controls (for example bunding and telemetry) are well established and embedded in water corporation design processes, underpinned by EPA Guidelines, State Environment Protection Policies, various offence provisions, as well as Occupation Health and Safety Regulations and Dangerous Goods Regulations. The 'contribution story' of including K03 Water Treatment Plants in the Scheduled Premises Regulations is effectively nil.

Load-based triggers (Q6)

- EPA's strong preference for controlling inputs and outputs as their primary regulatory tool is further illustrated by the proposal to create more load based regulatory triggers as a way to adapt to future challenges (under *Adapting to changes* discussion paper p4). This concept is fundamentally at odds with contemporary risk-based regulation, the 'contribution story' approach and the need for greater regulatory focus on diffuse sources of pollution.

The Earned Autonomy Program (Q9, Q10)

- In the September 2015 submission to the EPA Inquiry, the water industry advocated to accelerate the implementation of the earned autonomy program. However, the water industry's confidence that it will deliver genuine benefits has since diminished.

- Consultation models are typically characterised on the spectrum below, with engagement and participation increasing from left to right. Whereas the water industry is sufficiently resourced,

skilled and knowledgeable to engage with the EPA at the 'collaborate' and 'empower' end of the spectrum, EPA's typical approach is to engage with the water industry at the 'inform' and 'consult' end of the spectrum (examples include the new 30a Guidelines, the new Recycled Water Guidelines, restricting the use of offsets to licence discharges and the development of the Licensed Operator Risk Assessment).

- The EPA's engagement with the water industry to develop the earned autonomy program risks being characterised as an 'inform' and 'consult' approach. As an example, the EPA is proposing to develop an onerous upfront approval/gateway process to determine which tier a licence holder occupies. EPA has not entertained water industry suggestions (also advocated herein) that the earned autonomy program should: (1) include a greater number of blanket exemptions (for low risk activities), (2) employ a more simple gateway process that utilises existing standards like environmental quality certification, (3) place a greater emphasis on risk-based/targeted audits of the APS to ensure compliance, and (4) place a greater emphasis removing exemptions and benefits from licence holders that demonstrably fail to achieve the desired standard.

- During a recent earned autonomy pilot program workshop EPA forecast the creation of a hierarchy of community engagement approaches in the earned autonomy approval/gateway process, such that in order to access the tier one benefits of the earned autonomy program a licence holder must demonstrate a high level community engagement – for example by having a 'community consultation strategy'. Water corporations do not dispute the importance of proportionate community engagement (and all have community consultation strategies). However, it is very difficult to define and score the concept in an upfront approval/gateway process. To include this (or other similar) approval/gateway metric(s) will achieve little other than drive superficial compliance activity, regardless of whether the licence holder actually epitomises the desirable outcome. The 'contribution story' of a new approval/gateway process (based on such metrics) to access the tier one benefits of the earned autonomy program is dubious.

- A challenge for the earned autonomy program (that incidentally is exacerbated if the EPA choose to implement a complicated approval/gateway process, but resolved if the EPA choose to apply the model as advocated herein) is whether an entity with several licenced sites (like a water corporation) should have a single 'earned autonomy licence' or licence for each site. Water corporations support a single licence to reduce administrative burden. However, that should be based on a reasonable assessment of their entire portfolio of sites, rather than a lowest common denominator approach.

- In developing the earned autonomy program, the EPA should not over-emphasise the importance of fee reductions for tier one licence holders. The magnitude of EPA licence fees is not significant relative to construction delays and compliance costs associated with low 'contribution story' regulation. Water corporations also perceive that the EPA's decision to offer scaled fee reductions has led to the over-emphasis on the approval/gateway process (because of the financial risk to the EPA's revenue). Since a complicated approval/gateway process is undesirable, the EPA might consider an alternative approach of offering post-hoc discounts or refunds to the higher performing licence holders (one or two years later), rather than upfront fee reductions.

The Licensed Operator Risk Assessment (LORA) (Q9, Q10)

- The LORA is another element of the proposed approval/gateway process to determine which tier a licence holder occupies. Water corporations are very concerned that the LORA has been developed behind closed doors and applied with too little scrutiny. Water corporations can report numerous instances where the LORA survey was conducted in a very haphazard fashion, where neither the water corporation nor the EPA officer conducting the survey had a firm idea how the data would be used – consequently there is little confidence that the LORA scores are accurate.

- The LORA data has been discussed as playing a significant role in determining which tier a licence holder occupies since the earned autonomy pilot program began in late 2014. Despite repeated requests, it has taken until late 2015 for the EPA to commit to releasing water corporations' actual LORA scores. The reluctance to be transparent with the LORA scores is concerning.

- Water corporations have little information on the LORA. One aspect of the LORA that is clear is that it is not a risk-based tool. Despite claiming that LORA will provide for "Tiers of licence conditions, applied depending on a site's individual risk profile" (discussion paper p6), the LORA assesses risk of non-compliance with licence conditions, not the overall environmental risk of the site (which is more likely to be determined by an environmental risk assessment (ERA) process).

- Thus an outcome of applying the LORA tool to the earned autonomy gateway/approval process is that a water corporation with sites that are at risk of breaching licence conditions, and in need of upgrades to avoid doing so, will face a more stringent, costly and time consuming works approval pathway in order to implement improvements, than sites where the improvements are less necessary.

- Even for water corporation licensed sites that are at high risk of non-compliance with licence conditions, there is a very strong case for a blanket exemption for certain works approvals (underpinned by compliance reporting in the APS) to be built in to the Scheduled Premises Regulations, or a statutory EPA 'notice'.

Licence amendments (Q11)

- Section 20A of the EP Act provides for licence conditions to be amended. Although it is common for licences to be amended as part of a works approval, it is uncommon to amend licence conditions to better reflect the overall environmental risk of a site.

- In order for the LORA tool to be more effective and reflective of an actual "site's individual risk profile", the licence must better reflect the overall environmental risk of a site. A clearer pathway to amending licence conditions is required. A licence condition amendment pathway should be embedded in subordinate instrument that links to both the Scheduled Premises Regulations and the State Environmental Protection Policy. It would include: an environmental risk assessment, past performance of the licence holder and environmental quality certification. As discussed at length in the water industry submissions to the SEPP WoV Review and the EPA Inquiry, it is also critical that licence conditions begin to reflect the outcomes sought in the receiving environment, rather than the output of a licensed facility.

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Cumulative impacts from diffuse pollution (Q3, Q7, Q8)

- Water corporations are reliant on the EPA to protect the environment that provides cost-effective, fit-for-purpose water to Victorians. Water corporations support greater regulatory effort on environmental harm which is understood to be from diffuse sources of pollution. Section 4.1.1 of the discussion paper covers uses the electroplating industry as an example of 'diffuse pollution'. The water industry would be more inclined to describe electroplating as an unlicensed point source of pollution, rather than a diffuse source of pollution per se. From the water industry perspective, important diffuse sources of pollution to water ways include: stormwater, pesticides and unregulated onsite wastewater systems. Where practical, feasible, efficient and warranted on risk basis, diffuse sources of pollution should be integrated into the Scheduled Premises Regulations and licensing regime. Greater regulatory effort on diffuse pollution (on a risk-basis) would have a very positive contribution story.

- Although many diffuse sources of pollution will never be licensed and there is little role for the Scheduled Premises Regulations, this review can support the management of unregulated diffuse pollution by supporting wider use of offsets for licensed (or regulated but unlicensed) discharges on a risk-basis, to realise the best environmental outcome at lowest community costs.

Asbestos

- Water corporation emergency works operate 24 hours a day, 365 days a year, generating waste which needs immediate storage. This includes excess spoil from burst water mains and sewer spills that have not yet been classified. Asbestos can be present in pipe material and surrounding soil, potentially rendering it a prescribed industrial waste. A recent Enforceable Undertaking has shown that water corporation depots can meet the definition of a Prescribed Industrial Waste Management Scheduled Premises (A01).

- Several months after the enforceable undertaking incident, and with little consultation, EPA has granted to some water corporations a two year 'Waste Classification' under the *Environment Protection (Industrial Waste) Regulations* 2009 for asbestos cement pipe recovered from maintenance activities to be stored at agreed consolidation points.

- There is a strong case to create a new exemption for the water industry within the Waste section of the General Exemptions of the Regulations. This would serve as a long term exemption that is necessary given water corporations' essential service responsibilities. The water industry would welcome an opportunity to work with the EPA to develop a Specification acceptable to the EPA that ensured appropriate waste management practices. This exemption would have a positive 'contribution story'.

Scheduling buffers for licensed premises

- (from the water industry submission to the EPA Inquiry) *Residential setbacks from water industry assets such as treatment plants have been notoriously poorly enforced in the past, resulting in costly upgrades and sometimes forcing major assets to be moved – ultimately at community cost. Although the EPA has developed Guidelines on the topic, including 2013's Recommended Separation Distances for Industrial Residual Air Emissions, the EPA generally does not lend their weight to proactively and collaboratively developing solutions to unique challenges when they arise, or to defending buffer distances once they are established.*

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- Water corporations would welcome a discussion with EPA regarding how the Schedules Premises Regulations might be used to protect buffers around licensed premises.

Financial assurances (Q1)

- (from the water industry submission to the EPA Inquiry) *Victorians expect government agencies to work together to protect the environment and implement a whole-of-government environmental policy agenda. Although, water corporations' and EPA officers generally enjoy cordial and productive relationships, the regulatory framework promotes an adversarial approach. It does not accord consideration to the fact that water corporations are government-owned businesses with a statutory responsibility to be good environmental citizens – and the potential to play a much more constructive role. Instead it forces water corporations to operate under a complex, prescriptive and inefficient regulatory and reporting framework that should be reserved for entities that might otherwise attempt to avoid their environmental obligations. For example, the EPA (as a part of a works approval and licence) for an innovative new facility forced a water corporation to hold significant funds in a bank account as a guarantee against insolvency.*

- Requiring financial assurances from water corporations does not recognise the relative financial risk government-owned entities. The 'contribution story' is effectively nil.

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