

BP Australia Pty Ltd welcomes the opportunity to provide input into the Enquiry into the Environment Protection Authority. BP provides the following brief comments primarily in the context of the management of contaminated land issues; the comments generally follow the sequential question/headings of the 'Examining the future task of Victoria's Environment Protection Authority' Discussion Paper, dated August 2015. Questions which have not been specifically addressed have either been addressed in other questions, or BP has elected not to provide comment.

Do you think the key environmental challenges which will impact the EPA in the future have been captured? Are there any others?

Future challenges will require a more sophisticated understanding of the complexity and multi-dimensional nature of environmental problems. In the matters affecting contaminated land management specifically, our view is that EPA should put more focus on:

Flexibility:

Based on the increasing number of Clean Up to the Extent Practicable (CUTEP) determinations and Groundwater Quality Restricted Use Zone (GQRUZ) declarations, EPA may need to develop regulatory instruments that are better suited to regulating activities that follow clean-up. For example, regulator instruments such as Pollution Abatement Notices (PAN) and Clean Up Notices (CUN) may not be suitable in certain circumstances that are not strictly covered under the relevant provisions of the EP Act (sections 31A and 62A, EP Act).

In BP's experience, the traditional notice issuing powers are not the most effective instruments to manage situations where contamination has been caused by multiple parties, where various media has been affected, where contamination is co-mingled, where a strict demarcation of clean-up responsibility is not possible, or where contamination is distributed across multiple property boundaries (either public or private). These scenarios are complicated further where contaminant plumes endure successive property ownership and where property development proposals come into conflict with nominated ongoing contaminant management measures.

BP suggests that more discussion is needed about the range and application of regulatory mechanisms, especially where:

- Existing environmental liability has been openly and voluntarily disclosed and incorporated into the property transfer process to third parties.
- Residual contaminants at a site present no realistic risk to receptors and thus can be classified as requiring "no further action".
- Post-CUTEP or post-Audit management measures or conditions are being implemented or have been completed satisfactorily;
- Restoration of all beneficial uses cannot be realistically achieved now or in the future due to ongoing sources of impact from industry or commercial activity;
- Post-CUTEP or GQRUZ decisions have been made and there is no realistic prospect of beneficial uses ever being restored, or the land uses are unlikely to change.
- Groundwater is not presently nor ever likely to be a useable resource.

BP suggests that in these circumstances, a flexible alternative to PANs/CUNs could lead to better outcomes. For instance, in circumstances where active clean-up has been completed but a monitoring or management phase is entered into, a "Post-Remediation" or "Management-to-Closure" notice could be issued instead of another PAN or CUN. This alternative category of notice could be applied flexibly to suit the particular risks associated with existing or likely site activities. It would effectively regulate the type of activities that may exist after clean-up notice requirements

have been complied with, but where restoration of all beneficial uses has not been (or likely ever to be) fully achieved. Currently, post-remediation PANs and CUNs may have limited effect and operation where, for example, multiple owners or occupiers have caused pollution, where changes of land ownership restricts site access or where future land activities inhibit the implementation of management measures.

An additional instrument could include a “No Further Action” notice, similar to that which exists in some jurisdictions, to formally signal an end to all remediation/management activities. We note that the NEPM contemplates a similar outcome once certain criteria are met (see Schedule A, Recommended general process for assessment of site contamination).

These alternative arrangements would provide a more effective and flexible way for EPA Officers to deal with the progressive stages of the clean-up and management process. It is BP’s experience that a disproportionately large amount of time and resource is spent on initial assessment and Auditing the phases of a clean-up process. There is significantly less focus on post clean-up management and efforts at bringing activities to a definitive closure point. This imbalance needs to be addressed if more contaminated sites are to be restored to utility in shorter timeframes. A more even-handed regulatory approach across the entire clean-up lifecycle of a site would, in our view, enable better informed community decision-making about efficient use of land and groundwater resources.

Transparency and Consistency:

A consistent and efficient enforcement process applicable to contaminated sites would, in our view, require the imposition of greater accountability and responsibility on the part of the EPA as decision-maker, and would mean that reasons for certain decisions affecting sites would need to be justified and that this in turn would lead to more robust, resilient and credible process.

Our view is that the EPA would be greatly strengthened if there was more confidence in the decision-making process and that process was based on solid empirical foundations. For example, at present, the risk prioritisation of contaminated sites deemed worthy of regulation is not clear and many inconsistencies are evident. In our view, this is largely driven by the lack of a clear notification trigger for contaminated sites, which has lead historically to the situation where some parties deliberately avoid notifying contaminated land issues to avoid regulatory scrutiny, without apparent penalty. A transparent process by which the level of regulation, scrutiny and documentation is directly proportional to the risks posed with a contaminated site is recommended.

In relation to contaminated sites, our view is that there are opportunities to increasingly use the skills and experience of the EPA staff as opposed to the current approach which appears to default to third party auditors on most matters. We find this can add significant cost and complexity to often simple issues. An example where this may be appropriate is the (common) situation where the bulk of clean-up activities have been completed, but where restoration of all beneficial uses is not possible or practical. In this scenario EPA Officers should be equipped to make an assessment (using clear and justified criteria and evidence) on whether and when ongoing management and monitoring measures can be brought to an end. Due to this lack of clarity and consistency in the decision-making process management/monitoring measures continue unnecessarily for prolonged periods without any realistic prospect of all beneficial uses being restored to some pre-determined point. EPA Officers could more readily use their discretion to make these decisions without automatic recourse to Auditor advice.

How can the EPA's role in safeguarding the community against the health effects of pollution and pollution incidents be clarified or strengthened?

Benefits could be gained from working with experts in other agencies, especially where public health is concerned, for example Department of Health (EPA SA work in a collaborative manner with Department of Health), various water authorities, and emergency services.

Benefits could also be gained from greater engagement with industry, local government and community groups on contaminated land, pollution matters more broadly (e.g. NSW EPA have subcommittees on various issues that engage with local government, industry, health, consultants) to support and assist with decision-making direction on various environmental projects.

How can the EPA better identify and where necessary address problems that are the result of past activity?

In circumstances where contaminated sites or issues are not volunteered to the EPA, our experience is that EPA relies on its Officers to make their own assessment on whether such problems are worth addressing. While this is appropriate and should continue, it is our experience that EPA officers may benefit from clear and objective guidelines on how this assessment is to be undertaken to ensure that there transparent and consistent outcomes, and in order to avoid any sense of unfairness and bias.

EPA could also investigate the use of other tools to track known or suspected contaminated sites. Other EPA's and Regulatory agencies use different tools for this, examples of which are discussed below. For systems like these to work, formal notification requirements may need to be adopted.

What role should the EPA play in improving environmental outcomes beyond those necessary to safeguard human health?

EPA has a pivotal role in educating the general public about environmental protection, risk identification and assessment and must go beyond its core regulatory function to guide business towards measures targeted at liability prevention and precaution. Safeguarding the environment and human health is a very complex task which involves a sound understanding of scientific principles. EPA must be engaged in the public debate about science and its role in policy formulation and implementation.

EPA should play a more prominent role in facilitating/mediating multi-party issues. For example, where a contaminant plume has migrated to such an extent that several property owners/occupiers and other important stakeholders have been affected, the key communications often fail if because affected third parties often don't understand the issues, are not willing to countenance the consequences or simply refuse to engage.

The EPA should play a more prominent role and draw on its experience and knowledge to facilitate a process of information exchange, especially where the issues are complex. Risk and hazard communications can fail for many reasons that have been well-documented elsewhere. Despite often genuine attempts by the polluter/s to engage with the community, it is often not possible to advance the communication process without the regulator's active involvement and intervention. We recommend that EPA consider providing a formal guideline, a discussion forum or even a structured mediation facility (the choice of which would depend on the complexity of the particular issue) to enable issues to be properly vented, to generate appropriate remedial options and to allow disputes to be settled before they escalate.

What can we adopt from other regulators and regulatory models to implement best-practice approaches and ensure that the EPA can rise to Key future challenges?

There are many local and international examples of regulatory frameworks or regulation of specific issues that lessons could be learnt from.

Risk Based Regulatory Framework

The SA EPA uses a risk based approach to the assessment and remediation of contaminated sites. The process that everyone is required to follow is clearly laid out in the guideline documents creating clear expectations. SA EPA also utilise a site contamination index which provides a useful benchmark framework and tracking tool of contaminated land uses and provides the public and private industry with a way to assess the relevant risks, particularly in the context of land purchases. The framework also allows for formal transfer of liability to a third party, something which Victoria is currently lacking.

SA EPA's benchmarking and risk prioritisation is assisted by having a clear and unambiguous regulatory notification triggers, which also exists in most other jurisdictions in Australia. The lack of a definitive notification trigger leads to a distorted view of those activities which warrant EPA attention. The current focus of EPA intervention is on those activities and information which is volunteered by diligent parties or those activities that pose an imminent hazard. However, we consider that the absence of a formal notification trigger may mean that many pollution incidents go un-reported.

Contaminated Land Registers

EPA could investigate the use of other tools to track known or suspected contaminated sites. Various EPA's and regulatory agencies use different tools for this, for example the Department of Environment Regulation, WA use a system of classifying known contaminated sites and suspected contamination sites.

In New Zealand, Greater Wellington Regional Council (Regional Councils perform a similar function to EPAs in Australia having regulation over contaminated land) maintains a register of sites where activities involving hazardous substances have or may have taken place. The register is formally known as the Selected Land Use Register (SLUR), it records sites that fit the definitions in the Ministry for the Environment's Hazardous Activities and Industries List (HAIL). Sites that are registered in SLUR are known (or suspected) to have been involved (historically or currently) in the use, storage or disposed of hazardous substances and as a consequence may contain residues of these substances. In some cases these sites will be "contaminated sites" and in others not; to distinguish between sites, SLUR classifies sites under six distinct categories. The categories range from Verified/Unverified History of Hazardous Activity or Industry, Contamination Confirmed, Contamination Acceptable/Managed/Remediated, No Identified Contamination or Entered in Register In Error. As mentioned earlier, use of a similar tool could help EPA in designating the various stages of remediation and apply an appropriate classification.