



**Discussion Paper: Ministerial Advisory Committee
for the Inquiry into the Environment Protection
Authority, August 2015**

Submission by Boroondara City Council

Adopted by Council at the Ordinary Council Meeting on 26 October 2015

1. Introduction

The City of Boroondara (**Council**) is pleased to make a submission to the Inquiry into the Environment Protection Authority (**EPA**) Discussion Paper.

Council fully supports this Inquiry and is of the view that it provides an opportunity to address important issues. It is Council's hope that this Inquiry will result in meaningful, long-term changes and improvements to the EPA's operation and funding arrangements as well as detailed review of the Environment Protection Act. Such changes and improvements are essential because the EPA performs an important role through its technical expertise and enforcement functions. Furthermore, both Council and the community have high expectations of the EPA, particularly with regard to management of contaminated land, the environmental audit system and education.

Council is in a strong position to make submissions about the EPA given Council interacts with the EPA while performing a variety of its functions.

Management of potentially contaminated land and the Environmental Audit Overlay

The issue of management and identification of potentially contaminated land (**PCL**) and land affected by the Environmental Audit Overlay (**EAO**) is a significant concern for Council.

Council is concerned that it does not possess the resources or the technical expertise to perform this role effectively. Council submits that the EPA, as lead agency in this field, is best-placed to identify, manage and enforce contaminated land. Therefore, Council opposes being burdened with the ongoing responsibility for enforcement of conditions imposed on Statements of Environmental Audit, via Planning Permit conditions. In this regard, Council made a detailed submission to the Potentially Contaminated Land Advisory Committee in October 2011. For the purposes of this Inquiry, Council adopts that submission, which is included as **Appendix 1**.

Council endorses the position of the Discussion Paper, that early intervention is an efficient and cost-effective preventative measure. To this end, Council recommends that modifications be made to the Victorian Planning Provisions (**VPPs**) to make the EPA a 'determining referral authority' for all Planning Permit applications for a sensitive use on land affected by the EAO and for land having a high risk of contamination following a desktop review of the site's land use history.

Investigations and enforcement

The alleged illegal removal of waste material (such as contaminated soil and underground storage tanks) from sites under redevelopment is a significant issue within Council's jurisdiction. Council's recent experience has been that the EPA does not have sufficient resources to investigate or prosecute these allegations, despite being made aware of them by Council and the appointed environmental auditor. Council considers this to be inadequate and an unacceptable outcome for the

community. As stated, Council does not have the expertise or authority to 'pick up the slack' in matters where the inadequate resourcing of the EPA renders them unable to carry out their expected responsibilities.

The following submission is Council's response to the questions posed by the Discussion Paper. In preparing this submission, input has been sought from Council's Statutory Planning, Strategic Planning, Health Services, Environment and Sustainable Living and Environment and Infrastructure Directorate.

Council hopes that its submission is useful to Ministerial Advisory Committee's Inquiry into the EPA.

2. Response to the questions posed in the August 2015 Discussion Paper

ABOUT THE EPA

Questions posed by the Discussion Paper

- *What aspects of the EPA's work do you value and wish to preserve into the future?*
- *How can the EPA effectively work in partnership with other government agencies to meet the environmental challenges of the future?*

The EPA is an impartial, authoritative and respected source of independent science based information for the community and government on matters relating to our environment.

We believe the EPA should strive for global best practice in environmental protection. In relation to contaminated land (prevention, identifying, monitoring and remediating) this will require a collaborative approach with local government. Contaminated land is discussed in further detail later in this submission.

Council investigates a variety of complaints, such as noise from small commercial premises. Council is also involved in the investigation of noise from music venues. The EPA assists Council by providing the zoning levels required by the SEPPs and Council would like to maintain this relationship. Council also acknowledges the assistance the EPA has provided with regards to investigations regarding pollution and emissions from small industries operating in the municipality. Council therefore values the technical expertise held by the EPA and the assistance it provides.

However, it is Council's view that often the EPA does not proactively liaise with Council in matters regarding noise complaints, solutions with regards to PCL or the alleged illegal removal of contaminated material from redevelopment sites. Furthermore, in some cases where the EPA has assisted Council in investigations, Council has found it difficult to establish contacts within the EPA to obtain updates in the progress of their investigations. Council has also found that EPA officers do not possess sufficient knowledge about the Victorian planning system. For example, in one case where the EPA was investigating the spread of contamination from a redevelopment site to adjoining properties, the EPA suggested solutions that would

not have been able to be practicably or fairly achieved. For example, the solution suggested by the EPA was for Council to prohibit construction on the affected neighbouring (residentially zoned and residentially used) property. This was problematic for two reasons. Firstly, the existing planning controls would not have enabled Council to do prohibit or even refuse an extension to the existing dwelling or construction of a new dwelling(s). Secondly, the EPA's suggested actions were not transparent or easily discoverable in the event of the affected property being sold at a later date. A more appropriate solution would have been for the EPA to propose to apply the Environmental Audit Overlay to the affected property, via a planning scheme amendment. Council is of the view that these issues are symptomatic of insufficient funding and a poor delineation of enforcement responsibilities.

At present, Council finds its relationship with the EPA is fragmented and occurs only when specific matters arise. Council is of the view that the EPA's functions would be greatly enhanced by an ongoing relationship with Council officers in regards to these issues. Such an ongoing relationship would enable both Council officers and the EPA to exchange concerns, share knowledge and work through solutions together.

Council is also of the view that the EPA should be undertaking more of an educational and advisory role with local government. For example, this could involve EPA officers making presentations to Council officers (such as Statutory Planners or Environmental Health Officers) about particular topics such as using and applying the State Environment Protection Policies (**SEPPs**) or basic information sessions about risks associated with contaminated land.

An ongoing challenge for Council has been the lack of a clear delineation between the enforcement role of the EPA and the role of Council, particularly in relation to noise complaints and land contamination. We note the useful table published on Pages 18 and 19 of the Discussion Paper, however it is our experience that the responsibility for investigation and enforcement of complaints in relation to noise emissions can often be pushed back to Council by EPA staff, even in instances where the noise source comes under the jurisdiction of the EPA.

For example, enforcement responsibilities between the EPA and Council for noise complaints relating to residential construction noise is not clear. Council considers that it would be appropriate to review the offences under the *Environment Protection Act 1970* and the *Health and Wellbeing Act 2008* so that clear delineation of enforcement responsibilities is provided. While it may be appropriate to increase the enforcement responsibilities and powers for local government (for example enforcement of SEPPs) this should be met with a commensurate increase in funding for local government.

Council's experience has been that the EPA's enforcement activities tend to focus on large, higher-risk land uses (such as landfills) at the expense enforcing other allegations (such as developers removing potentially contaminated soil from development sites). While Council recognises that this is an outcome of the EPA's risk-based enforcement approach, Council is of the view that more resources are required to effectively enforce the other allegations that may not be as high-risk. Council's experience is that the community expects EPA enforcement to occur

regardless of the risk-factor associated with the alleged non-compliance. This is discussed further later in this submission.

Recommended actions:

- 1. More clearly define the roles of Council, the EPA and Victoria Police in relation to enquiries, complaints and enforcement related to noise emissions.**
- 2. Investigate and implement a formal process whereby more effective working relationships between the EPA and local councils can be established and maintained.**

PROTECTING PUBLIC HEALTH

Question posed by the Discussion Paper

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

Funding

Major pollution incidents within the City of Boroondara's jurisdiction are uncommon as Council does not have any industrially-zoned land or many land uses requiring EPA works licences within its municipality. Council considers that the main human health risks within its municipality are from contaminated land (as discussed on Page 21 of the Discussion Paper).

Council's view is that the community is best protected by risks from pollution and pollution incidents by ensuring that the EPA will:

- Initiate early contact with land owners / developers via this submission's recommended changes to the VPPs that would make the EPA a 'determining referral authority' in certain circumstances;
- Proactively monitor construction sites where contamination is known to exist;
- Investigate alleged illegal activities on contaminated land such as removal of contaminated soil and underground storage tanks; and
- Take enforcement action where illegal activity is suspected.

In order to achieve this, appropriate funding is required.

Council would support the investigation of a levy to fund the monitoring and enforcement of properties with ongoing obligations under a Statement of Environmental Audit (**SEA**). Council would not support a general levy that was applied indiscriminately (e.g. to all rateable properties, or collected via a utility bill). In the case of monitoring or enforcing a SEA, only those seeking to obtain a development advantage by changing to a sensitive use should be burdened by the cost of administrative tasks associated with environmental clean-up.

Council notes that currently, most of the EPA's revenue is sourced from municipal and industrial landfill levies and that comparatively less funding is obtained from State Government grants. As the owners and operators of municipal landfills in Victoria, the local government sector therefore contributes substantially to the EPA's funding. Council acknowledges that landfill levies will remain an important source of funding for the EPA into the future. However, Council submits that the Victorian State Government should provide increased funding to the EPA to enable it to perform its functions and responsibilities effectively. Council is strongly of the view that funding of the EPA should primarily be a Victorian State Government responsibility.

Council further considers that there the opportunity to return some of the monies collected from the local government sector through the landfill levy, to enable local councils (in partnership with the EPA) to run local programs to reduce pollution and greenhouse gas emissions in their communities. Such programs would directly benefit the community.

Further areas of research

The SEPPs have not been reviewed for some time. Council considers that the SEPPs should be reviewed to ensure that they remain current.

Council relies on SEPPs and other EPA publications for the assessment of the likely impact of noise emissions when assessing Planning Permit applications. However, it is Council's experience that there are gaps in the body of research and in the SEPPs prepared and adopted by the EPA in relation to some noise emissions and 'sleep disturbance' events. Three such examples of these gaps are:

- There is limited guidance in the SEPPs for noise emissions from human voices and speech (such as from child-care centres or outdoor areas of restaurants and licenced premises);
- There is no SEPP that addresses noise and vibration from railways;
- There are a variety of overlapping methods for regulating noise emissions associated with construction activity. These include the EPA's "Noise Control Guidelines" for different types of construction work (e.g. road repair and track maintenance, large scale residential construction in non-residential areas, mixed use developments and commercial construction), local laws (for those Councils that have opted to create them) and via planning permit conditions. However, it is considered that there should be one consistent overarching approach to regulating construction noise. To achieve this, it is recommended that the EPA's "Noise Control Guidelines (Publication 1254, dated October 2008) be elevated to the status of a SEPP.

In all these examples, it is very difficult for Council to make an informed assessment of likely noise impacts. Given this lack of guidance, permit applicants (and in many cases Council, if the development proceeds to the Victorian Civil and Administrative Tribunal for a decision) must shoulder the financial burden of engaging acoustic experts to determine what the noise impact will be and what measures are required to manage it.

Council considers that this is an unacceptable situation which leads to uncertainty and increased costs for both permit applicants, Council and the broader community.

In some instances, Council has had to rely on environmental protection standards applicable to New South Wales or Queensland when considering the impacts of railway noise and vibration on proposed developments. Council submits that there must be environmental protection standards unique to Victoria.

Recommended actions:

- 3. Ensure the EPA is appropriately funded and resourced, through increased State Government grants, to ensure it maintains an ability to achieve global best practice in environmental protection.**
- 4. Investigate the creation of a site-specific levy to fund the monitoring and enforcement of properties with ongoing obligations under a Statement of Environmental Audit.**
- 5. Investigate the creation of a program whereby some of the funds collected through the municipal and industrial landfill levy are returned to local councils for programs to reduce pollution and greenhouse gas emissions at the local level.**
- 6. Review the State Environment Protection Policies to ensure that they remain current and reflect best-practice.**
- 7. The creation of SEPPs for the following types of noise emissions (including but not limited to):**
 - a) Outdoor events / open-air activities, including noise generated by people (e.g. child care centres and outdoor areas of restaurants and licenced premises);**
 - b) “Sleep disturbance” events;**
 - c) The impacts of railway noise and vibrations on proposed developments;**
 - d) Construction activities.**

PROTECTING LIVEABILITY - THE IMPORTANCE OF LAND USE PLANNING

Questions posed by the Discussion Paper

- How could environmental regulation and other statutory frameworks more effectively prevent future environmental risks and land use conflicts?*

The overall role of the EPA

It is Council’s position that the EPA is the agency best-placed to deal with technical matters related to identification and management of contaminated land. Council does not possess the technical expertise to effectively undertake these tasks. Therefore,

Council recommends that the EPA be appropriately funded to enable it to effectively manage and enforce matters relating to contaminated land.

The primary role of the EPA in relation to land use planning should be the identification, assessment and monitoring of PCL. PCL is generally identified within the planning scheme through the EAO and has largely been handed down to local councils to administer through their planning schemes. However, local councils do not have the capacity, the technical expertise or the resources to ensure that contaminated sites are properly administered and that there are no adverse health effects as a result.

The EPA is the body that should have the expertise and legislative authority to administer the processes of identifying, monitoring and remediating PCL throughout the state.

The Victorian State Government should take on more responsibility in this matter, and properly resource the EPA in order to facilitate a proactive approach in identifying PCL and ensuring that it is suitably designated within planning schemes.

Identification of potentially contaminated land

In 2011 the Advisory Committee into Potentially Contaminated Land investigated the methods of identifying PCL and whether that should be done in a proactive or reactive manner. Council at that time supported a proactive method of identification (see **Appendix 1** for a copy of Council's submission). Council continues to rely on that submission for the purposes of this Inquiry.

However, the identification of PCL remains the responsibility of local councils through the planning scheme amendment process or on an ad-hoc, site-by-site basis as part of the Planning Permit application process. This method can be prone to misidentifying sites and relies on untrained, non-experts (Council planners). Council does not consider this to be an acceptable approach given the potential for environment and human health impacts.

Council is of the opinion that the identification of PCL should be undertaken on a proactive basis by the EPA as the body responsible for administering the *Environment Protection Act 1970* and having the in-house capacity and skills required for the task. It should not be left to local councils. Council would support initiatives to assist the EPA in compiling that information given local councils have detailed local knowledge about their municipalities.

To illustrate how it can be done better, Council refers to the identification of flood-prone land by Melbourne Water through the Special Building Overlay (**SBO**). Melbourne Water proactively undertakes the required analysis to identify land that is potentially subject to flooding and then works closely with local councils to include those properties in the SBO through a planning scheme amendment process. For land covered by the SBO, Melbourne Water is a statutory referral authority under Section 55 of the *Planning and Environment Act 1987*. This means that applications to develop land within the SBO must be referred to Melbourne Water for their expert assessment. This is a good example how decisions are made by experts that have

the required technical skills to properly identify land and ensure appropriate development outcomes.

Similarly, VicRoads is a statutory referral authority for any changes to an existing crossover in a Road Zone. This is despite most councils having in-house traffic engineering expertise. Again, the system relies on the technical experts to have direct influence on the management of a specific issue without relying on non-experts to make decisions.

For these reasons, it is not considered to be satisfactory that matters of significant risk to the environment and human health involving contamination are left to non-experts within local councils to make critical judgments on the adequacy of expert information, management plans and whether enforcement action is warranted in the circumstances. From municipality to municipality, issues in relation to contaminated land occur relatively infrequently. As such, it is not cost-effective for Council to maintain its own specialist staff for this purpose. A centralised, specialist body is required to manage all aspects of contaminated land, with assistance from councils. As the leading authority in environmental protection, the EPA is best placed to take the lead role.

Council strongly recommends that the role of the EPA is significantly strengthened similar to how other state and service agencies already operate within the planning system. As such, Council recommends that modifications be made to the Victorian Planning Provisions (**VPPs**) to make the EPA a 'determining referral authority' for all Planning Permit applications for a sensitive use on land affected by the EAO and for potentially contaminated land (following a desktop review of the site's land use history). This will ensure that the EPA is involved in the Planning Permit application process from an early stage and will allow the EPA to apply its specialist input. This will also ensure that early contact and communication is established between Council, the EPA and the developer/land owner.

Similarly, it would be beneficial to establish a set of standard Planning Permit conditions that must be applied to Planning Permits for sensitive uses on contaminated or potentially contaminated land, to ensure a consistent approach across Victoria. A similar approach to this is already established in the VPPs for the inclusion of standard mandatory subdivision permit conditions, at Clause 66.01-1 (Mandatory conditions for subdivision permits). A suggested set of permit conditions is included at **Appendix 2**. It is Council's position that the responsibility of the enforcement of any such standard Planning Permit conditions fall with the EPA, not Council. As already stated in this submission, Council would support the creation of a site-specific levy that would help fund the EPA's monitoring and enforcement of ongoing conditions attached to Statements of Environmental Audit.

Maintenance of a register of identified PCL

A central register of PCL is critical to the efficient operation of the system. Currently such a register does not exist with reliance on each council to set up and maintain a register of PCL. Council considers that the EPA, as the administrator of the *Environment Protection Act 1970* should be singularly responsible for the recording, ongoing maintenance and availability of information.

Such a register would be greatly facilitated by the EPA taking a lead role in the identification and management of PCL as noted above. Ongoing maintenance of a register by the EPA would also facilitate a more efficient process for the removal of an EAO rather than relying on individual property owners to prompt the process for removing the EAO in instances where it is no longer required.

Enforcement of audit conditions

It is Council's view that the EPA should take the primary role in the enforcement of SEA conditions.

Council is of the view that the ongoing management of and compliance with conditions imposed in regard to particular sites should not be the responsibility of council. Council officers do not have the necessary technical expertise to deal with breaches of SEA conditions. As already stated in this submission, Council would support the establishment of a site-specific levy to provide the EPA with funding for the enforcement of ongoing conditions attached to a SEA.

Recommended actions:

- 8. Make the EPA responsible for the identification, management and enforcement of matters related to land covered by the EAO or land that is potentially contaminated, as described in this section of this submission.**
- 9. Modify the Victorian Planning Provisions to make the EPA a 'determining referral authority' for all Planning Permit applications for a sensitive use on land affected by the Environmental Audit Overlay and for land that desk top analysis shows is a high risk of being potentially contaminated.**
- 10. Modify the Victorian Planning Provisions to insert a set of mandatory Planning Permit conditions that address the following matters:**
 - a) The timing for obtaining a Statement or Certificate of Environmental Audit;**
 - b) The handling and disposal of contaminated soil;**
 - c) Restricting the carrying out of buildings and works prior to the obtaining of a Statement or Certificate to buildings and works that necessarily form part of the Environmental Audit process; and**
 - d) Requiring all directions and conditions contained in a Statement of Environmental Audit to be complied with to the satisfaction of the EPA.**

KEEPING COMMUNITIES SAFE - THE EPA AND EMERGENCY MANAGEMENT

Questions posed by the Discussion Paper

- *What role should the EPA play in emergency management?*

The EPA possesses specialist knowledge that would be beneficial in certain emergency management situations, where there is an actual or imminent large scale risk to the community from pollution.

Emergency Management Australia is the Australian Government agency responsible for reducing the impact of emergencies on the Australian community and built and natural environment. It is also the lead Australian Government agency for emergency response. Prevention is equally as critical to emergency management as response and recovery activities. It is noted that the EPA is prescribed the status of “responder agency” under the *Emergency Management Act 2013*, with defined responsibilities under that Act. However, it is considered that membership of the various State and Regional Emergency Management Committees established under Part 5 of the *Emergency Management Manual Victoria* should be reviewed for opportunities to utilise the skills and expertise of the EPA.

Recommended action:

- 11. Review the EPA’s role in emergency management in Victoria to ensure that it reflects best-practice.**

BEING STRATEGIC - PREVENTING PROBLEMS BEFORE THEY ARISE

Questions posed by the Discussion Paper

- *How can the EPA better identify and, where necessary, address problems that are the result of past activity?*
- *What can the EPA do to minimise hazards for the future?*

Council considers that the EPA has an important proactive role to play in the identification, management and enforcement of contaminated land.

As stated in this submission, Council considers that an improved regime for managing contaminated land will significantly minimise hazards to human health in the future. Council’s concerns are two-fold:

1. Identifying and managing contaminated or potentially contaminated land (PCL);
2. Ongoing responsibility for enforcement of conditions arising from a Statement of Environmental Audit (SEA).

Recommendations as part of this submission that would address Council’s concerns include increasing the State Government’s funding to the EPA to provide greater ability for EPA staff to respond to land contamination enquiries, complaints and enforcement matters as necessary. Other recommendations have included changes to the Victorian Planning Provisions, to make the EPA a “recommending referral authority” for proposals involving contaminated or PCL, implementing a standard set of planning permit conditions for applications for sensitive uses on contaminated land and implementing a site-specific levy for contaminated sites, to fund obligations relating to the enforcement of conditions arising from a SEA.

PROTECTING THE ENVIRONMENT - AN INCREASED FOCUS ON ENVIRONMENTAL OUTCOMES

Question posed by the Discussion Paper

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

It is Council's experience that the community looks to the EPA to take the lead in educating the community. As already stated in this submission, it is Council's view that the EPA has a very important role to play in terms of educating the community and providing assistance to Council where necessary.

Recommended action:

12. Investigate improving environmental outcomes beyond those necessary to safeguard human health by:

- **Providing support to local councils as described in this submission;**
- **Taking on a greater educational role in the community; and**
- **Providing local councils with funding (through the municipal and industrial landfill levy) to run local programs in partnership with the EPA, to reduce pollution and greenhouse gas emissions at the local level.**

THE EPA AND CLIMATE CHANGE

Question posed by the Discussion Paper

- *What role should the EPA play in reducing greenhouse gas emissions?*

The EPA should play a role in regulation and enforcement of greenhouse gas emissions. This exact role would depend on the context of the prevailing Federal regulatory framework. A particular opportunity exists to regulate activities and organisations which fall below the thresholds for Federal regulation.

Recommended action:

13. Investigate increasing the EPA's role in regulating activities and organisations which fall below the thresholds for Federal regulation.

ENVIRONMENTAL JUSTICE

Question posed by the Discussion Paper

- *How do you see environmental justice being applied to the work of the EPA?*

Council's experience is that the community expects justice to be obtained for illegal activities. As explained in this submission, it has been Council's experience that the EPA has not adequately investigated complaints referred to it by both Council and the community, or undertaken necessary enforcement activity when breaches are known to have occurred.

Council reiterates its position that the EPA must be appropriately resourced to ensure that it is able to effectively administer and enforce the laws it is responsible for.

REGULATORY APPROACHES

Question posed by the Discussion Paper

- *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?*

In preparing this submission, Council has reviewed the regulatory framework and stated vision and policies of the Commonwealth Scientific and Industrial Research Organisation (CSIRO) and various other state-based Environment Protection Authorities.

It is considered that there are a considerable number of shared values and objectives between the EPA and the CSIRO. It is recommended that the EPA review and adopt as applicable the CSIRO's "Health, safety and environmental sustainability policy" and "Science and delivery policy". We also pose the question, should the research carried out by the EPA be carried out by the CSIRO? Having two separate research-based environmental organisations may create inefficiencies. There may be an opportunity for research traditionally carried out by the EPA to be carried out by the CSIRO.

Recommended action:

- 14. Investigate whether there is an opportunity for research traditionally undertaken by the EPA to be carried out by the CSIRO.**

CONCLUSION

Questions posed by the Discussion Paper

- *Are there any other issues relevant to the Terms of Reference that you would like to raise that have not been covered in this paper?*

Council has raised all its issues in this submission.

Council thanks the Advisory Committee for the opportunity to make this submission. Council requests that due consideration be given to each of Council's recommended

actions. Given the importance of the EPA's role in protecting human health, Council hopes that this Inquiry will result in ongoing and meaningful changes to the EPA.



Potentially Contaminated Land Advisory Committee

Submission by the City of Boroondara

31 October 2011

Contact: [REDACTED]
Co-Ordinator Statutory Planning

[REDACTED]
[REDACTED]

Introduction

Boroondara City Council (Council) appreciates the opportunity to make a submission on the Potentially Contaminated Land Advisory Committee's (Committee) Issues and Options Paper (Paper).

Protecting the community from contaminated land is an important issue. The current mechanism in the Victoria Planning Provisions (VPP), while a step in the right direction, has led to confusion and overregulation in some instances and perhaps not enough regulation in others. As such, Council supports the Committee's effort to improve the regulation of potentially contaminated land.

At the outset, however, Council questions the basic premise that Council, through the Statutory Planning process, is best placed to manage contaminated land. As discussed throughout this submission, Council is concerned that it has neither the resources nor the technical expertise for this role and that other agencies may be better suited for management of this issue. Council understands that this viewpoint is discussed extensively in the Municipal Association of Victoria's submission and will not be repeated here.

With that caveat in mind, Council has endeavoured to respond to the issues and options presented by the Committee. Council's submission follows the Paper's format by providing Council's response to the specific questions and options presented.

5.1 Identifying contaminated sites within the planning system

Question 1: Is there a need for councils (or some other agency) to systematically identify potentially contaminated land?

Option 1A: Do nothing: Continue using the current 'alarm bell' approach that relies on the planner deciding that potential contamination might be an issue based either on an intimate knowledge of the area or a site history.

Option 1B: Council (or other agency) map potentially contaminated land based on a systematic assessment.

Council's answer to Question 1 is 'yes'. Option 1B is preferable to Option 1A. The problem with the current 'alarm bell' approach is that it is too easy for potentially contaminated land (PCL) not to be properly identified and remediated.

There are several reasons that a failure to identify PCL might occur. Some forms of contamination are not obvious to detect based on review of a planning permit application alone including contamination from imported fill or unknown storage of toxic chemicals. A planner may not identify a potentially contaminated site due to inexperience as to what kinds of uses may result in contamination or unfamiliarity with the site. Further, records available or the history of the site may be incomplete.

The existence of the Environmental Audit Overlay (EAO) can create a perception that PCL has already been identified. Therefore, if a site is not in the EAO it may be perceived that there is no need to consider potential contamination.

Accurate identification of known or potentially contaminated land, and implementation of appropriate local policy, would reduce the risk that appropriate remediation is not required. The need for further strategic work is identified in Clause 21.06 of the Boroondara Planning Scheme:

Undertaking further study to identify known contaminated land in potentially sensitive areas, and apply the Environmental Audit Overlay and zone appropriately so as to achieve flexible future use options.

Preparing a local policy to apply to zones where residential or another sensitive uses are permissible, to ensure appropriate rehabilitation takes place before new development occurs in areas identified in the Environmental Audit Overlay.

To complete this type of strategic work, Councils should be provided with adequate funding and technical assistance.

Question 2: If potentially contaminated land is systematically identified, how should this information be recorded and made available?

Option 2A: Council or other agency maintains a separate register.

Option 2B: A new planning scheme overlay be created:

To identify areas that may be contaminated, as distinct from areas that are known to be contaminated.

To ensure that land that may be contaminated is suitable for a use which could be significantly adversely affected by any contamination.

Option 2B is preferable to Option 2A. As the issue of PCL is managed through the planning process, clear identification of affected sites through a planning scheme overlay would produce the safest outcome for the community. Also, the application of the proposed revised Environmental Audit Clause 45.03 attached to the Issues and Option Papers requires identification of land that is 'known' to be contaminated as compared to 'potentially' contaminated land. The revised Clause 45.03 will not work if the two different types of land are not identified in a planning scheme overlay.

5.2 VPP tools to manage contamination

Question 3: Should certain buildings and works be exempted from the EAO?

Option 3A: Broad exemption: Exempts from the requirement to carry out an audit for buildings and works that are minor, associated with an existing sensitive use and don't result in uncovering contaminants by excavating soil.

Option 3B: Detailed list - A detailed list of exemptions for buildings and works. The list could include:

- *Routine maintenance and repairs to an existing building.*
- *Buildings and works that do not involve the removal of soil.*
- *Buildings and works more than 3.0 metres above natural ground level that would not result in an increase in the number of dwellings on the site.*
- *Buildings and works on a site that contains an existing dwelling that would not result in an increase in the number of dwellings on the site.*

Council's answer to Question 3 is 'yes' as there have been situations under the current regime where minor works required onerous and expensive environmental audits. Option 3B is preferable to Option 3A as it will provide clearer guidance to Council planners and result in a more uniform application of Clause 45.03 across Councils.

Question 4: Should the requirement for an audit be waived in the EAO when there is no change to exposure, or no relationship between the scale of works proposed and the scale of the clean up that might be required?

Option 4A: Maintain the mandatory requirement for audit in EAO.

Option 4B: Provide a mechanism to waive the audit requirement subject to a permit.

The Paper states that "[t]he point is not to prove an alternative to an audit for major redevelopment but to ensure an audit is not required when there is no significant health risk" (page 18). Council understands that the need to protect the community from contaminated land should be balanced with the potentially onerous environmental audit requirement.

As such, Council's answer to Question 4 is a qualified 'yes' and the preferred outcome is Option 4B to avoid requiring an environmental audit when one is clearly not needed. However, the caveat to Council's response is that the requirement should only be waived after referral of a planning permit application to the Environment Protection Authority (EPA) or, alternatively, to a qualified auditor and the recommendation for waiver is made by someone with appropriate technical expertise.

5.3 Alternatives to the audit process

Question 5A: Is there a need to set better guidance about when an audit is required?

Question 5B: Should the VPP provide guidance on alternatives to an audit?

Option 5A: Do nothing: the current system remains.

Option 5B: Make audits mandatory where there has been a previous industrial use.

Option 5C: Provide guidance around a range of approaches. In the VPP provide a 'stepped approach' so that an audit is only required where necessary and define the requirement for a Site Remediation Plan that might deal with contamination in the absence of an audit, including how to deal with groundwater, continuing as a source of contamination and providing a reporting mechanism.

Council's answer to Question 5A is 'yes' there is a need for better guidance about when an environmental audit is required. Council's answer to Question 5B is also 'yes'. Council submits that Option 5C would be the most efficient and effective way to ensure appropriate environmental assessment and notes that the proposed revised Clause 45.03 suggests such a mechanism. Comments on that proposal are provided below.

Council is concerned about the availability of sufficient technical expertise to determine the best approach if Option 5C were imposed. As the issue of contaminated land is relatively confined in Council's jurisdiction, it would likely not be possible or cost effective to hire staff with technical expertise for this sole purpose. Council supports the suggestion that the EPA serve as a referral authority for planning permit applications and provides advice to Councils on the appropriate level of environmental assessment.

5.4 Precinct identification

Question 6: Is there benefit in taking a systematic precinct based approach to assess the potential for contamination before rezoning of areas takes place?

Option 6A: Apply the EAO on precautionary basis. This can mean overly tough restrictions on development.

Option 6B: Take a precinct approach and assess the potential for contamination in a systematic way as part of the rezoning of a redevelopment area. This can be costly process and does not always mean that properties can be excluded.

Council does not have large precinct-type areas that may be rezoned from an industrial to a 'sensitive' use and, accordingly, will not comment on this question.

Question 7: In areas where the EAO may have been applied to land without contamination what approach should councils take?

Option 7A: Leave the existing EAO in place on residential properties in residential zones. Section 5.2 (VPP tools to manage contamination) deals with issues around providing flexibility in this overlay.

Option 7B: Replace the existing EAO on residential properties in residential zones with a new planning scheme overlay to identify areas that may be contaminated.

Council understands that this question is intended to apply in the interim to sites currently in an EAO before the further strategic work discussed above is completed. As the application of the EAO is mandatory Council will continue to apply the EAO until the Boroondara Planning Scheme has been amended. In other words, Council does not have discretion in how it applies the overlay. Council does support the removal of sites from the EAO where it can be clearly established that the site is not contaminated. For example, sites where an environmental audit has already been completed.

5.5 Timing of an audit during the planning scheme amendment process

5.5.1 The current guidance

Question 8: Is it appropriate to take a risk approach to the timing of an audit and only require an audit early when there will be no further management of the development process?

Option 8A: Try to clarify 'difficult or inappropriate'.

Option 8B: Adopt a risk approach and only require an audit early when there will be no further management options (or limited further management options) of the development process.

Option 8C: Always require an audit before an amendment is approved.

Council does not have large precinct-type areas that may be rezoned from an industrial to a 'sensitive' use and, accordingly, will not comment on this question.

5.5.2 Knowing land can be cleaned up

Question 9: Is a Site Remediation Strategy Plan an appropriate way for councils to satisfy themselves that the contamination can be managed?

Option 9: Formalise a Site Remediation Strategy Plan as a way for councils to satisfy themselves that the contamination can be managed.

Council does not have large precinct-type areas that may be rezoned from an industrial to a 'sensitive' use and, accordingly, will not comment on this question.

5.6 Managing building and works, and remediation

Question 10A: Should remediation works (potentially including basement construction) be allowed by way of separate permit, or as part of the main permit for a development?

Question 10B: Are safeguards needed if construction is undertaken but a certificate or statement of audit cannot be achieved?

Option 10A: In a revised EAO provide for a separate permit, for works necessary to assess environmental conditions and carry out remediation of the land to commence prior to the issue of an audit or statement.

Option 10B: In a revised EAO allow for remediation as part of construction. There may be a need for the developer indemnifying the council from any action resulting from the developer not achieving a certificate or statement of environmental audit.

As a preliminary matter, Council notes that the wording of these questions and options is different from the proposed revised Clause 45.03 attached to the Paper. In the revised clause works needed to conduct an environmental audit are exempted from requiring a planning permit. However, remediation work is not expressly exempted or otherwise referenced.

Council submits that minor works such as installing bore holes may be exempted from requiring planning permission. However, a planning permission should be required for more extensive works such as excavation. Council frequently receives complaints from residents about earthworks being conducted before a planning permit or endorsed plans have been issued. Without clarification on what works are required for the environmental audit, Council cannot determine whether the works are required for conducting an environmental audit or whether construction work has commenced without a planning permit. In either case, Council needs to respond to the community and cannot do so without adequate information.

Remediation works should not be undertaken until planning approval is received because the impact of remediation works need to be assessed with the planning merits of the proposal. For example, contamination may require sealing the site with a concrete slab. The impact of the concrete slab needs to be assessed with the planning merits because a concrete slab can limit landscaping opportunities and increase the height of a proposal. Alternatively if remediation measures require amendment of the permit, works should not be undertaken until that approval is received to avoid inappropriate planning outcomes.

Council has sites within its jurisdiction where a large hole has been dug for site assessment or basement preparation purposes before planning approval was received. The holes have sat for months and even years creating a health and safety problem, among other issues. Council submits that this outcome should be avoided were possible.

5.7 Amendment conditions

Question 11: What is the best way of ensuring statement conditions are obvious to purchasers and how can these be enforced if the statement is issued before a rezoning?

The options in Victoria under the planning regime include:

Option 11A: Using section 173 Agreement.

Option 11B: Using the Specific Sites and Exclusions Clause at 52.03 of the VPPs.

Option 11C: Using the Incorporated Plan Overlay so that the conditions are included in a short incorporated plan.

Council notes that this question is regarding land where an environmental audit was undertaken as part of planning scheme amendment. Council does not have large precinct-type areas that may be rezoned from an industrial to a 'sensitive' use and, accordingly, will not comment on this question.

5.8 Ongoing management

Question 12: Can ongoing conditions from a Statement of Environmental Audit be enforced by way of an Environmental Management Plan or Site Remediation Plan attached to the permit or is a section 173 Agreement needed?

Option 12A: Enforce Statement conditions by way of a 173 Agreement.

Option 12B: Enforce Statement conditions by way of an Site Remediation Plan approved by way of a 'secondary consent' and a permit condition.

Council's answer to Question 12 is that it depends on the specifics of the site and the complexity of the conditions in the Statement of Environmental Audit. To provide flexibility, both options should be available and applied as appropriate.

5.9 Types of land uses and activities that have the potential to result in land contamination

Question 13: Should the categorised potentially contaminating uses be kept, or should it be simplified or replaced with a simple statement?

Option 13A: Maintain the distinction between high and medium potentially contaminating uses and update the list based on EPA's advice.

Option 13B: Merge all activities in the high and medium categories into one category, 'Potential Contaminating Uses'.

Option 13C: Replace the list with a simple statement that refers to industry, mining or the storage of chemicals, gas, wastes or liquid fuel.

Council's concern is that contaminated sites often occur where the previous use does not necessarily suggest contamination including parks, nature strips and other areas that have had heavy fertiliser or pesticide use. Also, commercial and retail uses that have stored petrol on site and any site that has imported soil may be contaminated. Council submits that the current language does not adequately capture these uses. Council suggests that more technical, yet understandable, guidance for planners and lay people is needed on how to spot potentially contaminated land. Perhaps a review of common sources of contamination as identified in existing environmental audits could be collated and developed into a resource on how to identify PCL.

5.10 Communication and language

Question 14: Can VPP land use terms be used instead of 'sensitive use'?

Option 14A: Leave definition in the Ministerial Direction and Practice Note.

Option 14B: Avoid use of term 'sensitive use' and simply refer to VPP defined uses.

Council submits that it would be preferable to use the VPP defined terms as it would improve consistency and clarity in application of the environmental audit provisions. However, Council has not undertaken an extensive review of the use of those terms to determine whether those terms can be used instead of the current 'sensitive' use designation.

Question 15: Is there scope to change how certificates and statements of environmental audit are referred to?

Option 15A: Retain the existing form of words.

Option 15B: In planning schemes refer to:

A permit for a sensitive use cannot be granted until an approved environmental auditor states that:

- *They have completed an environmental audit under Part IXD of the Environment Protection Act 1970, and*
- *The land is suitable for the proposed use. The auditor can specify conditions that must be met.*

As the terms 'Certificates' and 'Statements' of environmental audit are defined and regulated under the *Environment Protection Act 1970*, to avoid confusion the language of that act should be used. Option 15B is potentially confusing because conditions may only be imposed under a Statement of environmental audit and not with a Certificate of environmental audit. Clause 45.03 may be clarified by providing a brief description of the difference between a Certificate and a Statement of environmental audit.

Possible revised EAO

Question 16: Is the proposed revised EAO a workable solution?

The proposed revised EAO relies upon two schedules – one identifying 'known' contaminated land and the other 'potentially' contaminated land. At the risk of stating the obvious, the proposed revised EAO will not work unless the strategic work referenced above in Question 1 is undertaken or the designation between the two is otherwise clearly made.

Council supports the effort to make the EAO more responsive to actual contamination threats. However, as a preliminary matter, the revised clause and schedules are confusing which makes it difficult to determine exactly how the clause and schedules are supposed to work. The clause and schedules should be redrafted to reduce or eliminate the circular references to permit triggers, exemptions, timing (i.e. before a permit is granted or after) and the environmental audit requirement. The new scheme will only work if it can be understood.

Specific comments on the language of the clause and schedules are as follows:

Clause 45.03

- 45.03-1 – Council supports the creation of a specific permit trigger under the EAO.
- 45.03-2 – The second sentence states "This does not apply if a schedule to this overlay specifically states that [a] permit is not

required." This exemption appears to apply only to the exemption for works required to undertake an environmental audit as there is no other exemption under the schedules. If that is the intent then it should say as such or the meaning of the sentence should otherwise be clarified.

- Clause 45.03-2 – Under the heading Environmental audit where it states "The land is suitable for the proposed use. The auditor can specify conditions that must be met," as discussed above in Section 5.10 Council believes that the terms "Certificate" and "Statement" should be used because they are defined terms under the *Environment Protection Act 1970*.

Below that bullet point it states: "This does not apply where a schedule to this overlay specifies that an environmental audit is not required." This sentence should be clarified as to whether it means an environmental audit is not required at all or is not required before a permit is granted because both options are discussed in the schedules.

- Clause 45.03-2 – the Environmental audit section states that a permit cannot be granted in certain circumstances until an environmental audit has been completed. Council is statutorily required to determine planning permit applications within 60 days. If this clause is implemented, appropriate changes to the *Planning and Environment Act 1987* are required so that a failure appeal cannot be lodged at the Victorian Civil and Administrative Tribunal while Council awaits the outcome of an environmental audit.
- Clause 45.03-2 –the Site Remediation Plan section states that "[a] permit may require that a Site Remediation Plan be prepared to the satisfaction of the responsible authority following the completion of an environmental audit if the audit results in a Statement of Environmental Audit with conditions related to the ongoing management of the use or monitoring of conditions." Council notes that depending upon the complexity of the conditions imposed in the Statement, technical advice may be needed to determine if the Site Remediation Plan adequately reflects those conditions. As such, review of the Site Remediation Plan by EPA staff or an environmental auditor may be required.
- Clause 45.03-3 – regarding the standard for a Site Remediation Plan it states that a Site Remediation Plan must include: "Mechanisms to address any ongoing sources of contamination on the site." As above, Council submits that EPA staff or an environmental auditor may be best placed to determine if the mechanisms are appropriate.
- Clause 45.03-3 – the Decisions Guidelines refer to "[t]he likelihood that any part of the environment will be adversely affected by any contaminated soil or be adversely affected by vapors from any contamination." This language is very broad and puts a burden on Council to conclude that the environment will not be adversely affected

by a proposal. Technical advice may be required to make this determination otherwise Council may simply take an overly cautious approach.

Schedule 1

- Schedule 1 appears to have a typo under Requirements in that the words 'An environmental audit' in the first line should be 'A permit'.

Schedule 2

- Under Requirements it states that "[a]n environmental audit is not required if a Phase 1 Environmental Site Assessment determines" but under the Application Requirement a Phase 1 Environmental Site Assessment is not required. As such, it appears that a Phase 1 Environmental Site Assessment should be included in the Application Requirements.

Schedules 1 and 2

- In the Requirement section there is a permit exemption "for works reasonably required to undertake an Environmental Audit including demolition works, site preparation works, construction of a basement." For the reasons discussed above in Section 5.6 Council does not support this exemption.
- In the Requirement section it states that an environment audit is not required if the responsible authority is satisfied that "[t]he nature of the development and proposed use means that there is no exposure of residents or visitor or other parts of the environment to contaminated soil or vapors." As above, this language is very broad and puts a burden on Council to conclude that "no part of the environment" will be contaminated by the proposal. Appropriate technical advice may be required to make this determination otherwise Council may simply take an overly cautious approach.
- In the Application Requirements section an "Environmental Site History" is referenced which appears to be the same as a "Site History" described in the proposed Clause 45.03-3 Standards section. To avoid confusion this document should be referred to consistently in the clause and the schedules.

Appendix 2: Recommended Standard Planning Permit Conditions for Land Suitable for a Sensitive Use

Land Suitable for a Sensitive Use

1. Prior to the commencement of construction or carrying out of buildings and works in association the building hereby approved:
 - a) A certificate of environmental audit must be issued for the land in accordance with Part IXD of the Environment Protection Act 1970; or
 - b) An environmental auditor appointed under the Environment Protection Act 1970 must make a statement in accordance with Part IXD of that Act that the environmental conditions of the land are suitable for a sensitive use.
2. Notwithstanding the provisions of Condition 1, the following works can be carried out before a Statement of Environmental Audit or a Certificate of Environmental Audit is provided to the Responsible Authority under Condition 1:
 - a) Demolition and buildings and works that necessarily form part of the Environmental Audit process; and
 - b) Buildings and works that the Environmental Auditor engaged by the owners advises must be carried out before a Statement or Certificate of Environmental Audit can be issued.

These works must be carried out in accordance with a Works Plan approved by the Environmental Auditor engaged by the owner. A copy of the approved Works Plan must be provided to the Responsible Authority and Environment Protection Authority Victoria before the commencement of the buildings and works for the purposes of this condition.

3. Before the construction of the building hereby approved commences (excluding buildings and works carried out in accordance with a Works Plan approved by the Environmental Auditor engaged by the owner), a copy of the Certificate of Environmental Audit and/or Statement, and the complete audit report and audit area plan must be submitted to the Responsible Authority.
4. The development and use allowed by this permit must comply with the directions and conditions of any Statement of Environmental Audit issued for the land to the satisfaction of the Environment Protection Authority Victoria.
5. Prior to the occupation of the [insert sensitive use - i.e. residential use, child care centre, pre-school centre or primary school], a letter must be submitted to the Responsible Authority and Environment Protection Authority Victoria by an Environmental Auditor accredited with the EPA, to advise that all construction and remediation works necessary and required by an environmental audit or statement have been carried out to the satisfaction of the Environment Protection Authority Victoria.

6. Any handling and disposal of contaminated waste or site soil must be in accordance with the requirements of any statement of environmental audit issued for the land, the requirements of the Environment Protection Authority and the Environment Protection Act 1970 to the satisfaction of the Environment Protection Authority Victoria.