



## **Civil Contractors Federation of Victoria Response to Draft Environment Protection Regulations**

### **Introduction**

The Civil Contractors' Federation (**CCF**) is the peak representative body for individuals and companies undertaking civil construction work in Victoria. The work undertaken by our members is invaluable to the creation of Victoria's civil infrastructure and is a significant contributor to the Victorian economy. Presently in Victoria our members are constructing some of the state's most significant infrastructure projects.

The CCF and its members appreciate the need for Victoria to have strong and effective environmental safety laws to protect the health of Victorians and to preserve the state's precious natural environment. Whilst our members are always vigilant to ensure that environmental risks associated with their activities are properly controlled, they are mindful of the significant impacts a failure to meet their duties can have on the physical environment and on human health.

The CCF supports the pending introduction of the new Victorian Environment Protection Act (**the Act**), and, in particular, the general environment duty imposed under the Act, which is designed to focus on the prevention of environmental and human harm by requiring duty holders to do all that is reasonably practicable to avoid human and environmental harm in a similar fashion to the operation of safety duties imposed by the Victorian OHS Act.

By the nature of their work, our members are constantly involved in activities which may constitute a risk to the environment. Predominantly, the type of work undertaken by our members involves heavy construction including earth breaking and excavation using mobile powered plant. The environmental risks associated with this work include the excavation, disturbance and disposal of soil which is industrial waste and/or may be contaminated.

As such, our members are clearly duty holders under the Act.

Whilst supportive of the legislative and regulatory changes proposed to ensure appropriate protections for human health and the environment, the CCF is keen to ensure that the Act and proposed Regulations do not impose unnecessary administrative and/or commercial burdens upon our members.

We do not propose to respond to all of the extensive documents that have been produced as part of this subordinate legislation review. We have instead confined our commentary to those matters which most significantly impact our members' activities.

It is essential that our members are provided easily accessible and detailed guidance material (possibly in the form of an application containing fact sheets linked to the relevant documents) to assist ensure compliance with the regulations and, by extension, the general environment duty.

### **Definitions**

It was hoped that the draft Environment Protection Regulations (**the Regulations**) would further define a number of terms that are relevant to the discharge of the general environmental duty under the Act.

Unfortunately, the draft Regulations have not further defined the terms "notifiable incident", "harm" or "material harm".

The CCF considers that in order to best assist duty holders fulfil their general environment duty and incident and contamination notification duties under the Environment Protection Act, that the Authority consider the publication of associated guidance material to help interpret these definitions after consultation with relevant duty holders.

The CCF considers that as it currently stands, and in the absence of further definitions, that there will be a significant and unnecessary increase in notifiable contamination reports and notifiable pollution incidents, given the manner in which these events are currently defined.

## **Contaminated Land**

The CCF notes that the Act has defined notifiable contamination in relation to contaminated land as "contamination that is prescribed notifiable contamination".

### **37 What is *notifiable contamination*?**

"Notifiable contamination", in relation to contaminated land," "means contamination that is—

- (a) prescribed notifiable contamination; or
- (b) if the regulations do not prescribe notifiable contamination by a particular waste, chemical substance or prescribed substance, contamination for which the reasonable cost of action to remediate the land is likely to exceed—
  - (i) \$50 000; or
  - (ii) any other prescribed amount.

The CCF also notes that the draft Regulations have prescribed "notifiable contamination" as follows:

## **8 Soil contamination**

For the purposes of section 37(a) of the Act, the following is prescribed notifiable contamination—

- (a) the presence of a contaminant in or on soil on land under the management or control of a person if—
  - (i) a person has been, or is likely to be, exposed to the contaminant; and
  - (ii) the concentration of the contaminant is, and is likely to remain, at a concentration that is equal to or exceeds—
    - (A) the average threshold for that contaminant; or
    - (B) the localised elevated values threshold for that contaminant;
- (b) the presence of a contaminant in or on soil on land adjacent to land under the management or control of a person if—
  - (i) the contaminant has entered from, or is likely to have entered from, the land under the management or control of the person; and

- (ii) the concentration of the contaminant is, and is likely to remain, at a concentration that is equal to or exceeds—
  - (A) the average threshold for that contaminant; or
  - (B) the localised elevated values threshold for that contaminant;
- (c) the presence of a contaminant in or on soil on land under the management or control of a person—
  - (i) that is likely to enter and remain on land adjacent to that land; and
  - (ii) in a concentration that is likely to be equal to or exceeds the HIL or HSL for that contaminant for the current use of the adjacent land, as specified in section 6 of Schedule B1 to NEPM (ASC).

## 9 Asbestos in or on soil

For the purposes of section 37(a) of the Act, the following is prescribed notifiable contamination—

- (a) the presence of friable asbestos in or on soil on land; and
- (b) a person has been, or is likely to be, exposed to airborne asbestos fibre levels in excess of 0.01 fibres per millilitre by means of inhalation.

The CCF notes that "contaminated land" is defined as land where there is waste, a chemical substance or prescribed substance that is present under the surface of the land in a concentration above the background level that creates a risk of *harm* to human health or the environment.

Therefore, on the current statutory construction, provided that land is contaminated (i.e. has contaminants in excess of threshold levels that constitute a risk of harm to human health or the environment) and that these contaminants have been or are likely to be exposed to humans, then these circumstances would constitute a notifiable contamination event.

The CCF anticipates, that in light of the principles of the legislation and without further guidance or interpretation, there will be a significant volume of contaminated land notifications submitted to the Authority post the implementation of the Act and the Regulations.

The CCF submits that the Authority should provide detailed guidance to duty holders to assist determine the circumstances where notifiable contamination has occurred as opposed to leaving it to the duty holders to determine whether a person has been or is likely to be exposed to a contaminant.

In particular it is imperative that our members receive guidance about when they are required to undertake soil testing to identify potential contamination in the absence of a relevant site history, change of site use or environmental indicators of contamination.

## Pollution Incident

Pursuant to the Act, a notifiable incident is a pollution incident (i.e. a leak, spill or unintended deposit or escape of a substance) that causes or *threatens to cause* material harm (i.e. not negligible harm to humans or the environment).

The Regulations do not further define the term "harm" and consequently the following Act definitions unchanged:

## 4 What is *harm*?

(1) In this Act, "harm", in relation to human health or the environment, means an adverse effect on human health or the environment (of whatever degree or duration) and includes—

(a) an adverse effect on the amenity of a place or premises that unreasonably interferes with or is likely to unreasonably interfere with enjoyment of the place or premises; or

(b) a change to the condition of the environment so as to make it offensive to the senses of human beings; or

(c) anything prescribed to be harm for the purposes of this Act or the regulations.

(2) For the purposes of subsection (1), harm may arise as a result of the cumulative effect of harm arising from an activity combined with harm arising from other activities or factors.

## **5 What is *material harm*?**

(1) In this Act, "material harm", in relation to human health or the environment means harm that is caused by pollution or waste that—

(a) involves an actual adverse effect on human health or the environment that is not negligible; or

(b) involves an actual adverse effect on an area of high conservation value or of special significance; or

(c) results in, or is likely to result in, costs in excess of the threshold amount being incurred in order to take appropriate action to prevent or minimise the harm or to rehabilitate or restore the environment to the state it was in before the harm.

(2) For the purposes of subsection (1), harm may become *material harm* regardless of the period of time in which the harm occurs and as a result of—

(a) a single occurrence of harm arising from an activity; or

(b) multiple occurrences of harm arising from the same activity; or

(c) the cumulative effect of harm arising from an activity combined with harm arising from other activities or factors.

(3) In this section, "threshold amount "means \$10 000 or a higher amount prescribed by the regulations.

Given the breadth with which material harm is defined, namely, any adverse effect on human health or the environment that is not negligible, the CCF anticipates, that, like notifiable contamination, there will be a significant volume of pollution incidents notified to the Authority once the Act takes effect.

## **Unsolicited (Junk) Mail**

The CCF notes that the draft Regulations propose to prohibit junk mail or unsolicited documents in residential letterboxes.

CCF members frequently notify residents using unaddressed letter drops to inform them of nearby civil construction work so that the residents are aware of the works and they are prepared for any transport or other amenity impacts posed by those works.

Whilst the definition of unsolicited document specifically excludes correspondence from utilities companies, the CCF submits that consideration be given to expanding that definition to include "notification of events or disturbances caused by nearby construction work" or similar so that there is no suggestion that these important maildrops will constitute an offence.

## **Noise**

We note the Regulations specifically excludes noise emanating from construction and demolition activity at industrial, commercial and trade premises from being considered to be unreasonable or aggravated.

However, given the temporal nature of construction work and the fact that this work occurs at a variety of premises, the CCF submits that this exclusion should also be extended to cover construction and demolition noise emanating from residential premises, entertainment venues, parks and roadways.

## **Environment Reference Standard**

The Environment Reference Standard (**ERS**) is a voluntary code that sets out the environmental values and objectives for ambient air, acoustic, land and water environments that are sought to be achieved or maintained in Victoria.

The CCF notes that odour has been added as a new air quality objective in the ERS.

The CCF submits that, like the noise exemption in the Regulations, odours created during the course of construction and demolition work should be specifically excluded from the ERS.

## **Permissions**

The CCF notes that due to the nature of the works undertaken by its members in relation to civil construction, that invariably its members will be generating, transporting and disposing of industrial waste (which may also constitute reportable priority waste) such that members will be required to hold the necessary registrations or permits for the transport of said waste, and, where necessary, to track the transport and lawful disposal of that waste.

Again, whilst the CCF agrees that these measures are necessary to achieve the preventative principles of environmental protection, the CCF submits that the permissions process should not impose an unnecessary administrative or commercial burden on duty holders and further, that clear guidance material is provided to duty holders to assist them to properly discharge their obligations and understand the permissions required to lawfully undertake their business activities.

## **Duties relating to waste**

The CCF considers that the three-tiered approach to the classification of waste prescribed by the Act and supported by the draft Regulations to be an appropriate means of classifying waste which will reduce the necessity for most duty holders to sample waste.

However, the CCF queries the utility of the introduction of the new Category D soils definition. Whilst duty holders have the option of containing Category D soils safely on the same site where it was unearthed, as opposed to disposal at a lawful place, such containment is subject to a 5-year permit, containment in an appropriate container and is subject to a site management order. The CCF suggests that the administrative and regulatory burden imposed on duty holders in relation to the containment of Category D soils presents as a disincentive for duty holders to consider not disposing of Category D soil at

authorised premises. Using the example of a cut and fill operation or site regrading, it would appear that under this regime a sampling program and Declaration of Use would be required. This would constitute an unnecessary burden for CCF members.

The CCF considers that its members, and others in the construction industry, would be best assisted in discharging their duties in relation to determining soil categories, through detailed guidance material from the Authority. Without extensive guidance material, CCF duty holders will be forced to rely upon regular sampling in order to discharge the general environment duty, which would undermine the purported simplification of the classification process.

Lastly, the CCF is concerned that the proposed Declaration of Use tool in relation to the storage, re-use and recovery of different types of lower risk wastes will present as an unnecessary administrative burden to duty holders, and consequently act as a disincentive to compliance.