MUNICIPAL ASSOCIATION OF VICTORIA

State Environment Protection Policy (Waters) Saved Clauses RIS

Submission

June 2023

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The MAV is the statutory peak body for local government in Victoria. While this paper aims to broadly reflect the views of local government in Victoria, it does not purport to reflect the exact views of individual councils.

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1 Introduction

The Municipal Association of Victoria (MAV) welcomes the opportunity to provide a submission to assist the Environment Protection Authority (EPA) and the Department of Energy, Environment and Climate Action (DEECA) consider the future of State Environment Protection Policy (Waters) saved clauses to enhance the management of urban stormwater and onsite wastewater, salinity and irrigation drainage.

Victorian councils have had a long-standing role in developing plans for urban stormwater and onsite wastewater management through various iterations of State Environment Protection Polices (SEPPs) over many years. We note that the obligations proposed in the draft Obligations for Managers of Land or Infrastructure (OMLI) are derived from the requirements set out in the current transitional regulations, and that these in turn reflected clauses retained from the SEPP Waters 2018 which had been developed following detailed consultation.

The MAV concurs with the assessment outlined in the RIS that it is appropriate for there to be some level of statutory requirement for councils to undertake urban stormwater and onsite wastewater management planning in consultation with water authorities and local communities. Having this obligation justifies their role in seeking the views of relevant stakeholders. It also guides their need to prioritise reviews of their plans on a regular basis so they reassess risks and make adjustments if environmental and land-use development patterns change over time.

As drafted however, the proposed Obligation for Managers of Land or Infrastructure (OMLI) does present new challenges for councils in their urban stormwater and onsite wastewater management functions which need to be further explored before this instrument is finalised. We are particularly concerned that Clause 5 in the proposed OMLI appears to introduce new management requirements for councils for stormwater infrastructure where there are cumulative risks to human health and the environment.

Third parties being able to seek enforcement in the performance of OMLI obligations is a new feature which was not incorporated into the SEPP Waters 2018 clauses developed prior to the commencement of the new environment protection regime. Under the new regime EPA is also authorised to take enforcement actions where it considers requirements are not being met. This stricter operating environment means it is important that the OMLI does not establish new obligations for councils beyond their current legislative remit. This is particularly relevant given that councils have no specified revenue sources with which to undertake these functions.

We strongly recommend that the proposed OMLI be amended to include an explanatory note that focusses on principles of proportionality and practicability to guide the development of the plans prepared by councils.

The MAV has not had the opportunity to consult with councils prior to providing this submission to DEECA and the EPA. As the obligations being proposed to be included in an OMLI have potential judicial and budgetary impacts for councils, we will provide further comment if we receive further insight and comment from councils.

2 Context

The Municipal Association of Victoria is the peak representative and advocacy body for Victoria's 79 councils. The MAV was formed in 1879 and the *Municipal Association Act* 1907 appointed the MAV the official voice of local government in Victoria.

This submission responds to the Regulatory Impact Statement (RIS) and draft Obligations for Managers of Land or Infrastructure (OMLI) proposed to be established as an Order under the Environment Protection Act 2017. These documents outline the Victorian Government's proposed response for dealing with the clauses retained in transitional regulations following the lapsing of the SEPP Waters 2018 when the new environment protection regime established by the Environment Protection Act 2017 came into effect on 1 July 2021. The transitional regulations are due to expire on 30 June 2023.

Please note that this submission focusses on the SEPP Waters Clauses 2018 relating to specific roles of councils. It does not consider the saved SEPP Waters clauses relating to salinity and irrigation drainage.

3 SEPP Waters 2018 retained clauses – specific comments

Comments on specific SEPP Waters 2018 clauses being included in an OMLI are set out below.

SEPP Waters Clauses 29/30 – domestic wastewater management plans

The MAV is concerned at the potential for creep in statutory scope beyond councils' current responsibilities defined in various pieces of legislation, including the Local Government Acts 2020 and 1989, and the Environment Protection Act 2017.

The proposed wording in the OMLI reflects the wording from Clause 29 in the SEPP Waters 2018, however the RIS description of the roles and responsibilities of councils appears to assume that they are responsible for managing risks to human health and the environment arising from onsite wastewater systems (see RIS, p19). This terminology is stronger than the Clause 29 in the SEPP Waters 2018, which is that councils develop and implement plans which identify risks and set out strategies to minimise cumulative risks from sewage discharges beyond allotment boundaries.

We query whether an OMLI is the appropriate instrument for councils to have to prepare domestic wastewater management plans. An OMLI by its title is specifically for land and infrastructure managers, however councils' role in onsite wastewater management is as a regulator which issues permits to landholders to install systems which do not exceed 5,000 litres capacity per day. They are not a designated land or infrastructure manager for this purpose, other than being responsible for onsite wastewater management systems they install for their own facilities. Water corporations also have responsibilities for onsite wastewater systems above 5,000 litres per day capacity - it is unclear why they should not also have responsibilities

for onsite wastewater management planning and harm prevention if a broader land manager remit is being envisaged.

This issue is important to councils, given that the current regulatory framework provides no provision for them to raise funds to cover the costs from this planning function. Nor are there funding mechanisms for councils to undertake the ongoing inspections they need to make to check that maintenance and other permit conditions are being met by landowners with onsite wastewater management systems below 5,000 litres per day capacity.

An explanation of councils' role is necessary to be included in the OMLI to ensure that if there are future issues raised by third parties that the EPA and courts are aware that assessments and management plans developed by councils are reasonable and practicable to implement. This explanation is currently included in Clause 29 of the SEPP Waters 2018.

Levels of risks presented by different topographies and proximity to waterways and underground water systems will also impact the extent to which local areas councils prioritise their focus and attention.

Recommendations:

- Review the appropriate statutory instrument for councils' role developing management plans to minimise cumulative pollution from onsite wastewater management systems below 5,000 litres per day

- Insert an explanation into the instrument providing context regarding councils' role in domestic onsite wastewater management, and that actions set out in the plans are reasonably practicable to implement

- Clarify that council obligations sit alongside the obligations of water corporations for onsite wastewater systems above 5,000 litres capacity per day.

SEPP Waters Clause 34(3) – obligations of infrastructure managers

From our understanding from discussions with councils in the past, they have used SEPP Waters 2018 Clause 34(3) as justification for conditions imposed through planning permits involving installation of stormwater infrastructure.

We are therefore surprised to see Clause 5 of the OMLI being proposed to be retained with applicability to just Melbourne Water and councils. We note that the definition of "infrastructure manager" in section 156 of the Environment Protection Act 2017 includes a person or body that either (a) manages or operates infrastructure, or (b) manages or controls the design, construction or maintenance of infrastructure.

"Infrastructure" under this section includes:

a) roads and traffic facilities and installations; and
b) sewerage, storm water drainage and water supply systems; and
c) wastewater treatment and septic tank systems; and
d) electricity and gas transmission and distribution networks; and
e) telecommunication networks; and
f) works to improve water edges and water quality; and
g) wharves, marinas and boat launching and berthing facilities; and
h) public transport facilities and installations; an
i) public parks and public spaces and related facilities and installations.

Given that all the managers of infrastructure covered through this list now have a General Environmental Duty not to cause harm to the environment, we are particularly puzzled as to why Melbourne Water and Councils are being singled out when other public sector agencies are not, such as VicRoads, other Crown land managers and utilities which also manage public infrastructure which can contribute to pollution generated by stormwater.

The RIS outlines that there was concern raised by stakeholders that without explicit requirements for councils and Melbourne Water to minimise risks associated with public stormwater infrastructure, the environmental protection elements of this infrastructure would not be appropriately inspected, maintained, renewed or replaced, leading to long term environmental damage. This discussion in the RIS does not outline why Melbourne Water and councils have been singled out for this provision, or why the GED which will apply to them as infrastructure managers is not sufficient.

We are concerned that this provision may have the intention or result of ascribing responsibilities beyond the scope of councils' current legislative remit in the Local Government Act 1989, where the drainage provisions are authorising rather than prescriptive about their responsibility for drainage assets. Currently there are clear arrangements for infrastructure to be vested in or managed by councils through legislation such as the Road Management Act 2004, Subdivision Act 1988 and Local Government Act 1989. Where these assets are vested in, or managed by councils they will have a GED. The OMLI should not be used to seek to ascribe responsibility to councils for assets outside this remit.

We are also very concerned at the inclusion of a new statutory obligation that councils must renew or replace stormwater infrastructure which can no longer be managed or maintained. Although the OMLI acknowledges this will have regard for this being reasonably practicable, this is a new development not previously canvassed with MAV and councils in any detail. The explanatory notes to SEPP Waters clause 34(3) do detail the renewal or replacement by owners and managers of assets, when assets are damaged or no longer functional. However, this was only included in the notes and not specifically outlined in Clause 34(3). In addition, clause 34(3) applied to all owners and managers of assets, created to protect water quality, rather than just Melbourne Water and councils.

The RIS does not provide much detail about how it derived its costings to justify this insertion into an OMLI. We are concerned that the potential impact of this new inclusion has not been properly assessed.

If this clause is to be retained via the OMLI, then at least all Victorian Government agencies and organisations managing infrastructure should be held to similar account as Melbourne Water and councils.

Recommendation:

- That Clause 5 of the OMLI be deleted or be revised to include reference to all infrastructure managers.

SEPP Waters Clause 34(4) – urban stormwater management plans

We concur that the OMLI is an appropriate instrument for the requirement for councils to develop urban stormwater management plans. Given that these plans could be challenged in court by third parties, we recommend that the assessment being reasonably practicable be included as an explanation or in the body of Clause 6 in the OMLI. This statement is currently included in SEPP Waters 2018, and is particularly relevant to retain given the additional exposure from the new enforcement provisions from the EPA and the courts.

We also note that councils receive no funding to undertake these plans, and that their resourcing is dependent on local priorities as outlined in the Council Plan also developed in consultation with the municipal community.

Recommendation:

- Insert an explanation into the instrument that the assessment has had regard for being reasonably practicable to implement.

Review

Given that this is the first OMLI which has been developed which directly impacts the obligations and activities of councils, the MAV recommends that the Victorian Government commit to a review of its effectiveness in three years.

Recommendation:

- Review the OMLI in three years.

4 Conclusion

The MAV was not involved in the development of the RIS or the proposed OMLI. Given these proposals have potential to set standards and required actions which go beyond councils' current statutory remit, we look forward to working with DEECA and EPA to achieve environmental objectives which are also practicable to implement.

Should you have any queries about this matter, please contact Rosemary Hancock, Manager Health and Local Economies, MAV by email rhancock@mav.asn.au.