Penny Armytage
Chairperson
Independent Inquiry into the EPA
Ministerial Advisory Committee
PO Box 214428 Little Lonsdale St
Victoria 8011

cc: Jane Brockington, Deputy Chair
Janice van Reyk, Member

29th October 2015

Dear Penny,

Re: Environment Victoria submission to the EPA Inquiry: Case studies of the EPA's response to critical challenges over the past decade.

Environment Victoria welcomes the opportunity to contribute to the review of the EPA.

Environment Victoria is one of Australia's leading independent environment groups. Now with more than 40 member groups across the state and 72,000 individual supporters, Environment Victoria was founded in 1969 by individuals and small local conservation groups who were working to protect the Little Desert area of western Victoria, and were successful in their campaign to establish a National Park in the region.

These groups identified an important gap in the environment movement, which was the lack of a voice operating state-wide and focusing on the decisions being made by the state government (and other governments or decision-makers) which had environmental implications, so founded the Conservation Council of Victoria, which later changed its name to Environment Victoria.

Since our founding in 1969 we have been representing Victorian communities on environmental matters and achieving conservation and environmental outcomes. Our predecessors at the Conservation Council of Victoria contributed to the founding legislation and architecture of the EPA.

Environment Victoria has interacted with the EPA closely over our 45 year history. We are both impressed by the commitment and professionalism of EPA staff, but also frustrated by the continued decline of Victoria's environment (as documented in Victorian State of Environment reports) and a continuing history of pollution events in this state that we believe could be prevented or reduced.

We welcome the comprehensive review of the EPA's performance and its enabling legislation. We recognise that many of the inadequacies of the EPA are a direct consequence of the legislation under which they operate which has not been modernised to any significant extent for decades.

In this submission we have chosen to focus on a series of case studies examining the moments when we have interacted most deeply with the EPA in recent years in an attempt to draw some conclusions about the EPA's effectiveness as a regulator and in preventing environmental harm. We believe that it is these moments of greatest stress upon Victoria's environment protection systems that provide the clearest examples of the need for reform of the EPA and its enabling legislation.

PO BOX 12575 A'BECKETT STREET, VICTORIA, AUSTRALIA 8006 LEVEL 2, 60 LEICESTER STREET, CARLTON, VICTORIA, AUSTRALIA 3053
Tel (03) 9341 8100 Fax (03) 9341 8199 Email: admin@environmentvictoria.org.au www.environmentvictoria.org.au ABN 84 495 053 605 Reg No A0023095M

Given this focus our submission largely concentrates on incidents where we believe there have been regulatory or environmental failures in order to demonstrate the inadequacies of the current arrangements. We recognise however that the EPA prevents harm every day in its operations and that much of its work is unheralded but effective.

We would be very happy to discuss this submission and our experience of the events described within with you at any time.

Yours sincerely,

Mark Wakeham
CEO Environment Victoria

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Tel (03) 9341 8100 Fax (03) 9341 8199 Email: admin@environmentvictoria.org.au **www.environmentvictoria.org.au** ABN 84 495 053 605 Reg No A0023095M

Case study 1: EPA approval of HRL Dual Gas coal-fired power station

Date: 20th May 2011

Background and context for the approval: HRL Dual Gas was proposing the construction of a new 600 MW coal-fired power station near Morwell.

In late November 2009 then Planning Minister Justin Madden announced that the proposed power station would be exempted from having to prepare an Environmental Effects Statement (EES) under the Environment Effects Act 1978. In a statement of reasons on the then "550 megawatt" power station proposal of October 2, 2009, Madden stated that no environmental effect statement was required as the construction of the power station "would not have significant adverse effect on environmental values" as it would be built on an "existing industrial site with no significant landscape, waterway, biodiversity or cultural heritage features."

This decision not to require an Environmental Effects Statement (EES) was despite the proposed power station exceeding one of the Ministerial Guidelines triggers for the Environment Effects Act which states that for projects with "potential greenhouse gas emissions exceeding 200,000 tonnes of carbon dioxide equivalent per annum, directly attributable to the operation of the facility" an EES should be produced.

Minister Madden claimed that "potential environmental effects of operating the power station, including opportunities to minimise greenhouse gas emissions, resources use, waste ... can be adequately assessed under the Environment Protection Act 1970. Best practice approaches will need to be applied in addressing those aspects."

EPA rationale for approval: In May 2011 the EPA announced that it had approved one 300MW generating unit of the two the company had proposed in its Works Approval Application. Instead of assessing the project against 'best practice' standards for generating electricity, the EPA assessed the project "against best practice for brown coal fired power generation". In a media release announcing the decision, released on Friday 20th May, the EPA stated that "the demonstration project is best practice for this type of brown coal technology and will produce electricity with around a 30 per cent improvement on current greenhouse gas emissions from coal fired power stations. This is a significantly better environmental outcome than other plants currently producing electricity from brown coal in Victoria."

EPA CEO John Merritt stated in a media release that the second proposed 300MW generating unit would be "reviewed when the proponent was able to demonstrate the successful operation of the first phase of the demonstration project." He also stated that the approval for the first unit was "conditional on HRL Dual Gas Pty Ltd submitting details on how it will meet all conditions prior to construction, including additional measures to reduce sulphur dioxide emissions."

In an interview Merritt argued that "we were clear that our interpretation of the Act and our application of the best-practice standard was to compare this technology against alternative brown coal technologies and power generation." Asked why the proposed power station wasn't compared against alternative energy sources, Merritt suggested the agency was constrained by its own legislation. "Look it's important for environmental regulators everywhere to work within the legislation that they have," he said.[1]

The EPA's decision was subject to multiple VCAT appeals. VCAT imposed additional conditions on the project including that the Dual gas proposal would only be acceptable if it replaced existing brown coal generation through power station closures.

[1] http://www.abc.net.au/pm/content/2011/s3222812.htm

Implications for EPA review:

- The EPA, and the Act that governs its operation, are poorly placed to properly consider greenhouse gas emissions from proposed projects. The fact that a project that increased the state's greenhouse emissions by 4 million tonnes every year did not trigger a formal EES process highlights that the state's regulation of greenhouse pollution is inadequate.
- The EPA's works approval process is often relied upon as an alternative to a full environmental effects statement, however it is an inadequate substitute for a more thorough process.
- The EPA's SEPPs and 'Best Practices' guidelines either do not provide enough guidance to decision-makers or have been poorly interpreted. The EPA's decision to define the HRL Dual Gas power stations industry sector or activity as 'brown coal electricity generation' was farcical. The product of all power stations is electricity or electrons. Arguably the EPA might have determined that the product of HRL's project to be 'baseload' electricity or electricity on demand, but choosing to assess the project's industry sector or activity as 'brown coal electricity generation' was a poor decision by the state's environmental regulator and protector.
- If the EPA is to genuinely be considered a protector of Victoria's environment it needs stronger enabling legislation and practice, particularly to deal with the growing challenge of climate change. The EPA's approval of a new, highly polluting and unnecessary brown coal power station for Victoria as recently as 2011 was a low point for the authority. The fact that the power station was never built highlights that it was unnecessary and should never have been approved.
- More positively the EPA supported the rights of a number of organisations, including Environment Victoria, to be granted standing in VCAT appeals of their decision. It is important that EPA decisions and processes support the rights of communities to legally challenge decision-making.

Case study 2: EPA approval of WA 52729 Esso Longford Gas Conditioning Plant

Date: 20/04/2013

Summary of incident: Esso was seeking approval to build a gas conditioning plant at Longford. The plant was estimated by Esso to emit around 1 million tonnes of CO2 each year (increasing the state's greenhouse emissions by nearly 1% each year).

In 2007 Esso referred the project to then Planning Minister Justin Madden to determine whether an EES was required under the Environment Effects Act 1978. Minister Madden made the decision that an EES was not required because the emissions associated with the project could be assessed at the Works Approval phase. This decision was made despite Ministerial Guidelines to the Environment Effects Act 1978 stating that "potential greenhouse gas emissions exceeding 200,000 tonnes of CO_2 equivalent per annum, directly attributable to the operation of the facility" are a potential trigger to environmental effects referral criterion.

EPA response to incident: Six years later in 2013 Esso submitted their Works approval to the EPA. The EPA subsequently approved the Works approval and did not appear to give serious consideration to the 1 million tonnes of greenhouse pollution that would be generated by the project as it was beyond the scope of the Works Approval. No serious consideration was given to alternatives to the project, as would have been required had an EES been undertaken.

Implications for EPA review:

- The EPA's works approval process is often relied upon as an alternative to a full environmental effects statement. It is a poor proxy however for a thorough assessment of the environmental impacts of proposed projects, with no requirement that alternatives to the project be examined, and limited examination of the environmental impacts of a project.
- The EPA, and the Act that governs its operation, are poorly placed to properly consider greenhouse gas emissions from proposed projects. The fact that a project that increased the state's emissions by 1 million tonnes every year was not subject to thorough examination, and did not trigger a formal EES process highlights that the state's regulation of greenhouse pollution is inadequate.
- The EPA needs to have powers required to regulate and reduce greenhouse pollution given that climate change is the largest environmental challenge that the state and the planet faces.

Case study 3: Morwell River collapse into Yallourn mine

Date: June 6th 2012

Summary of incident: On June 6 2012 the Morwell River diversion collapsed into the Yallourn coal mine in the Latrobe Valley. The Morwell River diversion passes between the two open-cut pits at Yallourn mine. The day after the mine site collapsed, mine and power station operator TRUenergy dammed the river in two places, diverted the flow of the river into their mine pits, and shut down most of the power station. This incident was the second catastrophic failure at Yallourn mine with the previous failure of the northern batter causing pollution of Latrobe River in 2007.

EPA response to incident: TRUenergy applied for an emergency discharge licence under section 30A of the *Environment Protection Act 1970*. A licence was granted to dump up to 300 ML of contaminated water per day into the Latrobe River which flows into the Ramsar listed Gippsland Lakes. This license lasted for 120 days and was then renewed 2 more times, with discharge happening to the Latrobe River for over a year. The company was required to undertake monitoring of the condition of Latrobe River. This monitoring found increased levels of turbidity as a result of the pumping of mine water into the Latrobe River.

Despite repeated inquiries to the EPA, Environment Victoria was never clear of the grounds upon which emergency discharge licences were issued. Our legal advice at the time found that there were only three grounds for issuing an emergency licence:

a) *to meet a temporary emergency;*
b) *to provide relief from a nuisance or community hardship; or*
c) *to enable repair, commissioning, decommissioning or dismantling of industrial plant or fuel burning equipment.*

It is arguable that the initial collapse of the mine met the first of these three criteria, but subsequent emergency licences failed to meet any of the three criteria. The incident highlighted that further definition is needed of the term 'emergency' in section 30A of the Act. After the river had collapsed into the mine the only emergency appeared to be the impact upon the profitability of TRUenergy's operation. Energy security was not at risk and was unlikely to be until the summer months. There was no risk to the environment beyond the mine site until the EPA approved the pumping of mine water into the Latrobe River. And it was many months before reconstruction of the Morwell River diversion. It is unclear to us why allowing the Town Pit, and then the East Pit of Yallourn mine to fill with water until the summer months when evaporation would have increased was not a viable option. It appeared to us that the decision to issue an emergency licence was made in the commercial interests of TRUenergy and not in the interests of environment protection.

Implications for EPA review:

- the EPA needs to be very clear about the grounds for emergency licences issued under section 30A of the Environment Protection Act 1970, particularly when they are likely to increase risks to the environment. Licences should not be granted merely because they suit the commercial interests of the proponent, rather they should only be granted to minimise environmental damage or serious inconvenience to the public.
- The Yallourn mine 2012 failure was one of a number of failures at existing coal mines in recent years. Other catastrophic failures at Yallourn in 2007 and the Hazelwood mine fire in 2014, and ongoing issues of subsidence at both mines highlight that mining is poorly regulated in Victoria. Part of the problem historically has been that the Department responsible for regulating mining activity has also been a proponent or advocate for exploiting the state's minerals resources. There is a greater role for the EPA, with new powers, to oversee and improve mining regulation in Victoria.
- The EPA needs to continue to deliver on its core regulatory function of ensuring that the Environment Protection Act is upheld and enforced.

Case study 4: Hazelwood mine fire

Date: 9th February 2014 to 25th March 2014

Summary of incident: The catastrophic fire in the Hazelwood coal mine started during a heatwave in February 2014 following ember attack from a nearby bushfire. Over 7000 emergency services personnel fought the blaze for weeks, with the fire declared "under control" on March 10, and then "safe" on 25 March 2014. During this period, the hourly air quality readings made public by the EPA showed that the overall air quality index peaked at over 1300. Anything over 150 is considered "very poor". The levels remained very poor for weeks.

EPA response to incident: Two days after the fire started, the State Control Centre officially asked the EPA to act as a support agency, to provide monitoring of and advice on air, soil and water pollution in surrounding areas. The report of the first Hazelwood Mine Fire Inquiry found that the EPA's support came too late after the initial request from the State Control Centre, and that the authority was "ill-equipped to respond rapidly," though ultimately deploying 136 on-ground staff. The Board of Inquiry indicated that in an emergency such as

the Hazelwood fire, “less accurate data obtained sooner would have been more valuable than data that was quality assured but took longer to produce.”

Even when data was available, however, there were problems with how this information was communicated to the public. During the fire, the EPA issued 58 advisory notices under the Bushfire Smoke Protocol, but these did not provide clear advice to communities about what they should do in response to the smoke. On February 16th, the EPA notified the Health Department of very high levels of carbon monoxide at monitoring stations around the mine, but the lack of a clear protocol resulted in mixed messages to the community about what to do. It is worth noting, however, that responsibility for the lack of clarity in communicating air pollution information to the public does not necessarily lie with the EPA – the Department of Health should be responsible for ensuring air pollution information is converted into appropriate action.

Since the fire, the EPA has been examining options to prosecute GDF Suez, the owners of the Hazelwood mine for breaches of the Act. However at the time of writing, over 18 months after the fire was extinguished, still no prosecution has begun. Such lengthy delays reduce public trust in the EPA’s ability to effectively regulate pollution and respond quickly to major breaches of the Act.

Implications for EPA review:

- The lack of a coherent response to the EPA’s data was a major problem during the mine fire. Even where data might not be perfect, in emergency situations where people’s health is at risk there should be a process to develop a response plan by other agencies supported by the EPA’s data.
- The Hazelwood fire exposed the limited regulatory power the EPA has over mines, despite mines being a significant potential source of pollution. Most mine regulation is carried out by the regulatory branch of the Department (now the Department of Economic Development, Jobs, Transport and Resources). The Review should consider whether the EPA should have a greater regulatory role in the mining sector and in ensuring the proper rehabilitation of mine sites (the fire may have been prevented had rehabilitation of old parts of the mine had been undertaken).
- The lack of a prosecution by the EPA, 18 months after the fire, should raise concerns about either (1) the ability of the EPA to adequately enforce its own legislation in a timely manner, or (2) the suitability of the legislation itself. If a pollution event as severe as the Hazelwood fire does not constitute a breach of the Environmental Protection Act, the Act is deficient and needs to be strengthened and modernised.
- Environment Victoria understands that the EPA does not have a standing budget for legal actions, and that a decision to take a legal action can require the diversion of resources from the Authority’s operational budget. The EPA needs to be properly resourced for both its core and discretionary needs if it is to maintain its independence and rigour.
- This event and other failures at coal mines in the Latrobe Valley have impacted disproportionately on that community, who experience significant disadvantage across many socio-economic indicators, including health and vulnerability to respiratory illnesses. The impact of pollution events in the Latrobe Valley is an example of the need to embed environmental justice in the reform of the EPA and its powers.

Case study 5: Yallourn ash slurry discharge into Morwell River

Date: 20th February 2015

Summary of incident: In February 2015 a coal ash slurry pipe at Yallourn power station and mine ruptured and 8.6 million litres of ash slurry solids and liquids leaked into the Morwell River.

EPA response to incident: The EPA investigated the incident and determined that the company had breached its licence condition, an offence under section 27 (2) of the *Environment Protection Act 1970.* The incident was deemed to have been preventable if the company had properly followed incident management procedures when the pipe ruptured. The maximum penalty infringement notice under the act of 50 units was imposed, the consequence being that Energy Australia, a subsidiary of China Light and Power- a company with a market capitalisation of $US21b- was slapped on the wrist with just a $7584 fine, significantly less than community expectations and no real deterrent for future breaches.

Implications for EPA review

- The sanction imposed by the EPA was completely inadequate. It demonstrates that the penalty units need modernising to ensure an appropriate sanction for serious breaches of licence conditions.
- The fact that the EPA chose to impose this penalty instead of taking legal action suggests a lack of confidence in achieving a successful prosecution in court. There is a need to strengthen the Act to make companies more accountable for breaches of their licence conditions, and improve the prospects of success of legal action by the EPA.
- Environment Victoria supports the proposal by Environmental Justice Australia that a general duty not to pollute be introduced into the Environment Protection Act. Such a clause would clarify that the intention of the Act and the EPA is to avoid pollution events.

Case study 6: Repeal of the Environment & Resource Efficiency Plan program

Date: 25 March 2014

Summary of event: The successful Environmental and Resource Efficiency Plan program, known as EREP, was discontinued in 2013 and ultimately repealed by the Victorian Parliament in 2014. The termination of the program was a consequence of a review aimed at reducing duplication with Federal schemes such as the (now repealed) carbon price. There was also some overlap between EREP and the Federal Energy Efficiency Opportunities scheme, but the Federal scheme lacked some of the key strengths of the Victorian program, and it has also since been de-funded by the Federal Government.

The EREP program was administered by the EPA and applied to business who consumed more than 100 TJ of energy and/or 120 ML of water each year – around 250 businesses in total. For these businesses, EREP made it mandatory to make an assessment of efficiency opportunities, and to implement any energy or water saving solutions that had payback periods of under three years.

EPA response to incident: The decision to discontinue the EREP program was taken by the previous Victorian Government, not the EPA itself.

The regulatory cost of the scheme was estimated by the EPA to be between $3.5m to $4.7m over 22 months. Against this, the program was expected to achieve savings to Victorian businesses of around $90m each year;

possibly as high as $145m each year if all identified efficiency measures were put in place [EPA doc 1400, Feb 2012]. The cost savings to business were through the use of less energy, less water and the production of less solid waste (lowering disposal costs). It also helped lower liabilities under the carbon price.

Approximately three quarters of the savings were in the manufacturing sector – a sector that has been finding it increasingly hard to compete internationally, with a number of high profile closures in recent years. EREP was actively helping manufacturers bring down their costs and assisting in the maintenance of Victorian jobs and industry.

Implications for EPA review:

- An important part of the EPA's work is, and needs to be, programs that pre-empt and reduce environmental damage.
- A review by the EPA found that even when businesses identified efficiency measures that were cost-effective, these were often not implemented in the absence of a government program like EREP. That is, the participation of and encouragement by the EPA is critical to businesses actually implementing efficiency benefits.
- A re-introduction of EREP, in particular with its mandatory implementation of fast pay-back efficiency measures, would (1) help the EPA improve its role in reducing the sources of pollution and (2) be consistent with the current government emphasis of improving energy and water efficiency.

For further information on this submission please contact:

Mark Wakeham
CEO Environment Victoria
9341 8127
m.wakeham@environmentvictoria.org.au