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Better environment plans

Guidelines issued under section 188 of the *Environment Protection Act 2017*

Publication 2053 | 23 Dec 2022

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1. Background and regulatory context

Victoria’s new *Environment Protection Act 2017* (the Act) and associated subordinate legislation commenced on 1 July 2021. The new environment protection framework is designed to prevent harm to human health and the environment from pollution and waste. At the centre of this framework is the general environmental duty (GED). The GED applies to all Victorians. It requires that the risks to human health and the environment, posed by an activity, are eliminated, or reduced so far as reasonably practicable. Further information on the duties and obligations under the Act is available on EPA’s website: [www.epa.vic.gov.au/newlaws](http://www.epa.vic.gov.au/newlaws). The [reference](#references) section lists key guidance materials.

Alongside ‘traditional’ regulatory instruments such as permissions and remedial notices, the Act introduced “better environment plans” (BEPs). BEPs are statutory-based voluntary agreements between EPA and other parties. They are EPA endorsed plans of actions to be performed by one or several duty holders. BEPs provide regulatory support to duty holders who aspire to go beyond minimum compliance with their duties or obligations under the Act, or who want to trial innovative approaches to comply with the Act. BEPs thus have a unique place in EPA’s regulatory toolbox.

Duty holders considering a BEP proposal should be familiar with the duties-based environment protection framework. They should be comfortable with the requirement to eliminate or minimise risks as far as reasonably practicable and should have a solid understanding of their industry’s established, effective practices to manage risks. EPA expects that potential proponents understand the statutory purpose of BEPs and that they consult with affected stakeholders as they develop and put in place a BEP proposal. Proponents need to show how this consultation has influenced their proposal.

1. Purpose of this guideline

EPA has issued this guideline under section 188 of the Act. EPA must consider this guideline when determining whether to accept a proposed BEP. The guideline explains the statutory and administrative requirements associated with BEPs. It also sets out the guiding principles and criteria that EPA employs when considering BEP proposals. Potential proponents should consult this guideline to ensure they understand and meet these.

The guideline should be read in conjunction with the Act and other guidance published by EPA.

1. What are BEPs?

BEPs are established by Part 8.2 of the Act and enable:

* regulatory support of innovative ways of achieving compliance and improvements
* flexible approaches to address complex environmental problems involving many parties, or relating to multiple sites with a single owner
* collaboration between duty holders who want to achieve a standard of conduct that goes beyond basic compliance
* regulatory support for environment improvement action by individuals or groups
* voluntary collaboration between duty holder(s) and EPA. For example, where common approaches to solve enduring and/or complex problems have failed. Or where the duty holder(s) want to trial creative ways to comply or aspire to go beyond compliance.

Once a BEP is accepted, it is placed on EPA’s public register. Commercial-in-confidence information will not be disclosed on the public register if the applicant does not consent to its disclosure. This ensures compliance with section 457(2) of the Act.

Where a participant delivers the actions under a BEP, they are taken to be compliant with the specific duty or obligation under the Act that the BEP sought to address to the extent that the BEP makes provision for performing that duty or satisfying that obligation. It is important to note that a BEP does not provide protections for actions of a participant outside the scope of the BEP. For example, if a participant contravenes the Act in a way that sits outside the matters agreed in the BEP, EPA may take compliance action for that breach. In this instance, the fact that a BEP is in force and the duty holder complies with the BEP does not in any way affect EPA’s power to take compliance or enforcement action against the duty holder in relation to contraventions outside the scope of the BEP.

Likewise, if a participant does not comply with their BEP, then EPA may remove them from the BEP or revoke the BEP. Where there has been a breach of the Act, EPA may also take compliance or enforcement action for that breach.

1. Statutory purposes

Section 180 of the Act states that the purposes of better environment plans are:

(a) to enable persons to develop innovative ways to comply with this Act or to exceed compliance with this Act; and

(b) to facilitate voluntary collaboration between persons who must comply with this Act and the Authority for the purposes of achieving the purposes of this Act and objective of the Authority.

BEPs offer an opportunity for a duty holder to proactively undertake actions to exceed their environmental obligations or to identify and implement innovative solutions to environmental issues.

* 1. Innovation

The Act does not define the concept of innovation. This allows EPA to use a common meaning. The Macquarie dictionary defines ‘innovate’ to mean ‘bring in something new’; ‘make changes in anything established’, ‘to bring in (something new) for the first time’. The word ‘innovation’ is generally used to convey the use of a new method, new ideas and new products. The breadth of this common meaning enables EPA to take a pragmatic and flexible approach.

BEPs enable duty holders to trial an innovation to comply with the Act. EPA’s endorsement of the plan is an important recognition and support for positive action that may lead to an improvement in the way that duty holder eliminates or reduces risk. This ultimately leads to improved environmental outcomes. This effect is replicated where the proponents share their learnings with industry, as expected.

* 1. Exceed compliance

The concept of ‘exceeding compliance’ is not constrained by a specific legislative definition. To understand what ‘exceed compliance’ means, it must first be established what a duty holder must deliver under the Act. Then this baseline must be compared to what they have offered to deliver under a proposed BEP.

This flexibility may enable a group of duty holders to collaboratively deliver environmental outcomes beyond what they can, and are expected to, deliver on their own. For example, duty holders in a precinct may agree on actions that each party will deliver to overcome a complex environmental problem that cannot be solved by separate actors working on their own.

In contrast, an individual duty holder may seek agreement with EPA to divert some resources towards actions that will have a much more significant benefit for the environment over and above what they would be required to deliver if they were to simply comply with their legal obligations.

* 1. Collaboration

BEPs, by their very nature, are intended to be a collaborative tool. This may involve several duty holders working together to address complex environmental issues or it could be a collaboration between an individual duty holder and EPA. Either way, this tool facilitates parties working together.

1. Benefits of BEPs
   1. Benefits for duty holders

The potential benefits of a BEP for duty holders include:

* Providing a framework for piloting an innovative approach to treat a risk that is not regulated via a permission or remedial notice. For example, trial a new technology.
* Providing an opportunity to share learnings and contribute to industry wide improvements in environmental management.
* Developing a deeper understanding of the impacts of an activity on other parties. Fostering an improved relationship through consultation and engagement.
* Facilitating collective action to address complex and persistent environmental issues. Especially, where these have been challenging to address individually.
* Demonstrating leadership within an industry.
  1. Benefits for EPA

The benefits of BEPs to EPA can include:

* Increased transparency – BEPs must be placed on the public register. They are thus an accessible and transparent instrument for documenting compliance.
* Offering a mechanism to support duty holders who want to be industry leaders by going beyond the minimum required under the Act.
* Increasing visibility or knowledge of risks under control of the duty holder and their actions to manage these. These might not have been otherwise presented to the regulator.
* Using one instrument with several parties to secure better outcomes for the environment that can’t be achieved through other instruments in the Act. This is particularly important where many parties are responsible for legacy contamination.
* Fostering innovative means to comply with the law. This is a crucial aspect of a model of laws based around the GED. This is because these innovations will raise the state of knowledge of risks and controls. This in turn will drive improvements in compliance standards.
  1. Benefits for the community

BEPs can also be beneficial for the community; this can include:

* Greater transparency and understanding of environmental risks and associated factors.
* Opportunity to engage with relevant industry and be consulted about finding solutions to environmental issues that affect them.
* Improving the condition of the environment. Helping to prevent harms to human health and the environment.

1. When can EPA accept a proposed BEP?
   1. Statutory requirements

The Act sets boundaries on when EPA mayaccept a proposed BEP. EPA must be satisfied that:

* the BEP proposal is consistent with the [statutory purposes](#statutory) set out in section 180 (section 4 above) and
* its implementation is likely to deliver the BEPs objectives.

This is of fundamental importance. EPA cannot approve a BEP that it does not believe is innovative or beyond compliance. A BEP must clearly articulate the relevant duty or obligation of the Act that it is intended to address. The actions the proponent commits to must be clear and time bound so their delivery can be monitored.

EPA may accept a BEP subject to any conditions EPA considers appropriate. Examples may include reporting frequency, engagement of suitable experts to verify statements or reports, consultation intervals, communication of results with industry peers.

Refer to [Appendix A](#appendixa) for examples of scenarios where the use of a BEP could be appropriate.

* 1. Guiding principles

In line with the statutory requirements outlined earlier, EPA will be guided by a set of principles when determining whether to accept a proposed BEP (table 1).

Table 1: Key guiding principles when considering BEP proposals.

| Principle | Description |
| --- | --- |
| **Beyond regulatory tools** | EPA will consider whether the outcome proposed by the BEP could be achieved through other tools. (e.g. remedial notices, permissions). If that is the case, then the proposal is unlikely to be delivering on the statutory purpose of a BEP. |
| **Authenticity of agreement** | It is integral to the delivery of BEP outcomes that the duty holder is authentic in seeking a voluntary agreement of this nature. EPA must believe that the commitments proposed through the BEP will be delivered. In considering this, EPA will also look at the compliance history of the applicant. This excludes spent convictions within the meaning of the *Spent Convictions Act 2021.* |
| **Lift standards** | EPA will assess whether the proposed BEP will lift environmental performance across industry and thus raise the state of knowledge of a known risk. Once achieved, this knowledge will necessarily feed into the understanding of those risks and may be able to be replicated by industry peers, and beyond. – All with the same goal of improving environment and human health protection. To this end, EPA expects that a BEP contains a communication plan that outlines how the proponent/s will share relevant details with their peers. EPA does not expect the applicant to reveal any information that is commercial in confidence, unless the applicant wishes to. |
| **Engagement of those affected** | The intent of BEPs is to enable collaboration to deliver outcomes. Accordingly, EPA expects that impacted communities will be appropriately engaged when proposing and implementing a BEP. This may include Traditional Owners, local communities, local industry, local and State government. EPA places high importance on meaningful consultation with affected parties. More details can be found in [section 9](#section7), below. |
| **Clear and measurable** | EPA must be able to assess participants’ compliance with commitments made under a BEP. The proposed actions committed to in the BEP must be clear, measurable and time bound. |
| **Reporting** | EPA will consider the adequacy of reporting requirements in the BEP throughout implementation and on completion. EPA needs to be assured that BEP commitments are being delivered by participants. Reporting is an important part of this. |
| **Other legislative requirements** | EPA needs to consider any applicable statutory requirements and/or frameworks. EPA should have regard to principles of environment protection when administering the Act. As such, these principles will be considered when deciding on each proposed BEP.  EPA will also consider any requirements imposed by other statutory frameworks. This includes, but is not limited to, the [*Climate Change Act 2017*](#references)*, Charter of Human Rights and Responsibilities Act 2006, Aboriginal Heritage Act 2006* andany applicable Environment Reference Standard **as relevant to each individual** proposal. |

1. Circumstances where a BEP may not be suitable

There are circumstances where it is unlikely that EPA will accept a BEP proposal. Refer to table 2 for examples.

Duty holders who are contemplating a potential BEP proposal should consult table 2. If one or several of the circumstances listed in table 2 apply, they should contact EPA via [BEP@epa.vic.gov.au](mailto:BEP@epa.vic.gov.au). EPA can help clarify if their situation means the use of this statutory instrument is not appropriate.

Table 2: Scenarios in which a better environment plan is likely to be not suitable.

|  |  |
| --- | --- |
| Circumstance | Explanation |
| **The duty holder is not compliant** | The duty holder is not compliant with the relevant duty. They want to use the BEP to seek ratification of their steps to work towards compliance. However, their compliance plan does not include measures to innovatively comply or exceed compliance. It thus does not deliver the statutory purpose of a BEP. |
| **Conviction(s) for indictable offences** | The duty holder has been convicted of an indictable offence within the past 10 years (for example, offences under environment protection or occupational health and safety laws in any Australian jurisdiction). Note, EPA does not consider any spent convictions within the meaning of the *Spent Convictions Act 2021*. |
| **Absence of a key duty holder** | Where several duty holders propose a BEP to address a collective risk (e.g. precinct-wide), EPA expects that all parties required to solve this issue take part in the BEP. Absence of a key duty holder would reduce the likelihood of the BEP delivering the objectives of the proposed plan. EPA needs to be satisfied that the proposed plan will deliver its objectives. EPA is unlikely to be satisfied if key participants are not involved. |
| **Applicant’s attitudes towards information sharing** | EPA expects that as an outcome of an innovation BEP, details of the successful innovation will be shared with the public. This is to enable replication through industry-wide improvements. The applicant is not required to disclose commercial-in-confidence information unless they agree to. |

1. How to submit a BEP proposal

Each BEP is an individual document tailored to suit the issues it addresses. A proposed BEP must be specific about its objectives and the obligations or duties to which it relates.

* 1. Mandatory information

Pursuant to section 181 of the Act, a BEP proposal must contain:

1. *the* ***objectives*** *of the proposed better environment plan including, but not limited to, the risk of harm to human health or the environment that the proposed plan addresses*
2. *the* ***participants*** *in the proposed plan*
3. *any other person who is likely to be affected by the proposed plan and whether that person has been* ***consulted****, or* ***will be consulted****, in relation to the proposed plan*
4. *the* ***actions*** *or responsibilities that each participant must undertake under the proposed plan*
5. *the* ***reporting*** *requirements for each participant under the proposed plan*
6. *the time or day by which the participants must undertake any action required under the proposed plan*
7. *the* ***time period*** *during which the proposed plan is to be in force.* 
   1. Supporting information

Other information may also be useful to support assessment of a BEP proposal. Provision of this information with the initial submission is not compulsory. However, it may assist EPA when assessing a BEP proposal. It may also avoid requests for further information under section 182(3) of the Act, and associated delays.

BEP proponents should include the following information in their submission:

* a description of how the duty holder/s currently meets the relevant duties and obligations under the Act. How will this BEP go beyond compliance or use innovation to deliver compliance
* site details explaining the existing uses of the site. This includes any existing operations, facility, process, and production rate
* the relevant history to the issue (e.g. compliance, community concerns, investments)
* any relevant or applicable policy and guidance produced by EPA or other recognised best practice guidance
* a stakeholder engagement plan (refer to [section 9](#section7))
* a communication plan that details how the proponent intends to share the learnings from the BEP with industry peers
* scenario-based commitments and responses, where relevant. For example, how the duty holder will deal with:
  + changes in the land portfolio (BEPs dealing with many sites)
  + changes in reasonable awareness (e.g. new information)
  + enquiries by EPA
  + disputes about adequacy of management actions taken
  + failure to disclose or other non-compliance scenarios
  + situations in which the BEP does not provide coverage. E.g. imminent risks, pollution/notifiable incidents, or those matters that would be subject to urgent EPA action)
* an independent review of the proposed risk management methods or a review of the performance of the plan. This review must be by a suitably qualified professional. In other words, a person with qualifications that are relevant to the risk that the BEP is addressing. Details of the reviewer, their qualifications and experience should be provided in the proposal. In some circumstances, EPA may require an appointed environmental auditor to be involved.
  1. Submission requirements

Section 181(3) of the Act specifies the mandatory requirements for submitting a BEP proposal.

* + 1. Approved manner and form

To submit a formal BEP proposal duty holders must email the completed and signed **Better Environment Plan – Submission** template and all supporting documentation to [BEP@epa.vic.gov.au](mailto:BEP@epa.vic.gov.au).

To access the current version of the template, navigate to: [epa.vic.gov.au > Home > About EPA > Laws and Regulation > EPA tools and powers > Better environment plans](https://www.epa.vic.gov.au/about-epa/laws/epa-tools-and-powers/better-environment-plans).

EPA encourages duty holders to use the guidance and support materials that are also hosted on this website. Examples are:

* **Scope of BEP**.This form assists duty holders who wish to develop a BEP by providing a template on which to document a summary of their proposal for EPA’s consideration.
* **Proposed BEP – assessment against guidelines**. This checklist guides applicants when preparing a BEP proposal. It also steps them through the mandatory, and non-compulsory information requirements.
  + 1. Fees

Section 181(3)(c) of the Act provides that a BEP submission must include any prescribed fee. The Environment Protection Regulations 2021 (Regulations) prescribe set and variable submission fees for BEPs. Variable fees are payable where EPA’s assessment of the proposal exceeds 14.9 hours, and they are capped. The set fee is due upon submission of the BEP proposal.

The Regulations also provide that EPA may also charge a fee for services provided by the Authority to advise or assist a person to prepare a proposed better environment plan for submission to the Authority. These services include (but are not limited to) meetings or reviewing draft proposals. The fee is applied on an hourly basis.

The Regulations also provide EPA with discretion to waive or refund fees in certain circumstances.

Fees are indexed annually and based on fee units advised by Department of Treasury and Finance. To determine the fees applicable at time of submission, duty holders should consult [epa.vic.gov.au > for-business > fees](https://www.epa.vic.gov.au/for-business/fees).

1. Stakeholder Engagement

The best environmental and human health outcomes occur when businesses are pro-active in managing their environmental risks and engage meaningfully with the concerns of their stakeholders, including those of local communities, Traditional Owners, local industry, and the relevant tier/s of government.

EPA expects applicants to involve relevant stakeholders while developing their BEPS. This means that key issues can be addressed prior to submission. In the very earliest stages this may be limited to regulators and local government. However, EPA expects that the local community is engaged as early as possible. It means that their concerns are understood at a point where design and other elements of the proposal can easily be adjusted in response. Traditional Owners have an ongoing cultural connection to Country. This is regardless of how disturbed an area may be. Traditional Owners may thus also potentially be affected by a BEP proposal. It is crucial therefore to ensure that Traditional Owners views and rights (for instance, under the Aboriginal Heritage Act 2006) are understood and addressed from the inception stage.

The BEP must account for community and other consultation consistent with s181(2)(c). It must contain information about *‘any other person who is likely to be affected by the proposed plan and whether that person has been consulted, or will be consulted, in relation to the proposed plan’.*

EPA also expects that consultation with affected parties will continue throughout the implementation of the BEP as the actions committed to in the BEP are being delivered.

References

Table 3: References

|  |  |  |  |
| --- | --- | --- | --- |
| Resource | Title | Description | Publication |
| Legislation | *Aboriginal Heritage Act 2006* | Legislation relating to the protection of Aboriginal cultural heritage in Victoria. | [Victorian legislation website](https://www.legislation.vic.gov.au/in-force/acts/aboriginal-heritage-act-2006/024) |
| Legislation | *Charter of Human Rights and Responsibilities Act 2006* | Core legislation relating to the protection and promotion of universal human rights in Victorians. | [Victorian legislation website](https://www.legislation.vic.gov.au/in-force/acts/charter-human-rights-and-responsibilities-act-2006/015) |
| Legislation | Climate Change Act 2017 | Provides Victoria with the legislative foundation to manage climate risks and drive transitions to achieve long-term emission reduction targets. | [Victorian legislation website](https://www.legislation.vic.gov.au/in-force/acts/climate-change-act-2017/008) |
| Legislation | *Environment Protection Act 2017* | Core legislation that empowers EPA Victoria to protect human health and the environment. | [Victorian legislation website](https://www.legislation.vic.gov.au/in-force/acts/environment-protection-act-2017/006) |
| Policy | Compliance and Enforcement Policy (EPA Publication 1798.2) | Sets out EPA’s approach to compliance and enforcement activities. | [EPA website > About EPA > Publications](https://www.epa.vic.gov.au/about-epa/publications/1798-2) |
| Policy | EPA Charter of consultation (EPA Publication 1928) | Outlines key parts of our laws that require or may benefit from consultation and describes how EPA may undertake such consultation | [EPA website > About EPA > Publications](https://www.epa.vic.gov.au/about-epa/publications/1928) |
| Guidance | Reasonably practicable (EPA Publication 1856) | Explains the concept of reasonably practicable | [EPA website > About EPA > Publications](https://www.epa.vic.gov.au/about-epa/publications/1856) |

Appendix A: Scenarios where the use of a BEP may be appropriate

Table 4: Examples of scenarios where a BEP could be implemented.

| Type of BEP | Preconditions | Influences and other considerations |
| --- | --- | --- |
| **Single site management of a risk/hazard**  *The BEP sets out measures that address an environmental issue at a site.* | Both parties would need to assess and accept any risks of failure with the investment, considering the ‘fallback’ if the failure occurs. | Will not be considered where the:   * proposal reflects already known, or widely used, approaches. * proposed approach falls into the remit of another statutory tool (e.g. pilot project licence, remedial notice)   Very unlikely to be considered where:   * there is a history of poor performance. * the issue is not proactively managed by the duty holder (e.g., discovered by EPA during inspection).   More likely to be considered where the BEP would allow the site to make a larger investment in improvements. |
| **Multi-party: precinct pollution (e.g., water, dust)**  *The BEP sets out measures that a mixed set of entities (e.g., industry and road infrastructure, or farmers and water managers) will apply over an agreed timeframe, to collectively address a problem.* | Where common industry practices (e.g., as per standard guidance) alone do not achieve the desired environmental outcome.  Where applying a party-by-party approach (e.g., individual notices) is ineffective. | Unlikely to be considered where there are clear sources/major contributions from individual non-compliant actors that can be addressed via remedial notice.  More likely to be considered where:   * the BEP secures many parties committed to improvement, over a given timeframe. * pollution comes from diverse sources. Also, if there is need for coordination among parties to achieve an outcome. |
| **Multi-party: precinct contamination (e.g., plumes crossing sites, complex ownership of groundwater issues)**  *The BEP sets up investigation, management, and clean-up approaches.* | Where the spread of contamination suggests that a combined, precinct contamination assessment would be necessary. Issuing notices and requiring assessments for individual sites is unlikely to effectively manage the diagnosis and apportioning of management responsibility.  Where a notice could not require the level of action required to address the environmental issue. For example, securing actions that go beyond what the Act can require. | More likely to be considered where:   * the parties seek to work together to manage the issues. This can include formalising agreements between parties around costs and leadership, and the BEP can secure this. * signing the BEP would bring focus to the issue, driving momentum that would deliver environmental benefits.   Less likely to be considered where critical parties are not cooperative. Especially where the primary polluter or land holder, or key duty holders do not consider that they are responsible for the issue. |

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