Submission to Independent Inquiry into EPA Victoria (Final)

Viva Energy Australia

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Format: On-line submission to the following questions:

1. **What do you think are the key environmental challenges which will impact the EPA in the future?**

   No response

2. **What aspects of the EPA's work do you value and wish to preserve in the future?**

   Under the Environment Protection Act 1970, premises which have the potential for significant environmental impacts are subject to works approvals (for construction or modification of facilities or processes) and / or licences (for operating conditions, discharge limits, monitoring and reporting requirements). They provide a means to effectively manage these premises in a transparent way, in which ensures an adequate level of community confidence is maintained.

   Viva Energy's engagement with the EPA in respect of licence amendment and compliance for its operations at Geelong Refinery and Newport Terminal is generally constructive with respect to reducing the level of prescription, complexity, resource demand and regulatory burden associated with these licences. The ongoing constructive relationship to reduce red tape and deliver outcomes that benefit the community, industry and government is highly valued. The strengthening of this constructive approach along with a risk based decision making framework will provide improved industry outcomes consistent with community expectations.

   Environmental licence reform in the early 2010's has resulted in a shift from very prescriptive to more objectives-based licence conditions. Also, EPA has moved away from requiring time-based improvements through licences. Instead licence conditions are set and other notices (e.g. Pollution Abatement Notice) are used to drive improvements.

   Similarly, we welcome the recent improvements to the works approval framework, including the introduction of a "fast-track" approval pathway.

   It is also important that policy and regulation provides flexibility for our operations. For example, current "Section 30" mechanisms which allow for temporary operational changes or unusual operating conditions, eg. during our refinery maintenance "turnarounds", should be preserved.

3. **How can the EPA effectively work in partnership with other government agencies to meet the environmental challenges of the future?**

   No response

4. **How can the EPA's role in safeguarding the community against the health impacts of pollution be clarified or strengthened?**

   In general we consider that the EPA currently provides clear guidelines on their role and monitoring of the environment for health hazards. Timely and effective liaison with other health and safety government organisations is key to protecting community health from pollutants.

   From a Viva Energy perspective, clarification of EPA expectations and roles and responsibilities regarding notification of neighbours or the broader community on acute health impacts in the event of an environmental pollution incident would be of benefit.

   We have noted that the EPA's website has improved in recent years with an increase in the quantity and quality of environmental health information provided and better links to other relevant government agencies.

5. **How could statutory frameworks more effectively prevent future environmental risks and land use conflicts?**

   There is considerable scope to improve the links between contaminated land legislation and planning legislation, including the use of planning controls to prevent land uses and developments which are incongruous with site contamination present.

   Further, there is scope to introduce a more sustainable risk-based approach particularly for management of petroleum-related contaminants in groundwater, including through the use of institutional controls, rather than the relatively inflexible application of existing policy and guidelines. This will enable the resolution of issues associated with land and resource use conflict to be addressed more readily.

   This is covered in more detail in our response to Question 7.

6. **What role should the EPA play in emergency management?**

   The EPA's role is relatively clear for major incident management where district/state plans (such as Emergency Management Victoria Plan) are invoked. Our view is that the EPA has a clearly defined role within the plan, and arrangements to enact these plans and provide for EPA's integration into the Incident Management Team structure.

   Viva Energy considers that better clarity could be provided on the role of the EPA in localised incidents where Level 1 plans (local response resources only) are implemented and higher level plan activation is not required.

For example, the Discussion Paper states an example of how the EPA is the authority for inland waterway contamination. Local response plans don't always recognise this and in practical terms, notification of an incident where a member of the public felt this was an "emergency" would normally be made to 000 not directly to the EPA. Attending emergency services (and our own business) have protocols to notify the EPA as part of a response but recent incidents Viva Energy have been involved in have highlighted that how the message of the incident is conveyed to the EPA can have a significant impact on the EPA's response to the incident e.g. would they recognise the "emergency" nature of the call/incident and provide resources accordingly.

The EPA has advised that they have resources to deploy to support emergency management for localised incidents (including support for engaging local health services, etc). The concern is that low level incidents that are being otherwise well managed, may miss out on EPA response capability because the right engagement is not made with them (or identified as necessary) at an early stage.

Further clarity regarding the EPA role in low level incidents will serve to improve our own response planning and enhance our interaction with available response authorities. We note that EPA has already initiated facility-specific discussions with us and relevant response agencies to clarify this area.

7. **How can the EPA better identify and, where necessary, address problems that are the result of past activity?**

A key area of environmental regulation in Victoria that Viva Energy has taken the opportunity to comment on in this submission relates to contaminated site management. Viva Energy have considerable experience in managing these potential risks in their fuel distribution and retailing networks, and consider that it presents the greatest regulatory burden. The majority of these issues are the result of past activity and practices.

Specific aspects of contaminated site management commented on include:

- Mandatory Reporting of Contaminated Sites
- Inconsistency of Regulation Enforcement
- Environmental Audit System
- Contaminated Groundwater Policy
- Institutional Controls

More detailed feedback is provided below.

Mandatory Reporting of Contaminated Sites

Victoria is the only jurisdiction in Australia which does not have mandatory reporting of contaminated sites. In the absence of this requirement, Viva Energy adopts the relatively pro-

active risk-based approach of voluntarily notifying contaminated site issues to the Vic EPA which typically triggers the issue of a regulatory notice. We have concerns that other parties responsible for contamination do not adopt the same approach and, as a consequence, are not subjected to the same level of regulation. Introducing mandatory notification would create a level playing field and provide more assurance to the community that contaminated site risks are known by the regulator, are being adequately managed, and responsible parties are being regulated where warranted.

Viva Energy advocates for the mandatory notification of contaminated site issues to the regulator, with clear and pragmatic thresholds triggers. The NSW EPA approach is considered best practice, with their recently revised *Guidelines on the Duty to Report Contamination* under the Contaminated Land Management Act 1997 now aligning with National Environmental Protection Measure (NEPM). In particular it adopts a risk-based, pragmatic approach to notification of sites with light non-aqueous phase liquid (LNAPL, ie. petroleum products) in groundwater with clear scenario examples. For example, there is no duty to notify where contamination is contained to within the site boundaries, unlikely to move off-site, and the contaminants are not posing a risk to on-site receptors.

Inconsistency of Regulatory Enforcement

Viva Energy has experienced inconsistency in the application of regulatory notices under various contaminated site scenarios (ranging from low to high risk). This is having an impact on our ability to strategically plan and close-out our contaminated site portfolio which in turn impacts timing (delays) and financial commitments. For example, Clean-up Notices and Pollution Abatement Notices (or no notice) have been issued for similar scenarios on different sites. Often, but not always, these require Auditors to be involved and the Auditor role varies from statutory 53V or 53X Audit, or a non-statutory role.

Viva Energy recommends that a contaminated site compliance and enforcement framework be developed to provide more consistency and transparency in contaminated site regulation, and remove discretion at an EPA officer level. This should include provision to enter into a voluntary management agreement, with escalation to more stringent regulatory tools such as Notices or Orders in the event of non-compliance, as is the case in NSW.

Environmental Audit System

The most significant regulatory burden and costs experienced by Viva Energy are associated with the management and clean up of contaminated sites when under the direction of EPA-accredited Auditors.

The Environmental Audit system for contaminated land in Victoria is intended to provide assurance that potentially contaminated land is suitable for its intended use and/or adequate protection for human health and environment, under the provisions of the Environment Protection Act 1970. Generally, the trigger for Viva Energy to undertake a statutory Environmental Audit is in the case of property transactions involving a change to a more sensitive land-use, or as directed by the regulator by statutory Notice, or as a condition of a licence.

Under the Audit system the EPA "outsource" technical expertise by accreditation of independent environmental consultants. Viva Energy's experience is that in practice the Victorian Audit system provides a number of challenges and uncertainties to business resulting in increases in project complexity, cost and duration, including:

- Auditors take on full liability on behalf of the State (presumably with professional indemnity cover) associated with sign-off of an Environmental Audit. This point of liability can result in risk aversion and an overly conservative approach being adopted by Auditors, which can drive up scope, leading to increased costs and timing.

- Auditors, whilst being supportive, are quite often non-committal to an 'end to end' strategy or work scope 'road map' to achieve project objectives and complete an Audit. There is often a lack of defined practical end points. This results in changes to Audit work scope requirements mid-project, and in some instances just prior to planned Audit completion.

- There are inconsistent approaches to investigation and clean up requirements by individual Auditors working under liability concerns, and in the absence of clear technical guidance in some areas of petroleum site contamination management.

- Auditor fees are very high (average $300-$450 per hour), presumably reflecting the demand on their services and their liability risk. It is very difficult to obtain up-front certainty in terms of Auditor scope and costs due the uncertainties and subjectivities associated with the role. On average the Audit fees on an Environmental Audit project represent about 10%-20% of total project cost, and in addition, Auditor scope requirements can significantly increase project costs and timeframes compared with non-Audit projects.

- There is much duplication by the Auditor and the site assessment consultant. In our experience the Auditor effectively re-assesses the site's environmental condition (quite often only difference being the Auditor doesn't physically take the samples) and prepares a report that often replicates many sections of the assessor's reports. The Auditors employ a range of specialists to recalculate or hypothesise and challenge the assessor who is typically or should be of suitable qualification.

Viva Energy currently has several projects involving dormant sites undergoing Audit to enable divestment in Victoria which have been in progress for more than 10 years, and in some cases are still several years away from completion.

In summary, the Auditors are subject to both regulatory and commercial pressures to adopt a "conservative" approach to the issues they deal with and in Viva Energy's experience this has an adverse effect on scope, costs and timing of dealing with contaminated land. Viva Energy has concerns that the Audit system serves the interests of the environmental industry, to the

detriment of both the land holder and broader community. This includes loss of usable land for redevelopment, increased project costs and asset value realisation delays, resource use and waste increases from additional activities, and nuisance of vacant/disused land while under prolonged audit.

In our experience, the NSW and WA Auditor schemes seem to work relatively well. In NSW the regulator controls the deregulation of the site on acceptance of the Auditor recommendations. In WA the State maintains ultimate responsibility for the land assessment, based on Auditor reports. Generally, only contaminated sites which are more complex and with perceived threats to human health or impacts affecting residential/sensitive land trigger the need for an Audit.

Even in these jurisdictions Auditors can still be very conservative. Stronger institutional controls may aid less conservatism in favour of reliance on protecting the community by pathway controls such as groundwater use restrictions (more detail below).

We note that many environmental regulators in Australia are implementing environmental consultant accreditation schemes. These provide scope for regulators to rely on "suitably qualified persons" in certain scenarios rather than the added time and expense of Auditor review and sign-off.

Contaminated Groundwater Policy

In Viva Energy's experience, the uncertainties and scale of project scope, cost and timing are significantly increased for petroleum industry sites undergoing Environmental Audit that have groundwater contamination, particularly the presence of light non-aqueous phase liquid (ie. petroleum products) in groundwater.

The State Environment Protection Policy (SEPP) (Groundwaters of Victoria) 1997 sets out the framework for the protection of groundwater quality in Victoria. The Groundwater SEPP requires that groundwater quality be maintained as close as practicable to background levels. Further, the Groundwater SEPP requires that "where non-aqueous-phase liquid [eg. LNAPL] is present in an aquifer, it must be removed unless the Authority is satisfied that there is no unacceptable risk posed to any beneficial use". This is out of step with current understanding of LNAPL behaviour, which accepts that there is unlikely to be a restoration of beneficial use in the short or medium term and there are limits to LNAPL removal.
The EPA "CUTEP" Information Bulletin (Publication 840) provides guidance for the clean-up and management of polluted groundwater. It requires groundwater to be cleaned up to the extent practicable, with the assessment of practicability to include technical, logistical and financial considerations. In an Audit scenario, once CUTEP is considered to have been achieved, the Auditor puts this recommendation in a report to the EPA. The EPA then makes a formal determination regarding CUTEP and ongoing management requirements.

Viva Energy's experience with the practical application of the groundwater policy and guidelines by the Auditors and EPA for petroleum sites has highlighted the following key concerns:

- The assessment and determination of CUTEP is subjective, and open to interpretation and inconsistency. Further guidance regarding the factors to be considered is required.

- There is an expectation by Auditors and EPA that active groundwater remediation effort and spend must be undertaken where LNAPL is present, even if health and environmental risks don't warrant it, and/or there are significant technological challenges regarding the practicably of LNAPL removal. This is often the case in the fractured rock aquifers of the Melbourne area where active remediation typically results in limited LNAPL removal and negligible change to site risk profile.

- There are two tiers of sign-off (EPA and Auditor) required to achieve an Audit outcome involving a "CUTEP" site with groundwater pollution which leads to increased timeframes and duplication.

- There is considerable uncertainty regarding the ongoing site management obligations and timeframes post-Audit/CUTEP which present a challenge to business. The EPA reserves the right to periodically review the practicability of groundwater clean-up, and ongoing monitoring requirements are open-ended even where it can be demonstrated that a contamination plume is stable or contracting.

- The closure pathway for groundwater contamination at sites subject to 53V Audits is even less clear as the CUTEP process only applies to 53X "site suitability" Audits.

Suggested improvements to the contaminated groundwater regulatory sign-off process to reduce regulatory burden include:

- Application of sustainable risk-based approaches for investigation and CUTEP rather than the relatively inflexible application of existing policy regarding requirements for removal of petroleum-related contaminants and LNAPL from groundwater. Examples of recent best practice in this area include CRC CARE Guidelines for LNAPL Management (TR34), NSW EPA Technical Note on LNAPL Assessment and Remediation (EPA 2015/0553), and the California "Low Threat Closure" policy.

- Regulator assurance on Auditor decisions targeted at a portfolio-level on a risk basis, rather than detailed technical review and duplication of sign-off decisions at a project-level.

- Ultimate responsibility for liability associated with regulatory sign-off should reside with the state, as is the case in Western Australia.

Institutional Controls

Technology has limitations in terms of achieving clean up goals and speed of clean up at sites where contaminants are recalcitrant and difficult to remove. Viva Energy supports

incorporation of institutional controls within legislation and guidance as a means of allowing safe redevelopment of brownfield sites within a reasonable timeframe.

Viva Energy has several redundant properties within its portfolio, which are, or are perceived to be, environmentally impacted, and which remain idle because concerns regarding liability and corrective action costs deter potential developers, purchasers, and lenders. A number of these sites involve scenarios where Viva Energy is being expected to make an effort to remove contaminants that will not ultimately result in a reduction of any health or environmental risk, and the level of risk is acceptable in certain land-use scenarios with appropriate conditions and controls.

Viva Energy supports adoption of activity and land-use limitations to achieve either an "acceptable risk" or a "no significant risk" level. For example, an owner/operator who volunteers to remediate a site to meet an industrial or commercial use standard may do so in exchange for a restrictive covenant that limits the use of the site to industrial or commercial purposes only. Currently such land-use restrictions are able to be sought via council processes, but our experience is that opportunities for this are variable and can be limited across councils, and can add significant time to projects.

Viva Energy also advocates that environmental and planning legislation should be more integrated to provide a clear and consistent framework for land-use restrictions to be put in place, eg. through planning controls, and incorporation of future site management requirements on certain land-use or development triggers.

The NSW EPA approach is to provide a letter formally describing whether a site's environmental condition is considered significant enough to warrant regulation. Where it is, there are well established voluntary management and more directed regulatory requirements. For sites that are unlikely to pose a risk for the likely uses of the site, the NSW EPA letter confirms the risk assessment completed by the assessor as satisfactory and states the site environmental condition isn't significant enough to regulate. The NSW EPA letter is also sent to the planning department at the relevant local council to note on record. Information pertaining to the environmental condition is then available to any member of the public upon request through Council under a Section 149 of the Environmental Planning and Assessment Act 1979.

Another key institutional control is the restriction on groundwater use where groundwater contamination is present. At present the EPA has the ability to designate Groundwater Restricted Use Zones (GWRUZ) where CUTEP has been determined, but currently only a small proportion of contaminated sites go through the CUTEP process, and it can be protracted process.

The ability to designate a GWRUZ could be more widely available outside the CUTEP process, and also earlier in the project life-cycle. This could also be better integrated into the groundwater bore licensing system to ensure controls are effective. In our experience the South Australian approach is a good example of a robust groundwater bore licensing and control system.

8. **What can the EPA do to avoid potential future problems?**

   No response

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

   No response

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

    Climate change is a global issue and is best addressed at a national level. Ideally this is through market-based policy mechanisms which allow industry and consumers to find least-cost abatement opportunities, rather than through direct regulation.

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

    No response

12. **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?**

    Significant regulatory burden to a business in Australia such as Viva Energy comes from inconsistent environmental regulatory requirements across State-based and Federal jurisdictions.

    Again, we have focused below on the area of contaminated site management as this is where we see the most inconsistency across the country, and opportunity for improvement in Victoria.

    In respect of contaminated sites, the National Environment Protection (Contaminated Site Assessment) Measure (NEPM) is produced at a national level and available for States to adopt. This provides the basis for consistency during the assessment phase of a contaminated land project, and should be enshrined in any EPA guidance and policy.

    In the area of remediation and light non-aqueous phase liquid (LNAPL) management there is currently no national standard or decision making framework, but this is being addressed through the National Remediation Framework development.

    Viva Energy encourages the development and application of clear technical guidance to provide more certainty and consistency in contaminated site management.

    The Cooperative Research Centre for the Contamination and Remediation of the Environment (CRC CARE) has already developed technical guidance in a number of technical areas such as Monitored Natural Attenuation (MNA) of petroleum-related contaminants of concern, LNAPL behaviour and management in groundwater, and vapour intrusion risk assessment, with others still in development.

Regulatory authorities in Australia including the Victorian EPA are involved in the CRC CARE projects, and it is recommended that the EPA continue this, and incorporate technical guideline output into Victorian policy and guidance documents, as has been the case in NSW.

In terms of other regulatory approaches, we note the very positive developments relating to contaminated land management in NSW in the last year or so as referenced earlier in our submission. These include:

- *Guidelines on the Duty to Report Contamination under the Contaminated Land Management Act 1997* recently revised to be more risk-based and pragmatic with clear scenario examples in the Guideline.
- *Technical Note: Light Non-Aqueous Phase Liquid (LNAPL) Assessment and Remediation (EPA 2015/0553)* which aligns with the recently released CRC CARE TR34 guidelines, and is a very pragmatic, risk-based policy position.
- The NSW EPA also has a practical Contamination Assessment Form which allows them to screen notified contamination issues relatively quickly and determine whether formal regulation is required or not. The process draws on the concepts outlined in the California "Low Threat Closure" regulation introduced a few years ago.

We also see merit in some aspects of the WA contaminated site legislation, notably:

- Notification requirement (which is inherently risk based under the definition of 'contamination' under the Act);
- Clear and limited requirement for Audit, ie. when a site is a "source" site;
- Assurance of all future site owners understanding of site condition under "Form 6"; and
- Ability to transfer liability associated with contamination, and for a separate body (Contaminated Sites Committee) to apportion responsibility for contamination where multiple responsible parties are in dispute.

In terms of international policy best practice for contaminated petroleum sites, the California "Low Threat Closure" approach addresses a number of concerns raised in our submission.

13. **Are there any other issues relevant to the Terms of Reference that you would like to raise?**

No response