This is the City of Casey’s submission to the Advisory Committee’s Discussion Paper on Major Hazard Facilities (MHF).

Casey does not currently have any MHF registered under the Occupational Health and Safety Regulations 2007 (OHS Regulations) within its bounds. However, Casey does have reasonable experience and a good understanding of the planning issues associated with separation distances or ‘buffers’ for Waste and Resource Recovery Facilities (WRRF) which share many planning issues with MHF.

Establishing and maintaining buffers between uses with adverse amenity potential and sensitive uses has been a planning issue of significant concern for Casey for many years. Since 2009 Casey has made a number of submissions to the State government and its agencies on the subject, recommending changes to the planning system and planning controls which generally align with those suggested in this Discussion Paper for MHF:

» In mid-2009 Casey made a submission to the Review of Waste Transfer and Recycling Facility Provisions in Planning Schemes Advisory Committee. Casey’s submission responded to and broadly supported proposed changes to the State Planning Policy Framework (SPPF) for waste management to encapsulate resource recovery; the development of a model local policy and standard conditions; and, updates to planning scheme definitions to reflect changes in technology.

Casey’s submission also requested changes to Clause 52.10 of the Victoria Planning Provisions (VPP) to broaden its scope to necessitate statutory referral of applications for sensitive uses seeking to encroach into buffers of established uses with adverse amenity potential; and, introduce measures to clarify and strengthen the role and responsibilities of the referral authorities.

» In May 2011 Casey wrote to the then Minister for Planning, Matthew Guy MLC, and then Minister for Environment and Climate Change, Ryan Smith MLC, regarding buffer legislation. Casey requested that on-site buffers be applied to waste facilities through the VPP to ensure that inappropriate activities could not establish in their vicinity and alternate remote sites to be identified for waste facilities once current sites reached capacity.

Subsequently in August 2011, Council officers met with senior officers of the Department of Planning and Community Development (DPCD) to recommend that the State government investigate a suite of planning controls and retrospectively apply them to all activities that required buffers to sensitive uses. The controls suggested were:

1. Zoning or overlay controls to signal the existence of sites that require buffers to users of the Planning Scheme;

2. Clause 52.10 revised to consider sensitive uses as an encroachment. This would provide buffers in the reverse as well to protect already established facilities;
3. Statutory referral of planning permit applications triggered under points 1 and 2 above to the EPA and relevant authorities such as Workcover. These authorities’ roles and responsibilities must also be clarified and strengthened;

4. EPA’s Best Practice Environmental Management - Siting, Design, Operation and Rehabilitation of Landfills guidelines (BPEM) made an incorporated document and given effect via the mechanisms outlined above.

In October 2011 Casey received a response from the Minister for Planning, advising that DPCD, on his behalf, had asked the Victorian Planning and Environment Law Association to prepare a discussion paper identifying issues and possible principles for the application of land use buffers and to consult with the City of Casey in the process. [Note: this did not eventuate]

In November 2011 Casey made a submission to the Potentially Contaminated Land Advisory Committee on its ‘Issues and Options Paper’ considering changes to planning controls and systems to improve the way contaminated land is managed. Central to Casey’s submission was concern with the role of the EPA in the regulation and management of potentially contaminated land in Victoria. Casey again reiterated the need for the EPA’s role as a statutory referral authority to be substantially expanded.

In February 2012 Casey wrote to the Minister for Planning (Matthew Guy MLC) requesting a planning scheme amendment to create a 1 kilometre radius, off-site reverse amenity buffer around the Taylors Road landfill in Dandenong South that would necessitate a planning permit being required for sensitive uses seeking to establish within the buffer.

In May 2012 Casey again wrote to the Minister for Planning (Matthew Guy MLC) requesting he impose a 500 metre radius reverse amenity buffer around the Hallam Road landfill in Hampton Park in conjunction with the 1 kilometre radius one around the Taylors Road landfill to protect the Hallam Road site from the encroachment of further sensitive uses.

In November 2012 Casey made a submission to the EPA on the ‘Recommended Separation Distanced for Industrial Residual Air Emissions’ guideline. Casey’s submission generally supported the proposed guideline replacing the former one.

The new guideline was considered to be an improvement from both a structural and content perspective. However, Casey was still concerned with the absence of mechanisms to protect and preserve separation distances once in place, and the capacity to regulate inter-industry separation distances; the role of the EPA in the planning process; and, the statutory status of the guideline.

Currently Casey is a participant in the Metropolitan Waste and Resource Recovery Group’s (MWRG) Landfill Buffer Support Program (LBSP) with representation on the LBSP Action Group.

This Group is seeking to understand the needs of priority WRRF sites and their surrounding land uses, and develop appropriate planning policies, tools and other control measures to protect their operations from encroaching sensitive uses, as well as minimising the impact of these facilities on the environment, public health and amenity.

The LBSP project and this Discussion Paper appear to be exploring a number of common issues, including: the need to develop a consistent mechanism for defining buffer areas; the need for a new planning scheme tool to control use and development both on site and within any buffer areas; the need to clarify what is meant by sensitive use; and, the potential for application of the Agent of Change principle in relation to buffer areas.
Hazards, Risk and Consequence

» Does the planning system effectively address existing or greenfield MHF or other hazardous industry that poses a risk to the safety of surrounding areas? [1]

» How should planning address areas surrounding existing or proposed MHF or other hazardous industry that poses a risk to the safety of surrounding areas? [2]

» Should there be greater consultation when a new MHF is proposed or changes made that would require changes to its safety assessment? Who should be involved in that consultation? [3]

As outlined above, Casey has advocated over many years for changes to the planning system as it relates to potentially hazardous land uses and their interface and interaction with adjoining land uses.

In particular, Casey has sought mechanisms to better protect buffers surrounding potentially hazardous land uses to prevent inappropriate encroachments, as well as an elevated role for the relevant ‘expert’ government authorities.

As stated in Casey’s submission to the EPA on its Recommended separation distances for industrial residual air emissions:

“Planning authorities can provide for ‘buffers’ in strategic plans and seek to avoid rezoning land for sensitive purposes within proximity of industrial activities by implementing the separation distances. Similarly, provisions for separation distances are incorporated in the VPP to protect the amenity of sensitive uses from uses with adverse amenity potential.

However, … where land is already zoned for sensitive purposes within proximity to industrially zoned land there is no trigger in the current VPPs or universally recognised planning mechanism to protect industries from encroaching sensitive uses. Until this ‘reverse buffer’ issue is addressed, there is the potential for land use conflict.”

[Submission by City of Casey, EPA Recommended separation distances for industrial residual air emissions, November 2012]

Yet despite these approaches, no changes have been made, so the planning system still does not effectively address these issues.

A planning permit is still required for the use and/or development of land associated with an activity with adverse amenity potential. However a planning permit is generally not required for a range of potentially conflicting uses encroaching into an established activity’s buffer due to the zone controls.

Consequently, existing activities with adverse amenity potential are not protected from the encroachment of other land uses that can ultimately threaten their ongoing operation.

Planning controls should be incorporated into the scheme to trigger permit requirements for a range uses with the potential to conflict if they encroach unheeded into established buffers. The objective being to ensure that any pertinent issues are appropriately addressed in the assessment process, and subsequently through design requirements and/or permit conditions imposed on the proposed use and/or development.

In addition, the expertise of the EPA and Worksafe should be captured, with both being made statutory referral authorities for applications for potentially hazardous uses, as well as applications for proposals within established separation distances.

The exhibition and advertising requirements currently provided for in the planning system in relation to planning scheme amendments, planning permit applications and amendments to permits are considered sufficient for consultation with surrounding landowners and occupiers. In addition to these formal notification requirements, many local governments also engage with stakeholders regarding significant planning proposals in other ways.
Definition of a Hazard Facility

Should a definition for MHF be included in planning schemes, and if so, what might a definition include? [4]

The term selected to encapsulate the land uses subject of this Discussion Paper needs to be carefully chosen and defined.

While ‘MHF’ is suggested, this definition has specific connotations under the Occupational Health and Safety Act 2004 (OHS Act) and associated OHS Regulations which may not sufficiently cover the scope of land use activities required for the purpose of the planning system.

The OHS Regulations’ definition of MHF is principally applied to facilities that need to be registered and licenced to ensure their internal environment is a healthy and safe place for workers, with less emphasis on the potential impact of the facility on neighbouring properties. Therefore, aligning with this definition may not be practical or useful as the planning system has far broader objectives.

There are also other potentially hazardous land use activities that fall outside the scope of the OHS Regulations’ MHF definition, which from a land use planning perspective could be considered ‘major hazard facilities’, such as prescribed waste landfills and abattoirs.

The term ‘facility’ has connotations that would not cover land permanently designated for the purpose of transporting hazardous materials, such as pipelines. If similar controls are to be considered for pipelines, (which Casey supports) the scope of the definition should be expanded, or a separate definition used specifically for that land use.

Alternative terms that could be considered, include ‘major hazard infrastructure’, ‘controlled hazardous facilities and infrastructure’ or ‘potentially hazardous facility’ or ‘controlled hazard facility’ for facilities and ‘potentially hazardous infrastructure’ for pipelines.

Whatever term is chosen, for clarity and transparency, the types of land use activities falling within its scope should be defined within the planning scheme. The definition/s should include reference to land use activities involving the storage, handling, processing, production or fixed transport (ie. via pipeline) of large quantities of hazardous or potentially hazardous materials and goods.

Land use activities that could potentially be included within the scope of the definition include those referenced in the Discussion Paper being, oil refineries, chemical manufacturing sites, gas processing plants, LPG facilities, some warehousing and transport depots and water treatment plants, as well as abattoirs, prescribed and putrescible waste landfills (eg. Taylors Road prescribed waste facility in Dandenong South) and waste processing plants (eg. tyre recyclers).

Likewise, the term ‘sensitive use’ should also be defined in the planning scheme.

The term ‘sensitive use’ appears in the SPPF and in the Environmental Audit Overlay (EAO). For the purposes of the current EAO ‘sensitive use’ is explained as “residential use, child care centre, pre-school or primary school”. However, the term is not defined in either clause 72 or 74 of the planning scheme.

In its 2011 submission to the Potentially Contaminated Land Advisory Committee, Casey recommended that the term ‘sensitive use’ be defined in the planning scheme, in addition to its definition in Ministerial Direction No. 1 - Potentially Contaminated Land and the Potentially Contaminated Land General Practice Note (June 2005) to avoid any confusion about exactly what uses it encapsulates.
Risk Assessment and Modelled Hazard Boundaries

» Should MHF emergency plans also be (sic) required to consider the affect a major incident would have on property within the land use planning areas and provide this in information given to the local community? [5]

Under OHS legislation, MHF emergency plans need to address risk to persons both on and off site, however this does not necessarily mean they will address potential impacts on ‘property’ within any buffers established around the MHF.

Emergency plans should be required to consider the impact on property, as it would empower people to make better informed decisions in relation to the current or future use or development of their land and, if reverse buffers are established these would provide guidance for decision makers on how to better address and minimise any potential risks.

» Should the WorkSafe methodology for Inner and Outer Planning Advisory Areas continue to be the basis for identifying risk areas around MHF and be used for the land use planning system? [6]

» Should risk areas around MHF, through Inner and Outer Planning Advisory Areas, be identified in planning schemes? [7]

The Inner and Outer Planning Advisory Areas appear to have been beneficial to planning decision-making to date in the absence of any other more formal planning tools. The methodology has been developed by a body with relevant and specialist expertise so theoretically should reflect ‘best practice’.

These two Advisory Areas should be formally reflected in new tools in the planning scheme, such as individual schedules to an appropriate overlay. Each Area’s specific issues could be reflected in a schedule containing restrictions and/or requirements relevant to each.

» Are there other more appropriate mechanisms other than the planning system that could be used to identify risk areas around a MHF that would alert landowners, tenants, permit applicants, facility operators and prospective purchasers and others about a MHF and the risk potential? [8]

The planning system is publicly accessible and (in theory) ‘public friendly’. Most people are also aware that land use is regulated by ‘planning’. Property owners and prospective purchasers are provided with information on the zone/s and overlay/s applying to land when a property is being sold. Others, such as tenants and facility operators, can also readily access planning scheme information from public sources.

Conversely, other existing regulatory mechanisms, such as those provided under OHS and EPA legislation are a bit more obscure, so public awareness is limited.

Therefore the planning system is probably the best mechanism for identifying risk areas.

Reflection in the Planning System

» Should modelled risk areas around MHF be translated into planning schemes, and if so, how could this best be achieved? [9]

Modelled risk areas should be translated into planning schemes to protect both the surrounding land and the potential risk generator. However, the mechanisms for achieving this may vary depending on the situation.

Existing potentially hazardous facilities within an urban context, ie. inside the Urban Growth Boundary (UGB), should be zoned appropriately to best reflect their use and context, such as Special Use Zone (SUZ) or Industrial 2 Zone (IN2Z) with surrounding properties also zoned to reflect their predominant land use (eg. residential, commercial, industrial). Overlays should then be applied to control the use, development and subdivision of land within surrounding buffer areas to protect the potentially hazardous land use from potentially conflicting encroachments and control activities within the buffer.
For land outside established urban areas, including land in the Urban Growth Zone (UGZ), Green Wedge Zone (GWZ) or Farming Zone (FZ), existing or new facilities should not only be appropriately zoned to best reflect their use, but the zoning of land within their buffers may also need to be reconsidered.

When rezoning non-urban land for urban purposes, the zoning of land surrounding an existing potentially hazardous use should be chosen to enable more compatible activities to establish within defined buffers. Overlays could then be used to further control use, development or subdivision within the buffer.

**Policy**

» Is the treatment of MHF in State policy adequate/appropriate? [10]

» Should policy more clearly prioritise the protection of human life in areas around MHF similar to that provided under Bushfire policy? [11]

» Could local planning policy play a greater role in managing conflicting land uses and sensitive land use near MHF and provide strategic guidance on how such areas are developed? [12]

The current absence of State policy for MHF should be rectified.

In its submission to the SPPF Review Advisory Committee in May 2014, Casey supported the inclusion of a new State policy for hazardous facilities. This would greatly assist planning and responsible authorities with decision making and also potentially assist in dealing with expectations from proponents, applicants and neighbours of these facilities.

Policy for MHF should provide a balance between protecting human life and recognising that MHF do provide essential resources or infrastructure that people rely upon.

For municipalities with these types of facilities or infrastructure (ie. pipelines), a local planning policy would assist in providing more specific guidance for decision-making and also provide the local community with an understanding of the use and its operation and the context within which any decisions would be made.

**Zones**

» Should a specific zone be considered and applied to all MHF such as the SUZ or a new zone? [13]

» Could or should SUZ or other zone boundaries extend off-site from MHF and Schedules used to allow certain use and development to occur? [14]

» Could any new or modified zone include purposes, permit requirements, decision guidelines that identify and manage sensitive uses? [15]

» Should zones prohibit intensification of use or should they maintain a discretionary permit process? [16]

If the scope of a MHF within the context of the planning scheme is expanded beyond its current OHS definition, then the zone applied to each use should be considered on a case-by-case basis.

While the SUZ or the Comprehensive Development Zone (CDZ) may be the most appropriate zone for larger standalone type facilities, other zones, such as the IN2Z, may be more appropriate for a facility grouped with other potentially hazardous uses or surrounded by other industrial land uses.

The extension of zone boundaries ‘off-site’ could be pursued, but should only be considered where ‘off-site’ land is in the same ownership, there is the potential and strategic need for other compatible uses to be established or the use is proposed in a greenfield situation. Otherwise zones should only be used to cover the land associated with the potentially hazardous facility or infrastructure.
In a greenfield situation, the CDZ could be drafted to identify and manage sensitive uses surrounding a potentially hazardous use. However, the use of the SUZ in this way is not considered appropriate or consistent with established principles for its application.

While a zone could be used to prohibit intensification of any use (either the potentially hazardous land use, or the potentially encroaching sensitive use), with changes and advances in technology, it is considered more desirable to maintain the flexibility that discretion provides.

**Overlays**

» Could or should an existing or new overlay be used to identify risk and manage development on land surrounding a MHF? [17]

» Should both use and development of land around a MHF be managed in an overlay? [18]

» Could an overlay identify inner and outer hazards areas or be applied to identified areas (whether default or modelled)? [19]

Overlays have been used in planning schemes to manage natural environmental risks, such as bushfire, erosion and inundation. So precedent exists for the use of planning overlays for risk management purposes.

There is also precedent in the use of overlays to manage off-site issues in the drafting of existing overlays, such as the Airport Environ Overlay (AEO), Melbourne Airport Environ Overlay (MEAO) and Incorporated Plan Overlay (IPO). So the application of an overlay rather than a zone is considered a more consistent approach to dealing with off-site land uses.

As stated earlier in this submission, Casey has strongly advocated for a number of years for an overlay control to manage buffers around landfills. There are strong similarities between the on and off-site issues surrounding buffer management for both landfills and MHF. Consequently, Casey supports the development of a new overlay that can be used to manage potential encroachments into buffers around potentially hazardous man-made land uses.

Schedules attached to any overlay can be used to differentiate controls between inner and outer areas. The boundaries of these would need to be determined at the time the overlay is initially applied however, the drafting of the schedule could also provide flexibility for the application of requirements to address changed circumstances over time (eg. to respond to changes in technology which may enable greater intensification of off-site uses).

**Notification of Risk**

» Is notification of the risk status of land in proximity to a MHF important and how might it be achieved? [20]

Notification of potential risk is important, but it should not be the prime driver for imposing additional planning controls over land within MHF buffers.

The main reason for introducing additional planning controls over any land within a buffer should be to ensure that the amenity of any encroaching land use is preserved at an expected level and the ongoing operations of the MHF are not compromised by the encroaching uses.

A planning control such as a zone or overlay would be practical as this information appears in planning certificates and/or Section 32 statements, so future landowners can make informed decisions prior to purchasing any impacted property.

Of the two controls, a planning overlay would be preferable as this could be drafted to trigger additional buildings and works requirements and potentially impose additional use controls on top of the zone.
Referral Authority Requirements

» Would it be appropriate or beneficial to include key agencies such as the EPA and WorkSafe as referral authorities for permit applications lodged with identified risk areas around MHF? [21]

» Would the use of a zone or overlay provide the mechanism for engaging the EPA and/or WorkSafe as a referral authority for areas of risk around Major Hazard Facilities? [22]

As referenced earlier, Casey has previously advocated strongly for expansion of the EPA’s role as a referral authority given its technical expertise.

However, the role and responsibilities of the EPA in the planning process still need to be clarified and strengthened so its standing as the public expert in its field is acknowledged by the authority itself and reinforced through appropriate means making it more accountable. This was espoused by the Victorian Civil and Administrative Tribunal (VCAT) in *SITA Australia Pty Ltd & PWM (Lyndhurst) Pty Ltd v Greater Dandenong City Council* [2007] VCAT 156.

In the SITA case, heard before Helen Gibson, then Deputy President, and Dr Sylvia Mainwaring, Member, the role of the EPA was described as:

“21 …a repository of expertise that enables it to undertake expert scientific and engineering scrutiny of proposals to ensure that all reasonable steps are taken to reduce risks to human health and the environment to acceptable levels. The EPA possesses a level of expertise that is not possessed by planning and responsible authorities.

22 In general terms, the EPA is the pre-eminent, expert authority within the state on all matters concerning the control of pollution and protection of the environment. In our view, its assessment of matters related to these issues ought to be accepted as authoritative and in preference to other assessments or opinions in the absence of an established process whereby competing assessments or opinions can be tested and a binding determination made…”

The same arguments would also apply to WorkSafe in relation to MHF given their significant technical knowledge and experience.

Elevation of the status of both agencies could be achieved through appropriate planning controls establishing both the EPA and WorkSafe as referral authorities under Section 55 of the *Planning & Environment Act 1987*, in a similar fashion to that used in Section 52.29 which establishes the Roads Corporation (VicRoads) as a statutory referral authority for applications seeking access to a main road.

Adverse Amenity

Buffers/Separation Distances

» Should Clause 52.10 be reviewed to provide more than just an advisory role in determining the need for permits for industrial and warehousing uses? [23] If so, what should such a review seek? [24]

» Should the EPA IRAE Guidelines be better articulated in the VPP to accord greater weight to separation distances for industry or sensitive use expansion? [25]

» Are the separation distances/buffer distances in Clause 52.10 and the IRAE Guidelines clearly justified and appropriate? [26]

» Might a clearer articulation in the planning system of principles around the need for buffers be useful? [27]

» Does the planning system currently allow and/or facilitate appropriate responses to the provision of buffers whilst ensuring the most efficient land use and land value capture outcomes around MHF and industry? [28]
Casey has previously advocated for changes to Clause 52.10 of the VPP to broaden its scope to necessitate statutory referral of applications for sensitive uses seeking to encroach into buffers of established uses with adverse amenity potential; and, introduce measures to clarify and strengthen the role and responsibilities of referral authorities, in particular the EPA.

In its submission on the EPA’s *Recommended Separation Distances for Industrial Residual Air Emissions* in November 2012, Casey advocated that a ‘one stop shop’ document should be prepared for all separation distances for industry covering noise, vibration and hazardous air emissions, as well as residual odour and dust emissions, identifying the relevant legislation, responsible authorities or agencies. This could then set the maximum separation distances for all industry types and specify the component distances (ie. noise, dust, etc.) to assist with assessing any requests for reductions in separation distances or encroachments.

Casey also recommended that additional permit triggers be developed to ensure separation distances were protected; the EPA be made a statutory referral authority for applications for a range of other uses with adverse amenity potential listed in Clause 52.10 that have no note or a ‘Note 2’ irrespective of whether or not they comply with specified threshold distances; and the EPA be made a statutory referral authority for sensitive uses that may encroach into recommended separation distances (ie. reverse buffers).

A copy of Casey’s submission is attached for reference.

**Reverse Amenity and Agent of Change**

» Could the ‘agent of change’ principle be introduced to planning schemes for industry to ensure that the onus on ensuring appropriate buffers rests with the encroaching sensitive use? [29]

Introduction of the ‘agent of change’ principle would be beneficial to responsible authorities for the management of MHF and other land uses with potential off-site impacts, such as landfills.

The principle would need to be supported in both State and local planning policy, ideally incorporated into clause 52.10 and also reflected in the planning controls covering both the potentially hazardous land use and surrounding land within its buffers.

**Sensitive Uses**

» Should sensitive uses be formally defined in the planning scheme? [30]

Casey advocated to the Potentially Contaminated Land Advisory Committee in 2011 on the issue of defining sensitive uses in the planning scheme. As there have been no changes to the planning scheme in this regard since then, Casey’s 2011 response remains relevant:

> The planning scheme currently contains the term ‘sensitive use’ in the State Planning Policy section and in the Environmental Audit Overlay (EAO). While a definition is not found in the ‘definition’ section of the planning scheme, in the current EAO ‘sensitive use’ is explained as “residential use, child care centre, pre-school or primary school”.

> Under the revised EAO the term ‘sensitive use’ has been avoided with the control specifying the actual land use terms to which the controls applies.

> While the Ministerial Direction and the Practice Note should explain the definition, the term should also be explained in the planning scheme to avoid any confusion about exactly what uses it encapsulates, as irrespective of its inclusion or otherwise in the EAO, the term is used within the State Planning Policy for Environmental Risks (clause 13). This can be addressed by including a definition of ‘sensitive use’ within the General Terms in clause 72.

> Within the revised EAO the term is not required as the way it is now drafted to trigger a planning permit necessitates the use of VPP definitions.
In conclusion Casey submitted that:

A combination of both options should be adopted – leaving definitions in the Ministerial Direction and Practice Note, but also incorporating a definition within the General Terms in clause 72 to clarify the scope of the State Planning Policy for environmental risks which also uses the term.

Navigating the System

» Would a Planning Practice Note(s) for interface planning between industry and sensitive uses be useful? [31]

A Planning Practice Note would be particularly useful as potentially hazardous uses are not commonplace, so planners having to deal with these types of uses within the context of a planning scheme amendment, planning permit application or planning compliance may not have any expertise from which to draw from.

Pipelines

» Given there is already a legislative framework for pipeline protection, does the planning system need to include additional provisions? [32]

» Could a risk based spatial overlay developed for MHF and industry with a specific schedule for pipelines be a potential tool for use in identifying major pipelines in planning schemes? [33]

It would be useful for the planning scheme to identify pipelines as a major infrastructure item. This would ensure they were evident to the general public and developers, as well as authorities and the use and development of land in their proximity could be appropriately addressed.

The most practical means of identifying their existence would be through a spatial overlay. This is considered an appropriate planning tool as it can be drafted to ensure uses within its bounds are constructed of appropriate design standards.

The only apparent shortcoming would be associated with a responsible authority’s capacity to refuse buildings and works proposals which may intensify otherwise as-of-right uses, such as dwellings. However, the recent VCAT decisions cited in the Discussion Paper suggest this may be less of a concern.
Casey's Submission on the EPA's
Recommended Separation Distances for Industrial Residual Air Emissions
(November 2012)

EPA Recommended Separation Distances for Industrial Residual Air Emissions
Submission to EPA
November 2012
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Preamble

The issue of establishing and maintaining buffers or separation distances between uses with adverse amenity potential and sensitive uses is a planning issue of significance for Casey.

It has been the subject of the following submissions made by Casey to the State government and its agencies over recent years:

- In mid-2009 Casey made a submission to the Review of Waste Transfer and Recycling Facility Provisions in Planning Schemes Advisory Committee. This submission responded to and broadly supported proposed changes to the State Planning Policy Framework (SPPF) for waste management to encapsulate resource recovery; develop a model local policy and standard conditions; and, update definitions to reflect changes in technology. However, Casey’s submission went further, requesting changes to Clause 52.10 of the Victoria Planning Provisions (VPP) to broaden its scope to necessitate statutory referral of applications for sensitive uses seeking to encroach into buffers of established uses with adverse amenity potential; and, introduce measures to clarify and strengthen the role and responsibilities of the referral authorities.

- In May 2011 Casey wrote to the Minister for Planning and Minister for Environment and Climate Change regarding buffer legislation requesting that on-site buffers be applied to waste facilities through the VPP to ensure that inappropriate development could not establish in their vicinity. Subsequently, Council officers met with senior officers of the Department of Planning and Community Development (DPCD) in August 2011 to recommend that the State government investigate a suite of planning controls and retrospectively apply them to all activities that require buffers to sensitive uses. The controls suggested were:

1. Zoning or overlay controls to signal the existence of sites that require buffers to users of the Planning Scheme;
2. Clause 52.10 revised to consider sensitive uses as an encroachment. This would provide buffers in the reverse as well to protect already established facilities;
3. Statutory referral of planning permit applications triggered under points 1 and 2 above to the EPA and relevant authorities such as Workcover. These authorities’ roles and responsibilities must also be clarified and strengthened;
4. EPA’s Best Practice Environmental Management - Siting, Design, Operation and Rehabilitation of Landfills guidelines (BPEM) made an incorporated document and given effect via the mechanisms outlined above.

In October 2011 Casey received a response from the Minister for Planning advising that in response to Casey’s letter to him and Council officers meeting with DPCD, DPCD had asked the Victorian Planning and Environment Law Association to prepare a discussion paper identifying issues and possible principles for the application of land use buffers and to consult with the City of Casey in the process.

- In November 2011 Casey made a submission to the Potentially Contaminated Land Advisory Committee on its ‘Issues and Options Paper’ considering changes to planning controls and systems to improve the way contaminated land is managed. Central to Casey’s submission was concern with the role of the EPA in the regulation and management of potentially contaminated land in Victoria. Casey again reiterated the need for the EPAs role as a statutory referral authority to be substantially expanded.

- In February 2012 Casey wrote to the Minister for Planning requesting a planning scheme amendment to create a 1 kilometre radius off-site reverse amenity buffer around the Taylors Road landfill in Dandenong South that would necessitate a planning permit being required for sensitive uses seeking to establish within the buffer.
2.2. Document Scope

While the scope of the proposed guideline is defined as 'residual air emissions' it is restricted to off-site residual odour and dust emissions only, specifically excluding hazardous air emissions, as well as noise and vibration.

To improve its usability the proposed guideline should identify what industries are excluded from its scope; where the issue of hazardous air emissions is addressed; and, which State Government Department or agency has jurisdiction over disputes about hazardous air emission, in addition to listing other regulations, policies and guidelines that may be applicable.

For example, the Public Health and Well Being Act 2008 (PHWB Act), which is not listed, applies to emissions which are, or may be dangerous to health or offensive (with offensive defined under the PHWB Act as "noxious or injurious to personal comfort"). However, in some instances the degree of odour itself could be a health concern even if the emissions are not hazardous, so it remains unclear where responsibility for regulation or enforcement sits.

A document that is a 'one stop shop' for all separation distances for industry that covers noise, vibration and hazardous air emissions, as well as residual odour and dust emissions, identifies the relevant legislation, responsible authorities or agencies would be ideal. This could then set the maximum separation distances for all industry types and specify the component distances (i.e. noise, dust, etc.) to assist with assessing any requests for reductions in separation distances or encroachments.

The intent of the proposed guideline is also that planning/responsible authorities employ it in the preparation of strategic plans, policy development and in rezoning land, as well as in assessing planning permit applications. While it will be useful for strategic planning purposes, it will be more difficult to implement at the planning permit application stage.

For example, in the Industrial 1 Zone (IN1Z), Business 3 Zone (B3Z) and Business 4 Zone (B4Z), only planning permit applications for activities that come within the Clause 52.10 specified threshold distances of sensitive uses require a planning permit. While this may assist in avoiding industrial uses establishing too close to sensitive uses, the reverse still does not apply and there are no specific inter-industry conflict considerations.

Casey's recommendation:
- Consider creating a 'one-stop-shop' for all industry groups containing the greatest separation distances required to address residual odour, noise, vibration, dust and hazardous air emissions

3. Legal Status and Policy Basis

The proposed guideline's legal status and policy basis, as well as the EPA's role in the planning processes, should be better clarified, and more importantly, strengthened.

3.1. Environment Protection Act Status

While the proposed guideline attempts to set out its statutory status and policy basis under the Environment Protection Act 1970, as currently drafted, this is not sufficiently clear.

Sections 3 ('Legal Status of guideline') and 5 ('Policy basis') of the proposed guideline should be incorporated into a single re-drafted section which fully explains the proposed guideline's statutory status, policy basis and relationship to Clause 13 of the State Environment Protection Policy (Air Quality Management) [SEPP (AQM)]. This could possibly be addressed through the addition of a simple statement that the proposed guideline has been prepared as an implementation mechanism under Clause 13(2) of the SEPP (AQM).
Casey’s recommendations:
- Combine Sections 3 and 5 of the proposed guideline.
- State the proposed guideline’s relationship to Clause 13(2) of the SEPP (AQM).

3.2. Planning & Environment Act Status

3.2.1. State Planning Policy Framework

While the current guideline is a document which must be considered under Clauses 13.04 and 17.02 of the SPPF of the VPP so affects all Victorian planning schemes, neither it or the SEPP (AQM) are ‘incorporated documents’.

The DPCD Planning Practice Note on ‘incorporated Documents’ recommends that a document be incorporated in the planning scheme if it will be used to guide the exercise of discretion. So, to require planning and responsible authorities to have regard to the proposed guideline it is recommended that the EPA review the status of the SEPP (AQM) and the proposed guidelines in the VPP and seek to have both incorporated into the VPP.

Casey’s recommendation:
- That the proposed guideline and the SEPP AQM be made incorporated documents in the VPP.

3.2.2. Use and Development Controls

Under the Planning & Environment Act 1987

60(1A) Before deciding on an application, the responsible authority, if the circumstances appear to so require, may consider —

(f) any relevant State environment protection policy declared in any Order made by the Governor in Council under section 16 of the Environment Protection Act 1970; …

In addition, under the decision guidelines for all zones and overlays in the VPP the Responsible authority must consider the SPPF before deciding on an application. Therefore, both the SEPP (AQM) and the current guideline are assessment considerations when a planning permit is required for the use, development and/or subdivision of land.

While a planning permit is required for use, development and/or subdivision of land associated with an industrial activity with adverse amenity potential that does not meet specified distances from sensitive uses, a planning permit is not always required for sensitive uses that may be encroaching into the industrial activity’s buffer or separation distance.

Consequently, existing activities with adverse amenity potential are not protected from the encroachment of sensitive uses. This has the potential to create problems for existing industrial businesses in the future regardless of how well their site is managed, as owners and occupiers of land containing the sensitive uses invariably complain about the inappropriateness of their pre-existing neighbour.

Planning controls should be incorporated into the scheme to trigger permit requirements for sensitive uses proposing to encroach into separation distances to ensure the issue is appropriately addressed in the assessment process and subsequently through permit conditions or design requirements.

Casey’s recommendation:
- EPA request DPCD to investigate a VPP ‘reverse buffer’ mechanism to trigger a planning permit for any sensitive use proposing to encroach into an industrial activity’s separation distance.
3.2.3. Statutory Referrals

Statutory referrals are obviously only potentially required when a planning permit is triggered. As recommended above, additional permit triggers need to be developed to ensure separation distances are protected. However, even if this issue is addressed, currently under the VPP the EPA is only a statutory referral authority for a limited range of land uses with adverse amenity potential, being those:

- where a works approval, discharge or emission licence or licence amendment is required from the Environment Protection Authority;
- for industry or warehouse identified as having potential adverse amenity potential with a Note 1 under clause 52.10; or,
- for stone extraction if the land is intended to be used for future landfill purposes.

Therefore the EPA is not a statutory referral authority for applications for a range of other uses with adverse amenity potential listed in Clause 52.10 that have no note or a ‘Note 2’ irrespective of whether or not they comply with specified threshold distances. Nor is the EPA a statutory referral authority for sensitive uses that may encroach into recommended separation distances (ie. reverse buffers).

The role and responsibilities of the EPA in the planning process need to be clarified and strengthened, and its standing as the public expert in its field needs to be acknowledged by the authority itself and reinforced through appropriate means.

The significance of the EPA’s expertise has been highlighted in SITA Australia Pty Ltd & PWM (Lyndhurst) Pty Ltd v Greater Dandenong City Council [2007] VCAT 156 heard before VCAT’s Deputy President, Helen Gibson and Member, Dr Sylvia Mainwaring:

21 ... The EPA is a repository of expertise that enables it to undertake expert scientific and engineering scrutiny of proposals to ensure that all reasonable steps are taken to reduce risks to human health and the environment to acceptable levels. The EPA possesses a level of expertise that is not possessed by planning and responsible authorities.

22 In general terms, the EPA is the pre-eminent, expert authority within the state on all matters concerning the control of pollution and protection of the environment. In our view, its assessment of matters related to these issues ought to be accepted as authoritative and in preference to other assessments or opinions in the absence of an established process whereby competing assessments or opinions can be tested and a binding determination made. The same approach should be adopted with respect to official EPA policies and guidelines. It is not appropriate for the Tribunal (or others) to look behind these documents to challenge or discount their content. They should be accepted and applied by the Tribunal whatever shortcomings individuals may consider they have. This is a matter of good public policy in addition to it being a legislative requirement. It means though that the status of a particular document may be important in terms of whether it can be said to be official policy within the meaning of the Environment Protection Act 1970, a guideline document, a draft document or it has some other status. This will influence the weight to be placed on it in a decision making context.

The development of Memoranda of Understanding between responsible authorities and the EPA may be one means of achieving this, but amendments to the VPPs should also be made to reinforce the issue. It is recommended that the EPA be made a statutory referral authority for all uses listed in clause 52.10 to ensure that potential air (and noise) emissions are thoroughly considered. If planning controls are introduced to deal with the issue of ‘reverse separation distances’ to protect industries, it is also recommended that the EPA be given statutory status for encroaching applications.

Recommendation:

- EPA be a statutory referral authority for all applications for uses listed in 52.10.
- EPA be a statutory referral authority for applications for encroachments into separation distances.
3.2.4. Relationship to Clause 52.10

The proposed guideline’s relationship to Clause 52.10 of the VPP is explained in Table 1, however as currently drafted it is incomplete. The principal purpose and significance of Clause 52.10 is missing from the proposed guideline. Its principal purpose being:

To define those types of industries and warehouses which if not appropriately designed and located may cause offence or unacceptable risk to the neighbourhood.

And most significantly, compliance with a Clause 52.10 threshold distance is used as a ‘No permit required’ condition for many industrial uses in the IN1Z, B3Z and B4Z. Non-compliance with the specified thresholds triggers a planning permit requirement. Under the amended IN1Z and the new Commercial 2 Zone (C2Z - which will replace the B3Z and B4Z) proposed in the Reformed Zones for Victoria, this situation does not change.

Recommendation:
- Table 1 be amended to incorporate the purpose of Clause 52.10 and identify how compliance with Clause 52.10 thresholds are used as a ‘No permit required’ condition for industrial uses with non-compliance triggering a planning permit in some zones

4. Separation Distances

4.1. The Need for Separation Distances

The proposed guideline explains that separation distances are supplementary to source control and are designed to reduce and manage the effects of unintended or industrial residual air emissions (IRAEs).

While the proposed guideline also states that separation distances seek “to protect ... the potential impacts of sensitive uses encroaching on industry”, implementation of this is not currently fully supported by the planning system.

Planning authorities can provide for ‘buffers’ in strategic plans and seek to avoid rezoning land for sensitive purposes within proximity of industrial activities by implementing the separation distances. Similarly, provisions for separation distances are incorporated into the VPP to protect the amenity of sensitive uses from uses with adverse amenity potential.

However, as discussed earlier, where land is already zoned for sensitive purposes within proximity to industrially zoned land there is no trigger in the current VPPs or universally recognised planning mechanism to protect industries from encroaching sensitive uses. Until this ‘reverse buffer’ issue is addressed, there is the potential for land use conflict.

Casey’s recommendation:
- EPA request DPCD to investigate a VPP ‘reverse buffer’ mechanism to trigger a planning permit for any sensitive use proposing to encroach into an industrial activity’s separation distance

4.2. Recommended Separation Distances

Overall the structure, content and presentation of the ‘Index of Industry Categories’ and their respective separation distances in Table 2 of the proposed guideline is considered practical, user friendly and a significant improvement on the approach used in the current guideline.
Casey does not have the expertise or knowledge to comment on the actual recommended separation distances proposed, so accepts that the EPA has liaised with relevant industries and other experts in the field to determine appropriate requirements.

4.2.1. Specified Distance vs Site Specifics

Casey is concerned however, with the approach taken to defining the recommended separation distances.

There appears to be some conflict between the statement made in Section 7 of the proposed guideline which identifies the recommended separation distances contained in Table 2 the 'Index of Industry Categories' as being the 'default' and 'starting point', with the content of Table 4 in Section 9. The latter infers that site specifics may require a greater separation distance if uses have emission control technology of a worse standard, or an environmental risk assessment concludes that residual air emissions will have a greater impact. This infers that the separation distance ultimately required may be greater or lesser than that specified in Table 2 the 'Index of Industry Categories' in Section 7.

This differs from typical planning practice where the specified 'starting point' is the default maximum requirement and applicants have to rely on site specifics to reduce or 'argue down' that requirement. The way the guidelines are implemented in statutory planning does not always provide capacity to increase the specified distances.

It is recommended that the separation distance specified in the 'Index of Industry Categories' in the proposed guideline be revised up if necessary and become the standard and maximum required for each industry group. Site specific criteria can then be applied to reduce that distance.

Casey's recommendations:
- That the 'Index of Industry Categories' specify the greatest separation distance required for each industry group to address potential residual air emissions.
- That the criteria for site-specific variation be amended to only enable a reduction in separation distance.

4.2.2. Planning Scheme Threshold Distances

Clause 52.10 of the VPP identifies a range of industrial and warehousing uses that may cause offence or unacceptable risk. The threshold distances specified in the clause have a few implications within planning schemes:
- if not met they trigger planning permits for industrial uses in the Industrial 1 Zone;
- they trigger off-site risk assessments for uses with a 'Note 2';
- they trigger statutory referral to the EPA for uses with a 'Note 1' or where a threshold distance is not met.

The separation distances in the proposed guideline vary from those specified in Clause 52.10 of the VPP, partly because the Clause 52.10 threshold distances are 'all encompassing' allowing for noise, vibration and hazardous air emissions, as well as odour and dust.

Some distances specified in Clause 52.10 are greater than those in the proposed guideline, presumably either because their noise, vibration or hazardous air emissions are more far-reaching than the impacts of odour and dust, or because for various reasons the EPA has reviewed the extent of their impact downwards. If the latter, the Clause 52.10 threshold should be reviewed to ensure consistency.
However, some threshold distances in Clause 52.10 are less than those in the proposed guideline. These Clause 52.10 distances **must** be reviewed because of the implications (as listed above) that they have within the planning scheme. The industry types impacted include:

- Works producing iron or steel products up to 1 million tonnes per year;
- Inorganic industrial chemicals production (other than specifically listed);
- Soap and other detergents;
- Production of vegetable oils and fats using solvents;
- Smallgoods production;
- Fibreglass production;
- Clay bricks, tiles and pipe refractories with design production rate exceeding 10,000 tonnes a year;
- Paper or paper pulp production from prepared cellulose and rags, and;
- Wool scouring

**Casey's recommendation:**
- That all of the threshold distances specified in Clause 52.10 of the VPP be reviewed and amended in light of the recommended separation distances in the 'Index of Industry Categories' in the proposed guideline

### 4.2.3. Measuring Separation Distances

Effectively three methods for measuring separation distances are recommended in the proposed guideline. While the guideline states that the most suitable method will depend on land use characteristics of the location including zoning, density and strategic land use planning framework, only 'Method 1: Property boundary to property boundary' is preferred.

From experience, it is not considered appropriate to measure from activities to uses as the potential always exists for an activity or use to expand beyond its existing footprint. It is considered far more prudent to take a conservative approach and consistently rely on property boundaries. This would also avoid a situation experienced by Casey relating to the Hallam Road landfill of different EPA officers recommending different approaches for the same proposal.

**Casey's recommendation:**
- That separation distances be required to be measured from property boundary to property boundary i.e. only one measurement option be given, being Method 1

### 4.2.4. Varying Separation Distances

While it is accepted that there may be site-specific reasons for altering a separation distance, the capacity to increase separation distances is hugely problematic, particularly when these distances are translated into the planning scheme to become threshold distances and become the trigger point for permit requirements i.e. if the Clause 52.10 threshold distance is met for industry in IN12 then no permit is required, so there is no capacity to require a greater distance.

The onus should be on the potentially encroaching use to present information supporting a reduction in distance based on site and business specifics.

**Casey's recommendations:**
- That the specified separation distance be the maximum required distance and site specific considerations enable a reduction
- That the onus should be on the potentially encroaching use to argue for a reduction
- That reductions should be considered on site and business specifics
4.3. Compatible Land Uses

4.3.1. Interface Land Uses

The illustrative explanation of interface land uses is generally helpful.

Two components of Figure 4 require amending:

- Sensitive uses — should be expanded to cover all Education centres and also include Child care centres
- Interface land use activities — Display home should be deleted as no planning permit is required to revert its use back to a Dwelling

**Casey’s recommendations:**
- In ‘Sensitive Land Use Areas’ — replace ‘schools’ with ‘education centres’; and, include ‘child care centres’.
- In ‘Interface Land Use Areas’ — remove ‘display home’ from examples of activities to encourage

4.3.2. Inter-industry Separation Distances

While the proposed guide addresses the issue of potential inter-industry land use conflicts through its coverage on inter-industry separation distances, the capacity to avoid these through planning mechanisms is somewhat limited.

In preparing strategic plans that incorporate or focus on industrial land uses, the issue of inter-industry conflicts can be highlighted and potentially addressed through policy statements, guidelines or requirements; and/or sub-precincts can be designated for specific types of industrial activity. However, the ability to deliver the desired strategic outcomes on the ground is complicated by market forces and limited by the statutory mechanisms currently available to implement the strategic objectives.

At the statutory planning stage there is some capacity to control the establishment of industrial activities with adverse amenity potential. A permit is triggered if an industrial uses has the potential to adversely affect the ‘neighbourhood’ through transportation activities, storage arrangements or emissions. While technically this should negate any inter-industry conflict from occurring, in practice many industrial activities establish without seeking a planning permit and then through changes in operating practices and/or ownership may adversely impact on the amenity of other uses in the neighbourhood.

The permit trigger requirement in the planning scheme is also of some concern. It is recommended that EPA request that DPCD alter the wording of the ‘no permit required’ condition from ‘merely neighbourhood’ to ‘neighbourhood or create inter-industry conflicts with other existing industrial activities’ to highlight the need to better consider this issue.

As discussed earlier, Responsible authorities still do not have the capacity to regulate encroachment of sensitive uses into separation distances established around uses with adverse amenity potential. This is even more problematic within industrial zones where there are more uses not requiring a planning permit, and could potentially become an even greater problem if the industrial zones are amended as proposed under the Reformed Zones for Victoria.

Under the amended Industrial 3 Zone, Shop and Supermarket become ‘as-of-right’ uses. Potentially these uses could establish anywhere within the Industrial 3 Zone regardless of neighbouring or proximate existing industrial activities.

Triggers need to be incorporated into the VPP to overcome this ‘reverse buffer’ issue.
Casey’s recommendation:
• That EPA request DPCD consider the introduction of permit triggers to enable Responsible authorities to regulate potential sensitive uses encroaching into the separation distances established for uses with adverse amenity potential

5. Examples and Definitions

5.1. Examples

The addition of the examples section of the proposed guideline is beneficial for users and is supported. The figures provide good illustrations of indicative situations. It is suggested that the titles of the figures (i.e., in/appropriate buffer) be shifted from the boxes on the right-hand side to adjoining the Figure number.

There is a typographical error in the following sentence (suggested correction shown bold and underlined):

Figure 5 and... A new industry is proposed that has a recommended separation distance of 200m.

Casey’s recommendations:
• Examples section supported
• Amend typographical error as specified above

5.2. Definitions

The term ‘beneficial use’ is used through the proposed guideline but it is not defined. This term should be included in the table of definitions.

Casey’s recommendation:
• Include a definition for ‘beneficial use’ in the table of definitions