

Environmental Defender's Office New South Wales (Ltd)

Fact Sheet: Evidence collecting and environmental investigations

INTRODUCTION

Environmental investigations by community members or groups are important in the enforcement of environmental law, either to provide the basis for third party enforcement action, or to inform regulatory authorities of an environmental incident and to allow them to more fully investigate and take action.

The purpose of this fact sheet is to assist the community to collect evidence and undertake environmental investigations. The fact sheet identifies evidence collection techniques for undertaking an environmental investigation and describes the steps that should be followed in undertaking an investigation for:

1. Compliance with development consent conditions;
2. Illegal land clearing;
3. Forestry operations; and
4. Pollution incidents.

There are a range of environmental matters for which an environmental investigation could be used including illegal land clearing, compliance with development consent conditions, and pollution incidents. In each of these cases a range of techniques can be employed, including taking photographs and videos, collecting physical evidence, note-taking and collecting documentation relevant to the investigation.

The EDO has established a Compliance Portal to assist the community to play a role in ensuring compliance with permits and legislation in a range of environmental areas, including pollution, planning and development, land clearing, threatened species, mining, and marine conservation. The Compliance Portal is designed to equip the community with the appropriate tools and information to enforce the law or report environmental breaches to authorities. This factsheet should be read in conjunction with the Compliance Portal: www.edo.org.au/edonsw/compliance/

The EDO also has information on accessing information under Freedom of Information legislation, which may be an important component of an environmental investigation. Further detail can be found in the 'access to information' fact sheet: http://www.edo.org.au/edonsw/site/factsh/fs07_3.php

EVIDENCE COLLECTION TECHNIQUES

PHOTOGRAPHS AND VIDEO

Images are an important part of evidence as they allow other people to experience a site or event for themselves. They also strengthen other evidence

such as observations and notes. They may also be important in verifying the location where physical samples have been taken. In addition to the following points the Citizen's Guide to Environmental Investigations and Private Prosecutions¹ may be of use.

a) Photographs

When taking photographs where the size of an object is important, try to include an object of a known size to establish the scale e.g. coin, vehicle, person, ruler. It is also very important to record the following details for each photo that you take :

- Unique photo number or code
- Time and date
- Name of photographer
- The location of the photo
 - A description such as 'south-west corner of the XYZ reserve'
 - A mark on a topographic map; or
 - GPS coordinates
- The direction of the photograph e.g. NW, SSE, 250°
- The subject of the photograph

Some tips to improve the usefulness of your photos include;

- Ensure you take enough spare batteries and film or memory cards
- Check the camera settings before beginning. Make sure that the date and time are set to appear on photos and that this is set correctly
- You may need a tripod to improve the quality of the photos, particularly if light levels are low
- If you're using a film camera, or develop digital prints, write the photograph number or code on the back of prints
- It is better to take too many photos rather than too few
- Take some general, wide angle photos to establish the overall scene, then take close-up pictures of specific features.

b) Videos

One of the benefits of recording video footage is that you can provide a narration. It is important to describe what you can see but remain factual and don't state opinions.

¹Environmental Bureau of Investigation. *Citizen's Guide to Environmental Investigation and Public Prosecution*, Available online at <http://www.eprf.ca/ebi/guide/chapter5.html>. [Date accessed 19/11/08]

For example; Good commentary 'there is a pile here of ten trees, with large cut marks on the trunks, and track marks on the ground leading up to a parked bulldozer, with number plate XYZ'

Bad commentary 'Mr Brown has pushed these trees over illegally with his tractor – he should be in gaol!'

Some tips to make videos more effective include;

- Use a tripod to give a steadier shot
- Make sure that you pan slowly – fast panning will give a blurry picture
- If you need to zoom, do it between shots, as doing it while recording may make the viewer feel queasy. It's usually best to stop a recording, zoom in or out, and then start recording again.

NOTE TAKING

Taking notes and recording your observations is an important complementary method to be used with all the other methods.

Tips for note taking

- Use a waterproof pen or a pencil
- Number the pages
- If you type out your notes after field work, ensure that they are the same (i.e. use exact same words) as your field notes
- It might be a good idea to do a template so that you don't forget any information needed at each site e.g. for a water pollution incident, water temperature, dissolved oxygen, salinity, air temperature, wind conditions, time, date, etc
- Write down your observations objectively. Write down what you see, not what you think has happened:

e.g. 'water is turbid, with dirt track dissecting creek at XYZ location' is much better than 'the forestry commission has built a really bad road and is polluting the water with sediment and other pollutants, probably killing fish and other animals downstream'.

COLLECTING RELEVANT DOCUMENTATION

This should occur throughout your environmental investigation, and will be an important step in informing the direction of your inquiries and what you will do with your physical or photographic evidence once you have collected it.

Initially, you should collect all the consent documents, licences and permits related to the matter that you are investigating. In addition to websites and agencies referenced in this section, the Compliance Portal page on the EDO website² will be a useful information source.

² Environmental Defender's Office (2008) *Compliance Portal*. Available online at <http://www.edo.org.au/edonsw/compliance/> [Date accessed 17/11/08]

TRESPASSING

You should never trespass onto private property while collecting evidence. You may be prosecuted, or if the matter goes to court, your evidence may be inadmissible. Ensure that you comply with the law at all times while collecting any evidence or making observations. It is not a defence to trespass to say you did not know you were trespassing.

If you need to go onto someone's property to get evidence and the owner or occupier will not give you permission, you may be able to seek Court orders that you be given access to that property after Court proceedings have commenced.

EVIDENCE COLLECTING FOR COURT PROCEEDINGS

When you take court proceedings the other side will try and show that your evidence should not be taken into account or given weight by the Court. They also have the right to cross examine you about your evidence. The Court will not give your evidence very much weight and may exclude your evidence altogether if it can be shown that your evidence was either unreliable or obtained illegally.

Therefore, if you think that your evidence may later be used in court proceedings, e.g. if you plan to take a developer to court for non compliance with a consent condition, then it is important to keep the following things in mind when you are collecting evidence.

Reliability

The reliability of your evidence will be tested in Court by the other side. This means they will look for any errors in the way you collected the evidence or analysed the testing results. Some factors that should be kept in mind to ensure that your evidence is reliable include:

- The details about how you collected the evidence need to be accurate. You should take detailed notes/photos to show exactly where and when you collected any evidence. If you are unsure about these things, it may appear that your evidence is not reliable. For example, if you have seen a dirty substance being released into a river, but you cannot show exactly where on the river this was occurring, it will be difficult to prove who is causing the water pollution.
- If you are using any equipment to collect evidence, you must be able to give evidence that the equipment was working at the time. For example, if you are using a camera that records the dates and times a photograph was taken, you should check that the date and time on the camera is right before you take the photo.
- You also need to be able to show that you used the equipment properly. For example, if you take samples of water to show water pollution is occurring, you need to make sure the bottles you used were sterilised beforehand. If you are using more complicated equipment you may need to establish that you are qualified to use it. For example, if you are using a GPS to show the location of something, you must be able to establish that you are trained in using a GPS, so that the results you get from using it are reliable.

- If you take samples, you need to ensure you are careful about the chain of custody of those samples so that there is no issue about whether the samples tested are the same as the ones collected, or that the samples have been tampered with.
- Reliability also relates to the witnesses themselves. A reliable witness is someone who has a good memory of what they witnessed and is likely to tell the truth. For example, an angry ex-employee who has been fired recently by a company that is causing pollution may not be the most reliable witness in relation to that company's practices.
- Evidence from witnesses will also be more reliable if they can show that they clearly heard or saw something. For example, a witness who saw someone illegally clearing native vegetation and was a long distance away from where the clearing was occurring may not be able to give reliable evidence about who was doing the clearing.

Legality

- You must obtain evidence by lawful means. If it can be shown that the evidence you collected was obtained illegally, the Court might refuse to consider that evidence as part of your case. Examples of illegally obtained evidence include evidence you obtained when trespassing, or a recording of conversation you had with someone without first telling them that you were recording them.

STEPS IN UNDERTAKING AN ENVIRONMENTAL INVESTIGATION

COMPLIANCE WITH CONSENT CONDITIONS

Relevant legislation and regulatory authority

Where it is required, development consent is given under the *Environmental Planning and Assessment Act 1979* (EP&A Act). The authority responsible for enforcing compliance with consent conditions is the consent authority, which may be the Council or the Minister for Planning.³

The Minister for Planning is the consent authority for 'major projects' (generally large scale developments or developments in sensitive coastal areas), while Council is the consent authority for most other developments (generally smaller developments).

The Minister for Planning is required to make information publicly available in relation to development applications for major projects. The website of the Department of Planning contains three registers of major projects, which are:

1. A register of major projects – this lists all major projects for which approval is being sought. www.planning.nsw.gov.au/asp/register.asp
2. A register of projects on exhibition – this lists all major projects where environmental assessment documents are currently on exhibition to the public. www.planning.nsw.gov.au/assessingdev/onexhibition.asp

³ Under recent reforms, which have not yet commenced, consent authorities will be expanded to include a state Planning Assessment Commission and Joint Regional Planning Panels.

3. A register of notices of determination – this lists the determinations made for all major projects and identifies the conditions of approval for each project: www.planning.nsw.gov.au/asp/ndetermination.asp

Similarly, local councils are required to keep a register of development applications (DA), which also identifies the determinations of these DAs. The register must be available for public inspection at the Council office. Some Councils also provide access to these registers via their websites. Also, Councils are required to make certain information available to the public upon request, including development applications and associated environmental assessment documents. If you are refused access to this information, you can make a complaint to the Director General of the Department of Local Government or to the New South Wales Ombudsman.

For further information on the law relating to development consent, see the EDO Compliance Portal under 'Planning and development'.

Step 1: Collect relevant documentation

The development consent, including the conditions will be an essential document to determine if consent conditions are complied with. This can be obtained from the Local Council or the Department of Planning, whoever was the consent authority. It may also be important to obtain the original documentation that was lodged as part of the development application in order to obtain accurate maps of the site and see what environmental protection measures that the proponent committed to when lodging on the application.

Often consent conditions will include 'the proponent will carry out the activity in accordance with the Environmental Assessment, response to submissions, the statement of commitments and these consent conditions'. This means that it is important to have a copy of what was committed to in the EIS, or Environmental Assessment and any other written commitments made by the proponent as part of the development application.

Step 2: Collect evidence

Consent conditions may be quite varied and so the methods used to investigate compliance with them may also be varied e.g. conditions may relate to setback distance from the road, buffer zones for clearing around watercourses, work to be undertaken between certain hours, noise levels not to exceed certain limits.

Photos

Take photographs of the area and of the notes to accompany them. Make sure photos are marked with time and date, particularly if the condition relates to the time that an activity is undertaken. See section on taking photographs in this fact sheet for more information.

Physical evidence

If the consent condition being breached relates to noise levels you may need specialist equipment to measure noise levels. You should collect as much information as possible e.g. use a tape recorder or Dictaphone to record the noise in a particular location, and then notify the consent authority of the breach. They may then choose to investigate further and will have access to the specialised

equipment required. Alternatively you could employ a consultant to undertake monitoring on your behalf.⁴ This may be expensive.

For other conditions where no specialised equipment is needed, e.g. setback distance or height restrictions, you may be able to measure the distance yourself and provide photographic evidence to the consent authority so that they may enforce compliance.

Step 3: Contact relevant regulatory authority

If the consent authority chooses not to take action on a breach of consent, any person may bring an action in the Land and Environment Court to enforce a breach of the EP&A Act, which includes the enforcement of development consent conditions.⁵ You will need to obtain legal advice if you wish to enforce conditions in the Land and Environment Court.

LAND CLEARING

Relevant legislation and regulatory authority

If land has been cleared, and you suspect that it has been cleared illegally, it is important to check if approval has been obtained for the clearing.

Urban land

If the land clearing has occurred on urban land, the relevant legislation is the EP&A Act and the regulatory authority will be either the Department of Planning or Council. See section of this fact sheet on compliance with consent conditions for further information on consent authorities for different projects.

To check if an approval has been obtained for the clearing, you will need to make inquiries with the Department of Planning or Council.

To ensure that the land where the clearing is occurring is the same as that covered in the development consent, you may need to check with the Department of Lands for the location of the Lot and DP numbers covered by the consent. You can usually do this through their website and a fee may be charged.⁶

For further information on the law relating to land clearing compliance on urban land, see the EDO Compliance Portal under 'Planning and Development'.

Rural land

If the land clearing has occurred on rural land (including land zoned 'rural residential'), the relevant legislation is the *Native Vegetation Act 2003* (NV Act) and the regulatory authority will either be the Minister for Environment or the Catchment Management Authority (where the Minister has delegated a CMA his or her functions under the Act).⁷

⁴ The EDO may be able to refer you to some consultants to undertake this work. Call the EDO Law Advice Line 1800 626 239 for assistance.

⁵ Section 123 of *Environmental Planning and Assessment Act 1979*

⁶ Department of Lands. *Land and Property Information Search*. Available online at <https://lpi-online.lpi.nsw.gov.au/cgi-bin/lpis/menu.pl> [Date accessed 19/11/08]

⁷ Section 48 *Native Vegetation Act 2003*.

Under the NV Act, clearing requires approval through either a Property Vegetation Plan (PVP) or a development consent unless it is permitted under other legislation or is a Routine Agricultural Management Activity (RAMA).⁸ Importantly, broad-scale clearing **cannot be approved** under the NV Act unless it will improve or **maintain** environmental outcomes.⁹

The Minister for Climate Change and the Environment is required to make information available in relation to PVPs and development consents. The DECC contains a register of approved clearing under PVPs and development applications under the NV Act: www.environment.nsw.gov.au/vegetation/publicregister.htm

You can use the following website to get the latitude and longitude of a parcel of land and match this to the area where you have seen clearing occurring: <http://itouchmap.com/latlong.html>

For further information on the law relating to land clearing compliance on rural land, see the EDO Compliance Portal under 'Land Clearing'.

Step 1: Collect relevant documentation

Relevant documents include development applications (including associated environmental assessment documents), development consents (including conditions of approval), and Property Vegetation Plans.¹⁰

If a significant area has been cleared you may wish to obtain aerial photos to indicate that the area was vegetated at a particular date, and has now been cleared without approval. Some photos can be accessed online¹¹ or from the Department of Lands.¹²

Step 2: Collect evidence

Take photographic records of the area where clearing has occurred, accompanied by clear notes. Information and tips on taking photographs is under the 'tips on evidence collection techniques' section of this fact sheet.

Step 3: Contact relevant regulatory authority

If the clearing was not authorised report the matter to the Department of Environment and Climate Change (DECC) on 131 555.¹³ The more information that you are able to provide, the easier it will be for DECC to proceed with the matter. As a minimum you should include:

⁸ These include the construction, operation and maintenance of rural infrastructure, removal of noxious weeds, control of noxious animals, the collection of firewood, harvesting of other clearing of native vegetation planted for commercial purposes, lopping of vegetation for stock fodder, traditional aboriginal cultural activities, the maintenance of public utilities, any activity reasonably considered necessary to remove or reduce an imminent risk of serious personal injury or damage to property; NV Act s 11

⁹ Section 14(3) *Native Vegetation Act 2003*.

¹⁰ The DECC public register where all approved clearing information is contained is found at www.environment.nsw.gov.au/vegetation/publicregister.htm

¹¹ Google Earth. Downloadable from <http://earth.google.com/>

¹² Department of Lands. *Aerial Photography*. Available online at http://www.lands.nsw.gov.au/survey_maps/maps_and_imagery/aerial_photography [Date accessed 19/11/08]

¹³ The DECC website has useful tips on the information that you should provide to them <http://www.environment.nsw.gov.au/vegetation/illegalclearing.htm>

- a. Time, date and location of activity
- b. Description, registration numbers and type of any vehicles or plant involved
- c. An estimate of the size of the cleared area
- d. Any other information that you think is relevant.

Any information that you provide to DECC will be treated confidentially.

If DECC decide not to pursue the matter, any person may take action in the Land and Environment Court to enforce a breach of the EP&A Act¹⁴ or the NV Act.¹⁵

FORESTRY OPERATIONS

Relevant legislation and regulatory authority

The main laws that relate to the regulation of forestry operations in NSW are the *Forestry Act 1916*, the *Forestry Regulation 1999* and the *Forestry and National Park Estate Act 1998*.

The *Forestry Act 1916* establishes State forests and sets out a system of licences for carrying out logging on Crown-timber lands that *are not* covered by a forest agreement.

The *Forestry and National Park Estate Act 1998* sets out a system of licences for logging on Crown-timber lands that *are* covered by a forest agreement.

The *Forestry Regulation 1999* creates special offences that apply within Crown-timber lands, such as causing an obstruction on a roadway or interfering with logging operations.

There are many regulatory authorities for forestry matters, depending on the type of issue or particular impact. For matters relating to Integrated Forest Operations Approvals and harvest plans (such as buffer distances and exclusion zones), DECC is the regulatory authority. For water pollution or threatened species issues, DECC is the regulatory authority, for fisheries issues, the Department of Primary Industries (Fisheries) is the regulatory authority.

For further information on the legal aspects of forestry regulation, see the EDO factsheet on forestry: http://www.edo.org.au/edonsw/site/factsh/fs04_2.php

Step 1: Collect relevant documentation

Areas covered by a forest agreement

If the area where the forestry operation is occurring is in an area covered by a Regional Forest Agreement (generally east of the Great Dividing Range),¹⁶ and a

¹⁴ Section 123 *Environmental Planning and Assessment Act 1979*

¹⁵ Section 41 *Native Vegetation Act 2003*

¹⁶ See <http://www.forest.nsw.gov.au/ifo/eden/docs/Licences/EPA/Figure%201%20EPA.jpg> for map of which areas are covered by RFAs

Forest Agreement, then there will be and Integrated Forest Operations Approval (IFOA) and harvest plan that applies to the particular area being harvested.

The IFOA will outline all the conditions of forest approval including related to threatened species and water pollution. The IFOA should be read in conjunction with the harvest plan, that is prepared for each forest compartment (average 250 ha). The harvest plan is available for viewing at the local Forests NSW office¹⁷ and the IFOA for the harvesting operation is available online at <http://www.forest.nsw.gov.au/ifo/default.asp>.

Other areas

For those forest areas that are not covered by an RFA there are different documents that you should collect. These include the relevant threatened species licences, environment protection licences and the harvest plan and operational map for the area. Threatened species licences for forest operations are available on the DECC website at <http://www.environment.nsw.gov.au/threatenedspecies/S91Tscaregisterbydate.htm> and Environment Protection Licences are also publicly available at <http://www.environment.nsw.gov.au/prpoeoapp/searchregister.aspx> however if you can't find EPLs associated with forestry contact the Department of Environment and Climate Change.¹⁸

The Forest Practices Code for Native Forests may also be a useful document to read. This contains information on operational controls to maintain occupational health and safety requirements, environmental standards and the delivery of forest products and is available from Forests NSW Cumberland Office.¹⁹

Step 2: Establish area of focus

Find out where logging will be occurring in your area. The local Forests NSW office should have harvesting plans for the next month that are available for inspection.

You will require permission from Forest NSW to enter a logging site while logging is in progress. It's an offence to approach within 100m of timber harvesting or hauling equipment while it is being operated, unless you have Forests NSW approval. Forests NSW may erect notices prohibiting access to a forest area. It is an offence to enter a forestry area in contravention of such a notice without prior written permission of Forests NSW.²⁰

Forestry officers, police officers and other persons authorised by Forests NSW may request, in certain circumstances, that you leave a forestry area. Failure to comply with a lawful request is an offence.

Good areas to target within a logging that is not active are

- a) Watercourses
- b) Known threatened species habitat areas and other modified harvest zones such as special protection zones

¹⁷ For office locations see <http://www.forest.nsw.gov.au/contactus/default.asp>

¹⁸ info@environment.nsw.gov.au or 131555

¹⁹ Contact details are at <http://www.forest.nsw.gov.au/contactus/default.asp>

²⁰ National Parks Association of NSW and NSW Environmental Defender's Office (2006) *Community Guide to Forestry Monitoring*

- c) Boundaries of the harvest area and modified harvest zones.

Before you go into the field it is a good idea to look at the harvest plan and operational map to focus your investigation and alert you to particular threatened species conditions.

Step 3: Pre logging investigations

It is a good idea to visit a forest before logging commences because it may enable you to:

- a) identify flora or fauna requiring protection that have not been found by Department of Primary Industries (DPI). Note that if you are not licensed to survey for wildlife, only opportunistic surveys can be undertaken. For example, if a Superb Parrot flies across your path or you come across a koala scat, these are opportunistic sightings and should be reported to the DECC. You'll need to know the location on a map in order to have the sighting recorded.
- b) identify areas that should not be logged which may not have been marked on the harvest plan, e.g. where endangered ecological communities are located. See the threatened species website²¹ for a full list of EECs that can be searched by the location that you're interested in.
- c) check the tree markings for compliance with the harvest plan (in the areas that have already been marked up).
- d) Note that all boundaries marked on the operational map, except State forest and compartment boundaries, are indicative only. Accordingly, actual boundaries established in the field have precedence. For example where a River Red Gum forest extends, beyond the area shown on the operational map, any conditions applicable to that forest type apply to the entire area on the ground and not just the River Red Gum forest area shown on the map.

Step 4: Investigations during logging

Active logging sites can potentially be monitored after hours or from the boundaries of the harvest area. Remember that it is an offence to approach within 100 metres of harvesting or hauling equipment while it is being operated, and that you must obey exclusion notices erected by DPI.

If you are on the boundary of the forest area, remember that entering private property without permission may be trespass. When you enter and inspect an active logging operation with permission, DPI is required to hold a safety induction, a hard hat and vest must be worn by visitors and logging contractors must be notified of the inspection. Licence breaches are often found in the presence of DPI staff and when this occurs they have to formally acknowledge this.

A formal inspection is also useful:

- a) in learning how harvest plans are implemented and what understanding staff has of the licence conditions;

²¹ Threatened Species. *Department of Environment and Climate Change NSW*. Available online at <http://www.threatenedspecies.environment.nsw.gov.au/tsprofile/index.aspx> [Date accessed 19/11/08]

- b) for letting DPI know that the community is knowledgeable about licence conditions; and
- c) to force DPI to be prepared with their safety plans – a requirement under Work Cover.

Step 5: Investigations after logging

If you visit a forest soon after logging operations have ceased you may be able to:

- a) identify areas that have been logged but should not have been, eg. endangered ecological communities;
- b) identify trees that have been logged but should not have been, given their type or size (based on stumps), eg. River Red Gum greater than 150cm diameter at breast height, River Red Gum greater than 100cm diameter at breast height in habitat corridors, habitat and recruitment tree retention, mistletoe carrying trees required for retention;
- c) identify threatened species that were not identified/recorded, but which should have triggered some protection measures, eg. koala high use tree, nest/roost sites for threatened owls, raptors, parrots or bats.
- d) check that sufficient ground cover has been maintained to ensure the on-ground residue status is the same as it was prior to logging (photographs of on-ground residue are usually provided in the relevant harvest plan);
- e) check the condition of waterbodies and trees not harvested.

The most common things to look for

The most common breaches of environment protection licences (EPLs), or IFOAs are water pollution in the form of erosion and illegal snig tracks that have been placed on too steep a slope and/or cause too much erosion. Snig tracks are the pathways along which logs are moved to log dumps. The most common location of breaches of EPLs are stream crossings, eg. roads and snig tracks.

Water pollution prosecutions are the most common form of prosecution in relation to logging operations. It's likely that water pollution has happened or will happen as a result of logging operations if you see any of the following:

- a landslip or land and tree slide, the collapse of a part of a road, road cutting, or embankment.
- an erosion gutter or drain wash out on an exposed road surface.
- logging within 10 metres of a drainage line (or within 20 metres of a larger creek).
- bulldozer or other machinery tracks crossing a drainage line.
- logging on land over 30 degrees slope.
- soil exposed after a post logging burn within 10 metres of a drainage line.
- turbid (muddy) water running from a road or track into a forest creek.

- long stretches of dirt road where run-off water is not guided off the road by humps or road camber.
- “plugs” of soil or sediment in watercourses.
- spills of engine oil, diesel or other fuels.

Tips for collecting evidence in the field

Always note in writing the date, time and place of your observations. It is particularly important to record your location with as much accuracy as possible – preferably by marking it on a map.

Make records in as many ways as possible - written notes, photographs, tape recordings, video footage. Ask yourself - who, what, when, where, why.

Record what you saw, heard, felt, smelt and/or tasted. For example:

- record visual observations of flora and fauna, water pollution and/or individuals’ actions.
- record aural identification of fauna (eg. conversations with forestry staff, bird calls).

Where possible, take measurements or make estimates of size or distance, eg. tree stump measurements where you think the cutting diameter limit has been breached. Don’t forget to note down not only the measurement, but how you took it, eg. at what height did you measure/estimate tree stump diameter and what instrument did you use (naked eye, tape measure, ruler etc).

Where possible, seek independent witnesses and if you are in a group have more than one person record their observations.

Where possible collect physical evidence, eg. soil or water samples, plant or animal specimens. Remember:

- certain activities require licences or permits, eg. threatened species surveys.
- to keep written notes and record the location of the sample on a map and if possible, photograph or video sampling process.

For every photograph include an object of known size for scale (eg. person, vehicle, ruler, notebook, coin) and make sure to record:

- photograph number
- location of photograph (description, map, coordinates)
- direction of photograph
- subject of photograph.

Step 6: Contact the appropriate regulatory authority

If you identify a breach occurring call your local NSW Forests Office to report it.²² If it is a matter that is regulated by DECC e.g. related to threatened species or water pollution you should also inform DECC through the pollution line (131555).

For forests where there is an IFOA, there is no third party right of enforcement for any conditions of approval.²³

POLLUTION INCIDENTS

If the pollution is a one off event and serious, you should immediately notify the DECC through the pollution line (131555 – this is operational 24 hours a day). If the pollution is from a non-scheduled activity (such as pollution from a building site) DECC will direct your call to your local council, who are responsible for 'non-scheduled' discharges (under the POEO Act). If the pollution is ongoing and you have more time to collect evidence then the following steps may be useful to follow.

Relevant legislation and regulatory authority

Pollution in NSW is regulated through a system of licences. Environment Protection Licences (EPLs) are required where works and activities are listed in the *Protection of the Environment Operations Act 1997* (POEO Act). These are called *scheduled activities*.²⁴ Local councils have responsibilities for regulating pollution from non-scheduled activities.

EPLs are usually granted with conditions attached. These conditions are designed to prevent/minimise pollution and environmental degradation. Licence conditions relate to pollution prevention and monitoring, and cleaner production through recycling and reuse and the implementation of best practice.

Holders of EPLs are also required to lodge annual returns. The Annual Return is completed by a licensee in order to provide feedback to the EPA about its environmental performance. It requires completion of a monitoring summary and certification that it has complied, or has not complied, with the conditions attached to the licence. Details of non-compliances that occurred during the reporting period must be provided in the Annual Return.

The Environment Protection Authority (EPA) is the pollution regulator in NSW. It has been integrated into the Department of Environment and Climate Change (DECC), which is responsible for the administration of this legislation.

For further information on the law regulating pollution, see the pollution section of the EDO Compliance Portal: <http://www.edo.org.au/edonsw/compliance/>

Step 1: Collect relevant documentation

EPLs are available online at <http://www.environment.nsw.gov.au/prpoeoapp/searchregister.aspx> so you should see if the premises that you're concerned with has an EPL and if they do, which pollutants they are licensed to discharge.

²² For a list of all NSW Forests Offices call <http://www.forest.nsw.gov.au/contactus/default.asp>

²³ See EDO Forestry factsheet for further information on the regulation and enforcement of forestry legislation. http://www.edo.org.au/edonsw/site/factsh/fs04_2.php

²⁴ Scheduled activities are defined in Schedule 1 *Protection of the Environment Operations Act 1997*

Licence returns are submitted to DECC annually, and are available by applying under the *Freedom of Information Act 1989*. More information on using Freedom of Information legislation to access information is available in the EDO factsheet on Advocacy.²⁵ Self reported non-compliances with licence conditions are available on the public register.²⁶

Other documents that may be useful are the ANZECC Water Quality Guidelines²⁷ to compare any pollution occurring at a site with recognised guidelines for ecosystem protection, drinking water or stock and domestic use. The EDO Technical Fact Sheet on Water Quality Assessment may also be of use.²⁸

For air quality issues the EDO Technical Fact Sheet on Air Quality – Dust Monitoring will be useful.²⁹

Step 2: Collect evidence

Take notes and photographs/video footage of the area where the incident is occurring.

Physical evidence

Take any physical samples that may be necessary to prove what you're alleging e.g. if you think that a particular factory is emitting a certain type of water pollution, you will need to test the river upstream and the river downstream and if possible the discharge point from the factory to prove that it is the source of pollution. For particulate matter pollution i.e. dust, refer to the EDO Technical fact sheet on air quality.³⁰ The Citizen's Guide to Environmental Investigation and Private Prosecution provides useful advice on the collection of water samples and how to document air pollution incidents.³¹

Samples should be taken in accordance with recognised guidelines or procedures to ensure that the results are accurate.³² This also includes being analysed in a NATA accredited laboratory. If you need assistance interpreting your results the EDO Scientific Advisory Service may be able to help you. Contact the legal advice line.³³

Plan and collect samples (physical evidence)

Get a detailed map of the area, particularly of the waterway and its catchment. Consider the catchment, the suspected pollution, and spend some time making a plan before you commence sampling.

²⁵ Available online at <http://www.edo.org.au/edonsw/site/factsh/factsheets.php>

²⁶ Available online at <http://www.environment.nsw.gov.au/prpoeoapp/searchregister.aspx>

²⁷ Available online at <http://www.environment.gov.au/water/publications/quality/index.html>

²⁸ Available online at http://www.edo.org.au/edonsw/site/pdf/scifs/sfs_water_quality071213.pdf

²⁹ Available online at http://www.edo.org.au/edonsw/site/pdf/scifs/sfs_air_quality_dust060405.pdf

³⁰ Available online at http://www.edo.org.au/edonsw/site/pdf/scifs/sfs_air_quality_dust060405.pdf

³¹ Environmental Bureau of Investigation. *Citizen's Guide to Environmental Investigation and Public Prosecution*, Available online at <http://www.eprf.ca/ebi/guide/chapter5.html>. [Date accessed 19/11/08] Note that this publication is Canadian, and so references to legal frameworks are not applicable to NSW.

³² See Water Quality and Dust factsheets for appropriate methodologies that should be used. Available online at http://www.edo.org.au/edonsw/site/pdf/scifs/sfs_water_quality071213.pdf and http://www.edo.org.au/edonsw/site/pdf/scifs/sfs_air_quality_dust060405.pdf

³³ The EDO operates a free hotline for environmental legal advice, and scientific advice. Contact 1800 626 239 Tuesday –Thursday, 2.30-5.30pm.

Secure a number of clean sampling containers or bottles (contact local authorities or EDO Scientific Advisory Service). The number and type of bottles will depend on the type of suspected pollution, the intended analysis and your sampling plan. Clean bottles are often provided by analytical laboratories.

It would be ideal to also use a portable water quality meter (used to measure water attributes such as pH, electrical conductivity, dissolved oxygen, temperature and turbidity). Ensure that it is calibrated, and keep the calibration records. The top priority is your own health and safety and your sampling plan should take account of any sampling hazards, such as traffic, steep slopes, overgrown vegetation, deep water, snakes etc. Rivers are generally isolated localities and it is not safe to sample alone. It is sensible to alert friends and colleagues of your activities.

Visit the waterway above and below the suspected pollution and take notes of conditions (with photographs) to establish the exact source and the extent of the contamination. Investigate practical sampling issues such as how to access the waterway. Identify safe localities such as parks, bridges and walking tracks. Do not enter private land without the owner's permission.

Then produce a sampling plan for the incident. In most cases it would be appropriate to sample at one or two sites upstream of the suspected pollution (two sampling sites would be better than one). This is essential to establish the state of the waterway before the suspected pollution enters. Also collect samples of the suspected pollution source at the most visually affected site. If the pollution appears to be widespread, collect multiple samples downstream, with the objective of assessing the 'zone of impact' from the contamination. In general, it is appropriate to collect from two sites downstream. If the waterway is tidal, consider the effect of tides and collect samples within a single tidal cycle.

Take multiple 'replicate' samples at each site on each occasion. Results from a single sample at a site may be regarded as a chance occurrence. If possible, take two or three samples at each site over a minute or two. This will greatly improve the quality of the data. Also take photographs and sampling notes (see previous section).

When you sample, try and collect samples from running water in the centre of the river or stream. A bridge can be a great help. A bucket and rope can be very helpful sampling apparatus. Bring a supply of clean water and rinse all sampling gear between sampling sites. Also rinse the bucket in the stream before filling the sample bottle. Try and get the sample from below the water surface if possible.

Security of the samples is paramount. Keep them under your control, and ideally, lodge them with a NATA endorsed laboratory for analysis on the same day. Keep control of the samples as 'chain-of-custody' may be critical in a prosecution. A sampling esky is ideal for secure transport of samples at the appropriate temperature.

When organising for sample analysis, get advice on the type of analytical tests to run. They can be very costly. For assistance with the range of tests and interpretation of the data, contact the EDO Scientific Advisory service. Other groups that may help include your local water authority, local council, catchment management authority, conservation group or Streamwatch.

If the pollution is a long-term problem, you may need to consider conducting regular sampling. This may be a very substantial undertaking, but regular sampling can produce very powerful evidence. Such activities are supported by

Streamwatch, but there is often a waiting list, and they expect a strong ongoing commitment.

Step 3: Contact relevant regulatory authority

If the results indicate that pollution is occurring that is not allowed by the EPL then you should report your results to the regional DECC office.³⁴

If DECC do not wish to further investigate, or pursue the matter, any person is able to enforce a breach of an EPL in the Land and Environment Court.³⁵ You should obtain legal advice if you wish to do this.

³⁴ A list of DECC regional offices can be found at <http://www.environment.nsw.gov.au/contact/> You should contact a DECC office, not a national parks office.

³⁵ Sections 219 and 252 *Protection of Environment Operations Act 1997*

Further information/Useful Contacts

Department of Environment and Climate Change (incorporating EPA, NPWS, DEC and DNR)

59-61 Goulburn St, Sydney

9995 5000

Pollution line 131 555 (24 hours)

Regional offices and contact details <http://www.environment.nsw.gov.au/contact/>

Website <http://www.environment.nsw.gov.au>

Forests NSW

121-131 Oratava Ave, West Pennant Hills

9872 0111

Regional offices and contact details

<http://www.forest.nsw.gov.au/contactus/default.asp>

Website <http://www.environment.nsw.gov.au>

Department of Planning

23-33 Bridge St, Sydney

9228 6111

Major Developments Strategy – 9228 6379

Major Infrastructure Strategy – 9228 6349

Urban Assessment/Coastal Assessment and Hazards – 9228 6335

Website <http://www.planning.nsw.gov.au>