EDO Qld.
Environmental Defenders Office
Using the law to protect our environment.

Community rights and the Environmental Protection Act (Qld) 1994

This Factsheet is for general information purposes and is not legal advice. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.

1. Summary

- The Queensland State of the Environment Report (2007) is a useful tool for you to use when lobbying on environmental matters.
- The Chief Executive of the Department of Environment and Resource Management ("**DERM**") and local governments are required to maintain a public register which gives you access to various documents under the *Environmental Protection Act* 1994 ("**EP Act**").
- Generally the public does not have rights of submission in relation to the Environmentally Relevant Activities ("ERAs") that require licensing.
- The DERM and local governments share the administration and enforcement of those ERAs as set out in the *Environmental Protection Regulation 2008* ("**EP Regulation**").
- If you ring the **DERM Pollution Hotline - 1300 130 372** you can report alleged illegal activity. Your call will be logged and investigated or you will be referred to local government if the matter is within their jurisdiction.
- Learn what powers DERM has so that you can request particular action.
- Any person, including a member of the community or community group may go to the Planning and Environment Court for an order to remedy or restrain illegal activity such as an environmental offence or lack of approval or breach of a condition of approval. The general rule in the Planning and Environment Court is that each side bears his or her own costs irrespective of who wins the case as it is a public interest jurisdiction.

2. Object and Scope of the EP Act 1994

The object of the Queensland *Environmental Protection Act* 1994 ("**EP Act**") is to protect Queensland's environment while allowing for "ecologically sustainable development". Ecological sustainable development is development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.

In order to achieve this object, the EP Act provides for a range of mechanisms including:

- Environmental Protection Policies ("**EPPs**"), which establish environmental values and quality objectives, for example include Air and Water EPPs.

© EDO Qld

- a licensing system for "environmentally relevant activities" ("**ERAs**"). ERAs are typically industrial activities which have the potential to contaminate the environment, for example chemical storage, dredging or mining.
- establishment of the "general environmental duty" that applies to a range of activities;
- a system for identifying and managing contaminated land;
- environmental offences and executive officer liability;
- civil enforcement provisions enabling any person in the community to restrain breaches of the Act;
- public reporting of information on the environment, exemplified by the "State of the Environment Report"; and
- access to information provisions, such as the public register which is available to members of the public for inspection.

3. Environmental Protection Policies ("EPP")

A policy may be made under the EP Act by the Minister to enhance or protect Queensland's environment. These policies may broadly address the environment or anything that affects, or may affect, the environment. EPPs are relevant when later decisions are made under the EP Act, for example licensing of activities and assessing the condition of the environment.

There is no process set out in the EP Act for the public to propose that a policy be made. This means you will need to lobby the Minister and demonstrate that a new policy is necessary.

An EPP is subordinate legislation and does not have effect until it is approved by the Governor in Council. Each EPP must be laid before Parliament where they can be subject to a motion for disallowance.

There are currently four EPPs:

- *Environmental Protection (Air) Policy* 2008;
- *Environmental Protection (Noise) Policy* 2008;
- *Environmental Protection (Water) Policy* 2009; and
- *Environmental Protection (Waste Management) Policy* 2000.

4. State of the Environment Report and the Public Register

Every four years under the EP Act the Queensland Government is required to prepare and publish a report on the state of Queensland's environment. The SOE Report 2007 is a valuable reference document that community members can use in advocacy on environmental issues. SOE 2007 is available on the DERM website, along with the most recent data and information available on a range of indicators. The next SOE report is due to be released in 2011.

The EP Act also requires that a public register is kept by the administering authority which is the Chief Executive of the Department of Environment and Resource Management or the local council, which ever is administering the relevant ERA, as described below. Pursuant to the register, you are entitled to inspect and obtain copies of a range of listed documents. This is faster and cheaper than for instance applying to access information pursuant to the *Right to Information Act 2009* and *Information Privacy Act 2009*. The documents that you are entitled

to access are listed in s540 of the EP Act and include copies of environmental authorities (i.e. licences), copies of development approvals for ERAs described below and many other documents. When you contact your local council or a DERM office, you may need to be persistent in requesting access to the documents on the public register as many staff do not know about the register.

The DERM website has sections on “right to information” and “be involved” which provides information about accessing government information and lists opportunities for public comment and consultation processes: http://www.derm.qld.gov.au/about/rti/index.html ; http://www.derm.qld.gov.au/be-involved/index.html

5. ERAs and Community input

The introduction of the new *Environmental Protection Regulation 2008* saw some significant changes to the regulation of ERAs. There are now four types of ERAs under the EP Act, each are dealt with individually.

1. Chapter 4 of the EP Act deals with the requirements for the operation of all other types of ERAs;
2. Mining (Chapter 5) activities have a different regime under the EP Act which is detailed in the *EDO’s Mining information Sheet*;
3. Chapter 5A of the EP Act deals with the requirements for the operation of ERAs for greenhouse gas storage activities and petroleum activities only; and
4. Agricultural ERA in certain reef catchments.

Of primary concern are the ERAs dealt with in chapter 4.

An ERA is an activity that will or may release contaminants with the potential to cause environmental harm. ERAs range from chemical processing, waste treatment, spray painting to certain agricultural activities such as piggeries, prawn farms and cattle feedlots.

Some ERAs are administered and enforced by DERM others by the local councils. As a result of the introduction of the new *Environmental Protection Regulation 2008* the responsibility for a significant number of ERAs was shifted from the State government to local councils.

All ERAs have an Aggregate Environmental Scores (“**AES**”) which is determined by the degree to which the activity causes environmental harm, for example an activity that requires a larger amount of land will have a higher AES than an operation that uses less. AESs are really only used to assess the appropriate fee due.

All of the Chapter 4 activities require a registration certificate in addition to a development approval/permit before they can legally operate, unless there is a code of environmental compliance for the particular ERA.

The general public has no formal rights to make objections or submissions on proposals to carry out ERAs except certain mining activities.

If the ERA is assessed under the Integrated Development Assessment System (most are) you are entitled to see and copy the application and supporting materials. If the ERA is considered to be Impact assessable development (in rare cases), then the submission rights attached to that form of development are enlivened. Generally however, you have no formal submission rights, so you should write a letter to the decision maker (usually DERM or local government) giving your opinion on whether the application ought to be approved or conditions attached.

Your arguments should refer to the "standard criteria" which under the EP Act are relevant to the decision.

The Standard Criteria includes a variety of matters, including:

- the principles of ecologically sustainable development
- any relevant EPPs;
- the character, resilience and values of the receiving environment;
- all submissions made by the applicant and submitters;
- best practice environmental management;
- financial implications as they relate to the industry or type of activity; and
- the public interest.

Local planning schemes might contain additional community rights of submission and appeal on ERAs. If so, criteria set out in the planning scheme will be relevant to that decision.

6. Community input on Contaminated Land

Chapter 7, Part 8 of the EP Act contains provisions for identifying, recording and managing land that is affected by hazardous contaminants or which was the site for activities called notifiable activities, such as tanneries, which are likely to lead to contamination. Such land is placed on the Environmental Management Register.

The DERM might decide to require a site investigation to see the level of contamination and then either leave the land on the Environmental Management Register or put it on the Contaminated Land Register which is reserved for seriously contaminated sites that must be cleaned up.

The general public has no formal role in this process but can search both Registers and obtain copies of any site management plan.

Owners and occupiers of the land have a range of responsibilities in relation to the land.

7. Complaining and asking Government to act

The EP Act is mainly administered by the DERM with some responsibilities devolved to local governments. Look in the EP Regulation to see if the administration and enforcement of the ERA you are concerned about is the responsibility of DERM or council.

The administration of the EP Act, according to the DERM Annual Report 2009, led to 2,898 complaints to DERM and 18,730 complaints to local government in the period between 1 July 2008 and 30 June 2009.

If you ring the **DERM Pollution Hotline - 1300 130 372** you can report pollution or a breach of the EP Act. Your call will be logged and investigated or you will be referred to local government if the matter is within their jurisdiction. If a pollution incident relates to a residential property you should contact your local council.

If you can send in a letter with details and photographic evidence of the alleged breach then that will assist DERM or the local council to investigate the matter.

DERM has various legal powers or administrative processes. For example, you could ask DERM to:

- Send an inquiry or warning letter to the operator;
- Issue an infringement notice for a minor breach of the EP Act;
- Issue a direction notice;
- Issue a clean up notice;
- Issue an environmental protection order requiring the operator to do or not do something for example, to stop breaching a condition of approval or to obey a direction to conduct an environmental investigation;
- Require the operator to conduct an environmental audit or investigation which in some cases gives DERM power to tighten a development approval or environmental authority;
- Prosecute in court for an offence against the EP Act; or
- Seek a civil order of the Planning and Environment Court to remedy or restrain an offence against the EP Act or relevant parts of the *Sustainable Planning Act* 2009.

8. Duty to notify of serious or material environmental harm

The EP Act imposes a duty on people who become aware that unlawful serious or material harm is threatened by or is occurring because of an activity that they or their employer are conducting or should have conducted, to notify the relevant administering authority for the activity (the "***duty to notify of environmental harm***"). This should be done unless the harm is authorised under:

- an environmental protection policy;
- a transitional environmental program;
- an environmental management program;
- an environmental protection order;
- an authorisation;
- a direction from an authorised person in an emergency.

Failure to fulfill the duty to notify of serious or material environmental harm is an offence and prosecution may be carried out.

9. Environmental Offences

The EP Act creates a range of environmental offences, including provision for liability of executive officers of corporations.

In short, it is an offence if some type of approval is required but not obtained for an ERA or if an applicable condition is breached.

The introduction of the new *Environmental Protection Regulation 2008* and associated amendments has seen the movement of the majority of the offence provisions to the EP Act. Previously there were offence provisions in the EPPs and in the EP Reg, those provisions have now largely been consolidated into the EP Act.

The EP Act provides that it is an offence to cause environmental nuisance. Environmental nuisance is defined to include noise, dust, odour, fumes, ash, light and smoke nuisances etc.

Environmental nuisance complaints can be made to the DERM, who may subsequently issue a direction notice if the noise amounts to environmental nuisance. It is an offence to fail to comply with a direction notice, unless a reasonable excuse exists. In addition, the laws create specific offences for environmental noise. These provisions specify conditions, hours of operation and noise levels for a number of activities.

The EP Act also contains offence provisions relating to environmental harm. An act or omission that causes serious or material environmental harm or an environmental nuisance (those terms are defined) is unlawful (***unlawful environmental harm***) unless it is authorised to be done or omitted to be done under various instruments such as an EPP or a condition of a development approval etc.

However, it is a defence to a charge of unlawfully causing environmental harm to prove—

(a) the harm happened while an activity that is lawful apart from this Act was being carried out; and

(b) the defendant complied with the general environmental duty.

A ***general environmental duty*** is imposed on all persons and ensures that an activity must not be carried out if it causes or is likely to cause environmental harm, unless all reasonable and practicable measures are taken to prevent or minimise the harm.

In determining whether the general environmental duty has been met, regard may be had to factors such as:

- the nature of the harm or potential harm;
- the sensitivity of the receiving environment;
- the current state of technical knowledge for the activity;
- the likelihood of successful application of the different measures that might be taken; and
- the financial implications of the different measures as they would relate to the type of activity.

Non-compliance with the general environmental duty does not automatically lead to prosecution, however, an environmental protection order can be issued to secure compliance with this duty. If this order is not complied with then the person can be prosecuted.

10. Citizen Enforcement Provisions

Any person, including a member of the community or community group may go to the Planning and Environment Court for an order to remedy or restrain illegal activity such as an environmental offence, lack of approval or breach of a condition of approval. The general rule in the Planning and Environment Court is that each side bears his or her own costs, irrespective of the outcome of the case as it is a public interest jurisdiction.

For environmental offences under the Act, leave of the Court may be required. Gaining leave of the court is not required for a person whose interests are directly affected by the subject matter of the proceeding, for example, if your health was affected by air pollution from a nearby factory. However, a person who does not have a proprietary, material, financial or special interest in the subject matter of the proceeding will generally require leave of the Court. In granting leave, the Court must be satisfied;

- environmental harm has been or is likely to be caused; and

- the proceeding would not be an abuse of the process of the Court; and
- there is a real or significant likelihood that the requirements for the making of an order under this section would be satisfied; and
- it is in the public interest that the proceeding should be brought; and
- the person has given written notice to the Minister or, if the administering authority is a local government, the administering executive, asking the Minister or authority to bring a proceeding under this section and the Minister or executive has failed to act within a time that is a reasonable time in the circumstances; and
- the person is able to adequately represent the public interest in the conduct of the proceeding.

The Court may also consider other matters relevant to the person's standing to bring and maintain the proceeding.

Before going to Court over an environmental matter you will need legal advice and assistance and usually the opinion of a relevant expert, for example an air quality expert, who is able to be an "expert witness" for you in your case.

11. Further information

Environmental Defenders Office (Qld) Inc.
Ph: (07) 3211 4466
Email: edoqld@edo.org.au
Website: http://www.edo.org.au/edoqld/home.html

Environmental Defenders Office of North Queensland Inc
Ph: (07) 4031 4766
Email: edonq@edo.org.au
Website: http://www.edo.org.au/edonq/

Department of Environment and Resource Management
Ph: 13 7468
Website: www.derm.qld.gov.au
DERM Annual Report March 2009-June 2010
http://www.derm.qld.gov.au/about/corporatedocs/annualreports.html

© EDO Qld