



Water, Air & Noise Pollution

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Sydney:	02 9262 6989
Northern Rivers:	1800 626 239
Rest of NSW:	1800 626 239

Overview

Responsibility for regulating pollution in NSW rests primarily with the State government, through the Environment Protection Authority (EPA) and the Office of Environment and Heritage (OEH). Local councils also have some responsibility for regulating pollution.

This fact sheet provides information about how, and to whom, to report a pollution incident, and explains the laws relating to water, air and noise pollution in NSW.

Protection of the Environment Operations Act

The main law in NSW regulating water, air and noise pollution is the [Protection of the Environment Operations Act 1997 \(NSW\)](#) (POEO Act).²

The POEO Act:

- Empowers regulatory authorities to issue pollution licences;
- Creates a range of pollution offences and penalties;
- Allows regulatory authorities to enforce the POEO Act;
- Allows the public to take legal action to enforce the POEO Act.

¹ http://www.edonsw.org.au/legal_advice

² See also the *Protection of the Environment Operations (General) Regulation 2009* (NSW).

The POEO Act also contains offences relating to waste. These are dealt with in the [Fact Sheet on Waste Management](#).

Which Minister and Department are responsible for the Act?

The Environment Minister is responsible for administering the POEO Act.³

The Environment Protection Authority⁴ (**EPA**) is generally responsible for implementing the POEO Act, although some responsibilities are shared with other government authorities, such as local councils and the NSW Police.⁵

NSW Environment Protection Authority

The EPA is a statutory body which is responsible for the regulation of air emissions, contaminated sites, dangerous goods and hazardous materials, noise, pesticides, forestry activities, waste and water quality and state of environment reporting.

The EPA Board consists of five members comprising a Chairperson and four part-time members. The Chairperson is directly accountable for the performance of the EPA and the way it exercises its powers and functions under NSW environmental laws and, along with the EPA Board, is responsible for the governance and oversight of the EPA.⁶

Who is the 'appropriate regulatory authority'?

The POEO Act assigns responsibility for regulating pollution to the 'appropriate regulatory authority'.⁷ The appropriate regulatory authority is determined according to the type of premises which is generating the pollution.

Premises are separated into two categories:

- Scheduled premises (these are listed in [Schedule 1, Part 1](#) of the POEO Act), and
- Non-scheduled premises (these are listed in [Schedule 1, Part 2](#) of the POEO Act).

What are the EPA's responsibilities?

The EPA is the 'appropriate regulatory authority' for:⁸

- Pollution licencing;

³ *Allocation of the Administration of Acts* (NSW).

⁴ The Environment Protection Authority is a statutory authority with its charter, objectives and responsibilities set out under the *Protection of the Environment Administration Act 1991* (NSW). See also the *Protection of the Environment Administration Regulation 2012* (NSW)

⁵ *Protection of the Environment Operations Act 1997* (NSW) s. 6.

⁶ *Protection of the Environment Administration Regulation 2012* (NSW), s. 15.

⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 6.

⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 6(2).

- Activities at scheduled premises (there are listed in Schedule 1 of the POEO Act and include heavy industrial activities;
- Activities at some non-scheduled premises (that are not required to be licensed under the POEO Act; and
- Activities involving the State Government or a public authority.

HOT TIP

If the premises hold a pollution licence, the EPA is responsible for regulating those premises. You can find out if premises hold a pollution licence by [clicking here](#).

You can find a list of premises that are regulated by the EPA, but which are not licensed, by [clicking here](#).

There is a 'one premises, one regulator' rule, i.e. once the EPA has licenced a particular site for one type of pollution (e.g. water pollution) then it becomes responsible for regulating all pollution from the premises (e.g. air and noise pollution).⁹

Local council responsibilities

Local councils are responsible for regulating pollution from most premises which do not hold a pollution licence (i.e. premises that are *not* listed in Schedule 1 of the POEO Act). These are generally small-scale industrial activities as well as many non-industrial activities.¹⁰

Other public authorities

Other public authorities may be the appropriate regulatory authority.¹¹

For example:

- [Roads and Maritime Services](#) is the appropriate regulatory authority for issuing noise control notices and noise abatement directions relating to boats and boat-related premises,¹²
- The Marine Parks Authority has some responsibilities in marine parks.¹³

How do I figure out who the appropriate regulatory authority is?

The EPA has produced a [list of contacts](#)¹⁴ to help people identify which organisation is the appropriate regulatory authority for each type of pollution.

⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 44.

¹⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 6(2).

¹¹ *Protection of the Environment Operations Act 1997* (NSW), s. 6(3).

¹² *Protection of the Environment Operations Act 1997* (NSW), ss. 263, 275; See definition of 'marine authority' in the POEO Act's Dictionary; *Protection of the Environment Operations (General) Regulation 2009* (NSW), cl. 86.

¹³ *Protection of the Environment Operations (General) Regulation 2009* (NSW), cl. 85.

To go to the EPA's tables of contacts, click on the relevant link:

- [Water pollution](#)
- [Air pollution](#)
- [Noise pollution](#)
- [Waste and litter](#)
- [Chemical and radiation pollution](#)
- [Motor Vehicles](#)
- [Other](#)

Pollution licences

The EPA keeps a [public register](#) containing information about pollution licences.¹⁵

The public register contains:

- environment protection licences;
- applications for new licences and to transfer or vary existing licences;
- environment protection and noise control notices;
- convictions in prosecutions under the POEO Act;
- the results of civil proceedings;
- licence review information;
- exemptions from the provisions of the POEO Act or Regulations; and
- approvals granted for certain fires or incinerators .

The EPA issues pollution licences

Licences to pollute are called 'environment protection licences' (called 'pollution licences' in this Fact Sheet). The EPA issues pollution licences.¹⁶ Pollution licences can be issued to cover one or more forms of pollution (i.e. air, water and noise pollution).

¹⁴ <http://www.epa.nsw.gov.au/pollution/>

¹⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 308.

¹⁶ *Protection of the Environment Operations Act 1997* (NSW), s. 6(2)(a).

Scheduled premises require a pollution licence

Activities on [scheduled premises](#) must have a pollution licence.¹⁷ Scheduled premises are those which are listed in Schedule 1, Part 1 of the Act.¹⁸ They generally involve heavy or high-polluting industries.

Examples of scheduled premises are:

- Chemical production;
- Extractive activities;
- Livestock intensive activities;
- Mining for coal and other minerals;
- Coal seam gas exploration, assessment and production;
- Sewage treatment; and
- Waste disposal.

The EPA's detailed [Guide to Licencing](#) is designed to help people determine whether they need a pollution licence, and if so, how to apply for one.

There are criteria for determining whether a premises is a 'scheduled premises' based on the size or intensity of the activity being undertaken at the premises, or the sensitivity of the receiving environment.

For example, a water-based extractive activity which produces more than 30,000 cubic metres per year, or a cement works that has a capacity of 150 tonnes per day or more, must have a pollution licence.¹⁹

Offence not to have pollution licence for activities on scheduled premises

It is an offence to carry out an activity on scheduled premises without a pollution licence.²⁰

The maximum penalties are:²¹

- For a corporation - \$1 million and \$120,000 for each day the offence continues, and
- For an individual - \$250,000 and \$60,000 for each day the offence continues.

¹⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 48.

¹⁸ *Protection of the Environment Operations Act 1997* (NSW), sch. 1, pt. 2, also lists some activities which require a pollution licence which are not premises-based, such as mobile waste processing and the transporting of waste.

¹⁹ *Protection of the Environment Operations Act 1997* (NSW), sch. 1, cls. 6, 19.

²⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 48, 49.

²¹ *Protection of the Environment Operations Act 1997* (NSW), ss. 48(2), 49(2)

Water pollution from non-scheduled activities can be licensed

Some non-scheduled activities will have a pollution licence to regulate water pollution.²² If an operator of non-scheduled premises chooses to obtain a pollution licence, they will be able to rely on their licence as a defence if they are charged with the offence of polluting water.²³

Do new pollution licences require environmental assessment?

No, not automatically. There is no legal requirement for new pollution licences to undergo any form of environmental assessment (e.g. an environmental impact statement).

Instead, the environmental impacts of the activity will be assessed under the planning system.²⁴ This is because new pollution licences are usually issued in conjunction with a development consent or activity approval, and these types of developments will often require an environmental impact statement. (See our [Fact Sheet on Development Applications and Consents](#) for more information).

Integrated development

A development which requires both development consent and a pollution licence is known as 'integrated development'.²⁵ (See [our Fact Sheet on Development Applications and Consents](#)).

Once a development application is lodged for integrated development, the consent authority must first refer the proposal to the EPA and obtain its general terms of approval before granting development consent.²⁶ If the EPA indicates that it will not grant a pollution licence, then development consent must be refused.²⁷

Pollution licence must be given to approved State Significant Development (SSD) and State Significant Infrastructure (SSI) projects

The EPA is not allowed to refuse to grant a pollution licence if the Minister for Planning has granted approval for a State Significant Development²⁸ or State Significant Infrastructure.²⁹ (See our Fact Sheet on [State Significant Developments and State Significant Infrastructure](#)).

²² *Protection of the Environment Operations Act 1997* (NSW), s. 43(d).

²³ *Protection of the Environment Operations Act 1997* (NSW), s. 120 makes it an offence to pollute waters. Section 122 provides a defence if the person held a licence which covered the pollution, and that they had not breached the conditions of that licence.

²⁴ *Environmental Planning and Assessment Act 1979* (NSW), Parts 4 and 5.

²⁵ *Environmental Planning and Assessment Act 1979* (NSW), s. 91. See also *Protection of the Environment Operations Act 1997* (NSW), s. 51.

²⁶ *Environmental Planning and Assessment Act 1979* (NSW), s. 91A.

²⁷ *Environmental Planning and Assessment Act 1979* (NSW), s. 91A(4).

²⁸ *Environmental Planning and Assessment Act 1979* (NSW), s. 89K(1)(e).

²⁹ *Environmental Planning and Assessment Act 1979* (NSW), s. 115ZH(1)(e).

What happens if development consent is not required?

Where an activity requires a pollution licence but does *not* require development consent, the activity may still require environmental assessment under Part 5 of the EP&A Act.³⁰

This is because determining authorities have a duty to examine, and take into account, to the fullest extent possible, all matters affecting or likely to affect the environment by reason of the activity.³¹ This may require the preparation of a Review of Environmental Factors or, if the activity is likely to significantly affect the environment, it will require an Environmental Impact Statement before it can go ahead.³² See our [Fact Sheet on Development Applications and Consents](#) for more information on Part 5 of the EP&A Act.

What must the EPA consider when granting a pollution licence?

When deciding whether to grant a licence, the EPA must consider many factors, including (but not limited to):³³

- The objectives of the EP&A Act;³⁴
- The pollution that is likely to be caused;
- The practical measures that can be taken to prevent or reduce the pollution;
- Any relevant green offset scheme;
- Whether the applicant is a fit and proper person; and
- Any environmental impact statement or species impact statement.

Public participation

Public register for licence applications

The EPA must publish the details of each licence application it receives on its [public register](#).³⁵

Anyone can make a submission to the EPA on an application for a pollution licence, and the EPA must consider these submissions when deciding whether to grant a licence. This includes any public submissions made under the development assessment process.³⁶

³⁰ A pollution licence which is being renewed is exempt from Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW) and does not require an environmental impact statement: see *Protection of the Environment Administration Act 1991* (NSW), s. 12A.

³¹ *Environmental Planning and Assessment Act 1979* (NSW), s. 111.

³² *Environmental Planning and Assessment Act 1979* (NSW), s. 112.

³³ *Protection of the Environment Operations Act 1997* (NSW), s. 45.

³⁴ *Protection of the Environment Administration Act 1991* (NSW), s. 6.

³⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 308(2)(a).

³⁶ *Protection of the Environment Operations Act 1997* (NSW), s. 45(l).

There is no additional requirement for the EPA to advertise licence applications in a newspaper. However, if a licence application is accompanied by a development application, then the public notification provisions under the EP&A Act will apply.

Public may seek a statement of reasons

Anyone can write to the EPA requesting a statement of reasons as to why the EPA granted or refused a licence application (including applications for transfers or variations), and the EPA must provide these reasons.³⁷ The reasons must set out the significant environmental and other issues that the EPA took into account, and the outcomes, standards or requirements that the EPA considered applicable.³⁸

Appeals

Appeals by licence applicant

The applicant for a pollution licence can appeal the EPA's decision to refuse a licence, or against the conditions of a licence to the Land and Environment Court.³⁹ This is known as a merits appeal. For more information, see [Fact Sheet on the Land and Environment Court](#). The appeal must be brought within 21 days of the applicant receiving notice of the EPA's decision.⁴⁰

Can the public appeal?

Yes, but only where there is a legal error in the way the licence was issued.⁴¹ The public has no right to bring a merits appeal. An appeal based on legal error is known as judicial review. This is a challenge against the validity and legality of the decision-making process that the EPA followed in granting a licence e.g. a complaint that the EPA failed to take into account a relevant consideration in arriving at its decision. For more information on judicial review proceedings, see [Fact Sheet on Land and Environment Court](#).

Licence conditions

The EPA can impose conditions on a pollution licence to prevent or reduce pollution, or the risk of pollution.⁴²

Examples of common conditions include:⁴³

- Limits on the types and amounts of pollution that can be discharged;
- Monitoring and reporting obligations;

³⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 61.

³⁸ *Protection of the Environment Operations (General) Regulation 2009* (NSW), cl. 49.

³⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 287(1), and *Land and Environment Court Act 1979* (NSW), s. 17(a).

⁴⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 287(1).

⁴¹ *Protection of the Environment Operations Act 1997* (NSW), s. 252, and *Land and Environment Court Act 1979* (NSW), ss. 20(1)(c), 20(1)(cia).

⁴² *Protection of the Environment Operations Act 1997* (NSW), s. 63.

⁴³ *Protection of the Environment Operations Act 1997* (NSW) also lists some other common conditions: see ss. 66-76.

- Community consultation (e.g. regular meetings) and complaint mechanisms (e.g. a complaints register); and
- Conditions relating to green offset schemes.⁴⁴

It is an offence to not comply with the conditions of a pollution licence.⁴⁵ The maximum penalties are:⁴⁶

- For a corporation - \$1 million and \$120,000 for each day the offence continues, and
- For an individual - \$250,000 and \$60,000 for each day the offence continues.

Green offset schemes

A green offset scheme is a form of emissions trading under which a group of participants carry out a specific program to restore or make good environmental damage caused by activities which are authorised by pollution licences.⁴⁷

The EPA may impose conditions on a pollution licence in relation to a green offset scheme (e.g. requiring the licence holder to purchase credits in a particular green offset scheme) if there is no other way of preventing or controlling the impacts of the licenced activity.⁴⁸

Duration and review of licences

Once a pollution licence is issued, it remains in force indefinitely until it is suspended, revoked or surrendered.⁴⁹ However, the EPA must review each licence at least once every 5 years.⁵⁰ You can find out the review date for a particular pollution licence by checking the [POEO Licence List](#).

The EPA must give the public notice of its intention to review a licence at least one month, and not more than 6 months, before the review by publishing a notice in a State-wide newspaper.⁵¹

Anyone can make a submission to the EPA on the review of a pollution licence [at any time](#).⁵² The EPA website provides [instructions on making a submission](#).

Variation of licences

The EPA may vary a licence, or the conditions of a licence, at any time.⁵³ Before varying a licence, the EPA must invite submissions from the public if:

⁴⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 69(b).

⁴⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 64.

⁴⁶ *Protection of the Environment Operations Act 1997* (NSW), s. 64.

⁴⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 295O.

⁴⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 295N.

⁴⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 77.

⁵⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 78(1).

⁵¹ *Protection of the Environment Operations Act 1997* (NSW), s. 78(2).

⁵² <http://www.epa.nsw.gov.au/licensing/POEOreview.htm>

⁵³ *Protection of the Environment Operations Act 1997* (NSW), s. 58(4).

- The variation will authorise a significant increase in the environmental impact of the activity, and
- The proposed variation has not been the subject of environmental assessment and public consultation under the *Environmental Planning and Assessment Act 1979*.⁵⁴

Suspension and revocation of licences

The EPA may suspend or revoke a pollution licence by giving a notice in writing to the licence holder.⁵⁵ The EPA is not required to provide prior notice of its intention to suspend or revoke a pollution licence before giving the notice of suspension or revocation.⁵⁶

The reasons for suspending a licence may include (but are not limited to) the following:

- If the licence holder obtained it improperly;
- If a licence condition is breached; or
- If the licence holder is no longer a fit and proper person.⁵⁷

The Environment Minister has the power to suspend or revoke a pollution licence if the licence holder is convicted of a major pollution offence.⁵⁸

Water pollution

What is water pollution?

The legal definition of water pollution is very broad. It includes the introduction of any matter, whether solid, liquid or gas, into waters which changes the physical, chemical or biological condition of the water.⁵⁹ It also includes placing any matter where it might fall, descend, be washed or blown, into any waters (e.g. soil which may wash into a creek).

There are a number of substances (prescribed matter) which, if placed on or in water, are automatically assumed to constitute water pollution. These include animal carcasses, mud, spoil from mineral processing, human excreta and urine, oil and grease).⁶⁰

Who should I call to complain about a water pollution incident?

If you wish to report a water pollution incident, you can view the EPA's [list of contacts](#) to work out who you should call. The table shows which organisations are

⁵⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 58(6).

⁵⁵ *Protection of the Environment Operations Act 1997* (NSW), ss. 79(1)-(2).

⁵⁶ *Protection of the Environment Operations Act 1997* (NSW), s. 79(4).

⁵⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 79(5).

⁵⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 82.

⁵⁹ *Protection of the Environment Operations Act 1997* (NSW), Dictionary.

⁶⁰ *Protection of the Environment Operations (General) Regulation 2009* (NSW), Schedule 5.,

responsible (and their contact details), according to the type, or source, of water pollution.

Offence to pollute waters

All water pollution is prohibited unless it is authorised in some way.⁶¹

It is an offence to pollute waters without a pollution licence. The maximum penalties are:⁶²

- For a corporation - \$1 million and \$120,000 for each day the offence continues, and
- For an individual - \$250,000 and \$60,000 for each day the offence continues.

Water pollution can also constitute a more serious pollution offence. See below *Criminal offences*.

Defences

A person will not be found guilty of polluting waters if:

- the pollution was authorised by a pollution licence, and the conditions of the licence were not breached,⁶³ or
- that type of water pollution is exempt (e.g. sewage discharge, discharges from boat engines).⁶⁴

Water pollution from scheduled premises must be licenced

Water pollution generated by an activity on a scheduled premise must be licenced because all scheduled premises are required to be licenced.⁶⁵ Scheduled premises are those which are listed in Schedule 1, Part 1 of the POEO Act.⁶⁶

Air pollution

What is air pollution?

Air pollution is defined as the emission into the air of any impurity, including dust, smoke, cinders, solid particles, gases, fumes, odours and radioactive substances.⁶⁷

⁶¹ *Protection of the Environment Operations Act 1997* (NSW), s. 120.

⁶² *Protection of the Environment Operations Act 1997* (NSW), s. 123.

⁶³ *Protection of the Environment Operations Act 1997* (NSW), s. 122

⁶⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 121; *Protection of the Environment Operations (General) Regulation 2009* (NSW), cl. 55 (discharges of water from Victorian premises into River Murray), cl. 56 (discharges into sewer), cl. 57 (certified on-board sewage treatment systems), cl. 58 (boat engines), and cl. 59 (cold water releases).

⁶⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 48.

⁶⁶ *Protection of the Environment Operations Act 1997* (NSW), Schedule 1, Part 2, also lists some activities which require a pollution licence which are not premises-based, such as mobile waste processing and the transporting of waste.

⁶⁷ *Protection of the Environment Operations Act 1997* (NSW), Dictionary – ‘air pollution’ and ‘air impurity’.

Who should I call to complain about an air pollution incident?

If you wish to report an air pollution incident, you can view the EPA's [list of contacts](#) to work out who you should call. The table shows which organisations are responsible (and their contact details), according to the type or source of air pollution.

Air pollution offences

Unlike water pollution, there is no general prohibition on causing air pollution (except if it is a very serious pollution event, in which case it may constitute a *Tier 1 offence*; See *Tier 1 Offences* below).⁶⁸

An air pollution incident will only be an offence if it is a result of:

- A person carrying out an activity on scheduled premises without a pollution licence,⁶⁹
- A breach of a pollution licence or its conditions,⁷⁰
- Committing one or more of the specific air pollution offences listed in the POEO Act.⁷¹ These include (but are not limited to):
 - Failing to maintain or operate industrial plant or equipment in a proper and efficient manner;⁷²
 - Failing to carry out maintenance work on plant in a proper and efficient manner;⁷³
 - Failing to deal with materials in a proper and efficient manner (e.g. allowing raw materials, by-products or waste to cause air pollution);⁷⁴ and
 - Carrying out an activity or operating plant so as to emit pollution in excess of *prescribed rates or concentrations*.⁷⁵ (see *Prescribed rates of concentrations of air impurities* below).

Prescribed rates or concentrations of air impurities

There are specific standards above which listed pollutants (e.g. solid particles, smoke, dioxins, etc.) must not be emitted for both scheduled⁷⁶ and non-scheduled premises.⁷⁷

⁶⁸ The general Tier 1 offence of wilfully or negligently permitting any substance to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment could include the escape of an air pollutant: *Protection of the Environment Operations Act 1997* (NSW), s. 116.

⁶⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 48. All premises which are listed on Schedule 1 of the POEO Act are called 'scheduled premises' and require a pollution licence: see *Schedule activities require a pollution licence* above.

⁷⁰ *Protection of the Environment Operations Act 1997* (NSW), ss. 48, 64.

⁷¹ See Part 5.4 of the *Protection of the Environment Operations Act 1997* (NSW) which contains a number of specific air pollution offences: ss. 124-129, 133-134; 135A-135D (Domestic air pollution).

⁷² *Protection of the Environment Operations Act 1997* (NSW), s. 124.

⁷³ *Protection of the Environment Operations Act 1997* (NSW), s. 125.

⁷⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 126.

⁷⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 128.

It is an offence to carry out an activity which causes air pollution in excess of these standards. The maximum penalties are:⁷⁸

- For a corporation - \$1 million and \$120,000 for each day the offence continues, and
- For an individual - \$250,000 and \$60,000 for each day the offence continues.

In the absence of a relevant air pollution standard, the occupier must carry on the activity in a way that minimises or prevents air pollution.⁷⁹

Burning of fires and smoke

Who is an 'authorised officer'?

The EPA and local councils can appoint people as 'authorised officers'.⁸⁰ All authorised officers must carry an identification card and must produce it if asked to do so.⁸¹

The EPA explains on its website who is an authorised officer and what powers authorised officers have to respond to pollution incidents. See [Powers of Authorised Officers - A guide to your powers under environment protection legislation](#).⁸²

Directions by authorised officers

An authorised officer can issue a notice to the occupier (or the person apparently in charge of the premises) to extinguish a fire immediately if:

- the fire is prohibited by an order of the EPA, or
- air pollution from the fire is injuring the health of somebody or is likely to cause serious discomfort or inconvenience to someone.⁸³

EPA can prohibit fires

The EPA can issue an order preventing the burning of fires in the open, or in incinerators, if the weather conditions are such that burning will contribute, or be likely to contribute to, air pollution. The order must be published in a State-wide newspaper or broadcast on the radio.⁸⁴ It is an offence not to comply with an order. The maximum penalty is \$3,300.⁸⁵

⁷⁶ *Protection of the Environment Operations (Clean Air) Regulations 2010* (NSW), cls. 38-39, Schedules 2, 3 and 4.

⁷⁷ *Protection of the Environment Operations (Clean Air) Regulations 2010* (NSW), cls 44, 45, sch. 6.

⁷⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 132.

⁷⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 128(2).

⁸⁰ *Protection of the Environment Operations Act 1997* (NSW) Dictionary definition 'authorised officer'. 'Authorised officers' are appointed under s. 187 by an appropriate regulatory authority.

⁸¹ *Protection of the Environment Operations Act 1997* (NSW), s. 189.

⁸² <http://www.epa.nsw.gov.au/licensing/powersao.htm>

⁸³ *Protection of the Environment Operations Act 1997* (NSW), ss. 134, 135. Maximum penalty \$3,300.

⁸⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 133.

⁸⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 135.

Burning prohibited in certain local government areas

The burning of vegetation and domestic waste (excluding barbeques) is generally prohibited in most local government areas without approval from the EPA or local council.⁸⁶ There is a list of local government areas to which this prohibition applies.⁸⁷

Smoke abatement notices

An authorised officer can issue a smoke abatement notice directing the occupier of residential premises to ensure that excessive smoke is not emitted from the chimney. The person who is given the notice has 21 days to comply once the notice is issued and the smoke abatement order can last for up to six months.⁸⁸

Offensive odours

Scheduled premises

It is an offence for an occupier of scheduled premises (i.e. premises with a pollution licence) to emit 'offensive odours' other than in accordance with their pollution licence.⁸⁹

An 'offensive odour' is an odour which is harmful to a person who is outside the premises from which it is emitted or which interferes unreasonably with the comfort or repose of a person outside the premises from which it is emitted.⁹⁰

Non-scheduled premises

There is no specific offence prohibiting the emission of offensive odours from non-scheduled premises. However, in some cases, emitting odours may fall within one of the other general air pollution offences (e.g. failing to operate plant in a proper and efficient manner or to maintain the plant in an efficient condition).⁹¹ See *Air pollution offences* above.

Smoky vehicles

There is a limit on the amount of exhaust which a vehicle is permitted to emit.⁹² A motor vehicle must not emit exhaust (i.e. air impurities which are in excess of a certain standard of concentration) which is visible for a continuous period of more than 10 seconds.⁹³

⁸⁶ *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW), pt. 3, div. 3, cls. 12-13.

⁸⁷ *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW), sch. 8.

⁸⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 135B.

⁸⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 129.

⁹⁰ See the definition of 'offensive odour' in the Dictionary of the *Protection of the Environment Operations Act 1997* (NSW).

⁹¹ *Protection of the Environment Operations Act 1997* (NSW), s. 124.

⁹² *Protection of the Environment Operations Act 1997* (NSW), s. 154(2) defines 'emits excessive air impurities'; see *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW), cl. 16

⁹³ *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW), cls. 14, 15.

It is an offence for an owner of a motor vehicle to emit excessive air impurities while the vehicle is being used. The maximum penalty for a corporation is \$4,400, and for an individual it is \$2,200.⁹⁴

On the first occasion, a vehicle owner can be issued with a warning letter requiring the owner to service or repair the vehicle within the period specified on the notice.⁹⁵ If the owner fails to comply with the notice, they may be charged with a more serious offence.⁹⁶

Reporting smoky vehicles to the EPA

Vehicles that emit exhaust which is continuously visible for more than 10 seconds can be reported to the [EPA's Environment Line](#) on 131 555 or [online](#).

Before making a report you should:

- Be satisfied that you have correctly identified the vehicle;
- Be satisfied that the emissions are visible not just because of heat or the condensation of water vapour; and
- Be sure that the emissions are continuously visible for more than 10 seconds.

You should record the following details:

- The length of time (in seconds) that the visible emissions were observed;
- The registration number of the motor vehicle;
- The type of motor vehicle;
- The colour and darkness, in your opinion, of the air impurities emitted; and
- The location, date and approximate time of day that you made the observation.

Noise pollution

What is noise pollution?

Noise pollution is defined as the emission of offensive noise.⁹⁷

Who should I call to complain about noise pollution?

If you wish to report a noise pollution incident, you can view the EPA's [list of contacts](#) to work out who you should call. The table shows which organisations are responsible (and their contact details), according to the type or source of noise pollution.

⁹⁴ *Protection of the Environment Operations (Clean Air) Regulation 2010* (NSW), cl. 16.

⁹⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 161.

⁹⁶ *Protection of the Environment Operations Act 1997* (NSW), s. 161(4).

⁹⁷ *Protection of the Environment Operations Act 1997* (NSW), Dictionary.

Noise offences

There is no general prohibition on causing noise pollution. However there are a number of specific offences which regulate certain activities that result in noise pollution.

For example, it is an offence:

- To carry out an activity on scheduled premises without a pollution licence.⁹⁸ A pollution licence may often contain conditions which deal specifically with noise, such as the level of noise and times during which noise is permitted.
- To cause noise if the noise is caused by a failure to properly maintain plant or to operate the plant efficiently.⁹⁹
- To cause noise from industrial premises that deals with materials (e.g. raw materials) because of a failure to deal with those materials in a proper and efficient manner.¹⁰⁰

The maximum penalties for these noise offences are:¹⁰¹

- For a corporation - \$1 million and \$120,000 for each day the offence continues, and
- For an individual - \$250,000 and \$60,000 for each day the offence continues.

A regulatory authority can still issue a notice or order (see below) directing a person to stop making noise even if it is not an offence to make the noise in the first place.

Notices and orders to stop noise pollution

To control noise pollution, a regulatory authority can issue:

- A noise control notice, or
- A noise abatement direction.

Alternatively, a person can apply to a local court for a noise abatement order.

Noise control notices

The appropriate regulatory authority can issue a 'noise control notice' to the occupier or operator of any premises which prohibits that person from causing noise in excess of a specified level on specified days and at specified times.¹⁰²

The appropriate regulatory authority will usually be the EPA or the local council. See *Who should I call to complain about noise pollution?* Above to work out the appropriate regulatory authority.

⁹⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 48.

⁹⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 139.

¹⁰⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 140.

¹⁰¹ *Protection of the Environment Operations Act 1997* (NSW), s. 141.

¹⁰² *Protection of the Environment Operations Act 1997* (NSW), s. 264.

It is an offence to breach a noise control notice. The maximum penalty: ¹⁰³

- For a corporation is \$60,000 and \$6,000 for each day the offence continues;
- For an individual it is \$30,000 and \$600 for each day the offence continues.

A person who receives a noise control notice can appeal against the notice to the Land and Environment Court within 21 days after service of the notice or the making of the order¹⁰⁴ or 7 days if it concerns an animal.¹⁰⁵

Noise abatement directions: issued by authorised persons

An authorised person can issue a noise abatement direction to stop a person from making offensive noise.¹⁰⁶ The authorised person can issue the notice if it appears that offensive noise has been emitted at any time within the past 7 days.¹⁰⁷

An authorised person is:

- A police officer;¹⁰⁸
- A council officer;¹⁰⁹
- Any person appointed by the EPA;¹¹⁰ or
- In relation to vessels in navigable waters, an officer or employee of the Maritime Authority of NSW.¹¹¹

It is an offence to fail to comply with a noise abatement direction or to emit offensive noise within the 28 days following the direction (or such shorter time as specified in the direction). The maximum penalty is \$3,300.¹¹²

Once a warning has been issued to cease continued use of equipment, police have the power to seize equipment from a person who is breaching a noise abatement direction.¹¹³ Any equipment must be returned or released within 28 days.¹¹⁴

Noise abatement orders: issued by the Local Court

A person who is affected by offensive noise¹¹⁵ within their own house (or while occupying other premises) can apply to the Local Court for an order that the offensive noise stop (a noise abatement order).¹¹⁶

¹⁰³ *Protection of the Environment Operations Act 1997* (NSW), s. 265.

¹⁰⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 290.

¹⁰⁵ *Protection of the Environment Operations (General) Regulation 2009* (NSW), cl. 103.

¹⁰⁶ *Protection of the Environment Operations Act 1997* (NSW), ss. 275-276.

¹⁰⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 276.

¹⁰⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 275.

¹⁰⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 187(2).

¹¹⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 187(1).

¹¹¹ *Protection of the Environment Operations Act 1997* (NSW), s. 275(b).

¹¹² *Protection of the Environment Operations Act 1997* (NSW), s. 277(2) and (4). The *Crimes (Sentencing Procedure) Act 1999* (NSW) defines a penalty unit as \$110: s 17.

¹¹³ *Protection of the Environment Operations Act 1997* (NSW), s. 282.

¹¹⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 282(4).

If the Local Court is satisfied that the alleged offensive noise exists, or that it is likely to recur, it can order the noise to stop during specified times and order the person responsible for the noise to prevent a recurrence of the noise.¹¹⁷

A person against whom a noise abatement order is made can appeal against the order to the Land and Environment Court within 21 days after service of the notice or the making of the order.¹¹⁸

A noise abatement order cannot be issued against:¹¹⁹

- the State or a public authority, or
- premises that have a pollution licence.

It is an offence to breach a noise abatement order. The maximum penalty is \$3,300.¹²⁰

Restrictions on the use and sale of noisy items

There are noise emission standards for certain items of equipment.¹²¹

Restrictions on sale of noisy items

It is an offence to sell equipment (including cars and car accessories) that emits noise in excess of the noise levels set for that particular item.¹²²

Time restrictions on the use of noisy articles

There are a range of restrictions on certain noisy items, including set time limits (e.g. not before 8am, or after 8pm) during which noisy things must not be used.

The restrictions apply to:

- power tools (including lawn mowers, lawn trimmers, leaf blowers, chainsaws, air compressors) and other equipment (including swimming pool pumps);¹²³
- musical instruments and sound equipment;¹²⁴
- air conditioners and heat pump water heaters;¹²⁵ and

¹¹⁵ The Dictionary in the *Protection of the Environment Operations Act 1997* (NSW) defines 'offensive noise' as noise which is harmful to a person who is outside the premises, or which interferes unreasonably with the comfort or repose of a person who is outside the premises from which it is emitted.

¹¹⁶ *Protection of the Environment Operations Act 1997* (NSW), s. 268.

¹¹⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 268(4).

¹¹⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 290.

¹¹⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 270.

¹²⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 269. The *Crimes (Sentencing Procedure) Act 1999* (NSW) defines a penalty unit as \$110: s. 17.

¹²¹ *Protection of the Environment Operations Act 1997* (NSW), s. 136; *Protection of the Environment (Noise Control) Regulation 2008* (NSW), pt. 4, div. 1.

¹²² *Protection of the Environment Operations Act 1997* (NSW), s. 136.

¹²³ *Protection of the Environment (Noise Control) Regulation 2008* (NSW), cl. 50.

¹²⁴ *Protection of the Environment (Noise Control) Regulation 2008* (NSW), cl. 51.

¹²⁵ *Protection of the Environment (Noise Control) Regulation 2008* (NSW), cl. 52.

- burglar alarms.¹²⁶

Enforcement of pollution offences

There are three different enforcement mechanisms for pollution offences:

- Pollution notices;
- Criminal prosecutions; and
- Civil action.

Pollution notices

Regulatory authorities can issue a range of administrative notices (called 'environment protection notices', but referred to as 'pollution notices' in this Fact Sheet) in response to a pollution incident or a threatened incident.

Pollution notices are easier and simpler to use compared to court proceedings. They are generally used where a regulatory authority needs to respond quickly to relatively minor pollution incidents.

There are three different types of pollution notices:

- Clean-up notices;
- Prevention notices; and
- Prohibition notices.¹²⁷

Who can issue a pollution notice?

The appropriate regulatory authority is responsible for issuing pollution notices (except for prohibition notices, which are issued by the Environment Minister). In most cases, this will either be the EPA or the local council. Who the appropriate regulatory authority is will depend upon the type of premises which is causing the pollution.

To work out who the *appropriate regulatory authority* is, see above.

EPA Guide to notices

The EPA publishes a [Guide to notices](#). This is a guide to the powers which are available to the EPA and other regulatory authorities (such as local councils) when issuing pollution notices.

¹²⁶ *Protection of the Environment (Noise Control) Regulation 2008* (NSW), cl. 53.

¹²⁷ The *Protection of the Environment Operations Act 1997* (NSW) ss. 90, 104. This section also allows a fourth type of notice to be issued, called a compliance cost notice. A compliance cost notice can require the polluter to pay the regulator's costs of issuing a clean-up or prevention notice.

1. Clean up notices

If a pollution incident has occurred, the appropriate regulatory authority (either the EPA or the local council) can issue a notice directing a person to take clean-up action (a clean-up notice).¹²⁸ The notice can be issued to either the occupier of premises causing the pollution or the person suspected of causing the pollution, or both. The notice can either be issued in writing, or orally (but it must be confirmed in writing within 3 days).¹²⁹

The EPA can issue a clean-up notice to a public authority, such as a local council, suspected of creating a pollution incident.¹³⁰

It is an offence not to comply with a clean-up notice. The maximum penalty is:¹³¹

- For a corporation is – \$1 million and \$120,000 for each day the offence continues.
- For an individual – \$250,000 and \$60,000 for each day the offence continues.

2. Prevention notices

If an activity is being carried out in an environmentally unsatisfactory manner at any premises or by any person (e.g. through a breach of a pollution licence), then the appropriate regulatory authority (usually the EPA or the local council) can issue a 'prevention notice'.¹³² The notice can direct a person to take preventative action (e.g. to cease using plant, or to repair equipment) to avoid causing further environmental damage.

The notice can be issued to either the occupier of premises or the person carrying on the activity, or both.¹³³

It is an offence not to comply with a prevention notice. The maximum penalty is:¹³⁴

- For a corporation – \$1 million and \$120,000 for each day the offence continues;
- For an individual – \$250,000 and \$60,000 for each day the offence continues.

3. Prohibition notices

For more serious pollution incidents, the EPA can recommend that the Environment Minister issue a 'prohibition notice'.¹³⁵

Prohibition notices are used where there might be harm to the environment, a threat to public health, or discomfort or inconvenience to others.

¹²⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 91.

¹²⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 93.

¹³⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 92.

¹³¹ *Protection of the Environment Operations Act 1997* (NSW), s. 91(5).

¹³² *Protection of the Environment Operations Act 1997* (NSW), s. 96.

¹³³ *Protection of the Environment Operations Act 1997* (NSW), s. 96(2).

¹³⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 97.

¹³⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 101.

The notice is issued to the occupier or operator of premises (or both) and can direct them to cease carrying on an activity for as long as is specified in the notice.¹³⁶

It is an offence not to comply with a prohibition notice. The maximum penalty is:¹³⁷

- For a corporation – \$1 million and \$120,000 for each day the offence continues;
- For an individual – \$250,000 and \$60,000 for each day the offence continues.

Tips for complaining about a pollution incident

If you are concerned about a pollution incident, you should first contact the individual or company causing the pollution and request an explanation and ask that they fix the problem.

You should also report the pollution incident to the [EPA's Environment Line](#) on 131 555 or [online](#). Keep notes of your discussion and record the name of the person who takes your call.

If the EPA does not resolve the problem to your satisfaction, you should:

- Obtain a copy of the development consent for the premises from your local council or the Department of Planning and Environment and check whether the conditions of consent include pollution control;
- Obtain a copy of the pollution licence for the premises from the [EPA's public register](#), and check whether the licence authorises the pollution;
- Obtain copies of any monitoring reports which the polluter may have submitted to the EPA (again, from the [public register](#)) and compare them with the pollution levels permitted under the pollution licence;
- Contact environmental groups who are interested in preventing pollution, such as the Total Environment Centre in Sydney ; and
- Contact EDO NSW free Environmental Law Advice Line on (02) 9262 6989 or 1800 626 239 and obtain some legal advice about your other options.

Criminal offences

More serious pollution incidents are likely to attract a criminal charge which will be heard by the courts, rather than the polluter being issued with a pollution notice.

Pollution offences are classified into 3 categories:¹³⁸

- Tier 1 - most serious
- Tier 2 - for serious, mid-range offences

¹³⁶ *Protection of the Environment Operations Act 1997* (NSW), s. 101(2).

¹³⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 102.

¹³⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 114.

- Tier 3 - least serious, uses 'on-the-spot' penalty notices.

Tier 1 offences

Tier 1 offences are the most serious offences and involve wilful or negligent activities which harm, or are likely to harm, the environment.

Examples of Tier 1 offences include wilfully or negligently:

- Disposing of waste in a manner that harms or is likely to harm the environment.¹³⁹
- Allowing a substance to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment.¹⁴⁰
- Emitting an ozone-depleting substance in a manner that harms or is likely to harm the environment.¹⁴¹

It is a defence if the person establishes that they had no control over the causes of the event and that they took reasonable precautions and exercised due diligence to prevent the event.¹⁴²

The maximum penalties for Tier 1 offences are:

- For a corporation:¹⁴³
 - Wilful offence: \$5 million, or
 - Negligent offence: \$2 million.
- For an individual:¹⁴⁴
 - Wilful offence: \$1 million or 7 years' imprisonment, or both, or
 - Negligent offence: \$500,000 or 4 years' imprisonment, or both.

Case study: Polluter sentenced to 12 months imprisonment

[EPA v Gardner \[1997\] NSWLEC 169](#)

Charles Gardner was convicted of wilfully disposing of waste in a manner likely to harm the environment. Over a period of about 2 ½ years, Gardner had secretly pumped out about 130,000 litres per week of untreated sewerage from his caravan park into the Karuah River on the NSW North Coast. He did this to avoid the cost of lawfully disposing of the waste (about \$140,000).

¹³⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 115.

¹⁴⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 116.

¹⁴¹ *Protection of the Environment Operations Act 1997* (NSW), s. 117.

¹⁴² *Protection of the Environment Operations Act 1997* (NSW), s. 118.

¹⁴³ *Protection of the Environment Operations Act 1997* (NSW), s. 119(a).

¹⁴⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 119(b).

The Court fined him the maximum amount (at that time) for an individual of \$250,000, sentenced him to 12 months' imprisonment, and ordered him to pay the Prosecutor's costs of \$170,000.

Tier 2 offences

Tier 2 offences are serious offences which are not Tier 1 offences.¹⁴⁵

Examples of Tier 2 offences include (but are not limited to):

- Carrying out an activity on scheduled premises without a pollution licence;¹⁴⁶
- Failing to comply with a pollution notice (environment protection notice), such as a clean-up, prevention or prohibition notice;¹⁴⁷
- Causing water pollution;¹⁴⁸
- Emitting air impurities in excess of prescribed concentrations;¹⁴⁹
- Emitting offensive odours from schedule premises;¹⁵⁰
- Permitting land to be used unlawfully as a waste facility;¹⁵¹ and
- Failing to notify the appropriate regulatory authority of a notifiable pollution incident (see below *Duty to notify pollution incidents*).¹⁵²

Tier 2 offences are generally considered to be 'strict liability' offences.¹⁵³ This means that the prosecutor does not need to prove that the defendant intended to commit the act or was negligent. They only need to prove that the defendant's actions caused the pollution. The defence of honest and reasonable mistake is available.¹⁵⁴

The maximum penalties for Tier 2 offences are:¹⁵⁵

- For a corporation: \$1 million, and a daily penalty of up to \$120,000, and
- For an individual: \$250,000, and a daily penalty of up to \$60,000.

Tier 3 offences

Tier 3 offences are the least serious of the three categories of offences.

¹⁴⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 114(2).

¹⁴⁶ *Protection of the Environment Operations Act 1997* (NSW), s. 48.

¹⁴⁷ *Protection of the Environment Operations Act 1997* (NSW), ss. 91(5), 97, 102.

¹⁴⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 120.

¹⁴⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 128.

¹⁵⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 129.

¹⁵¹ *Protection of the Environment Operations Act 1997* (NSW), s. 144.

¹⁵² *Protection of the Environment Operations Act 1997* (NSW), ss. 148, 152.

¹⁵³ Although this is not expressly stated in the *Protection of the Environment Operations Act 1997* (NSW), the courts have regularly interpreted pollution offences, which are similar to Tier 2 offences, as strict liability offences: see *State Pollution Control Commission v Tiger Nominees Pty Ltd* (1991) 72 LGRA 337 at 342.

¹⁵⁴ *He Kaw Teh v The Queen* (1985) 157 CLR 523.

¹⁵⁵ *Protection of the Environment Operations Act 1997* (NSW) ss 123, 132, 141, 142A.

Tier 3 offences are Tier 2 offences for which a penalty notice can be issued.¹⁵⁶

A penalty notice is more likely to be issued if the breach is minor, or a 'once-off' situation that can be remedied easily, and the severity of the breach is not serious enough to warrant Court proceedings.¹⁵⁷

Tier 3 offences are absolute liability offences, for which there are no defences.

Enforcement officers (usually an EPA or local council employee),¹⁵⁸ have the discretion as to whether to serve a penalty notice. A person has 28 days from the date on which it was served to pay the fine under a penalty notice, or the person can elect not to pay and have the charge dealt with by a Court instead.¹⁵⁹

Penalties vary for Tier 3 offences, with the maximum penalty being \$15, 000 for both individuals and corporations and the minimum penalty being \$80 for individuals and \$300 for corporations.¹⁶⁰

Duty to notify pollution incidents

Polluters have a legal obligation to **immediately** report all pollution causing or threatening material harm and all relevant information about it to **each relevant authority**.¹⁶¹

Relevant authorities are:

- the appropriate regulatory authority;
- if the EPA is the appropriate regulatory authority – the EPA,
- if the EPA is not the appropriate regulatory authority – the local authority for the area in which the pollution incident occurs, e.g. the local council or the [Regional Illegal Dumping Squad](#),
- the Ministry of Health,
- the WorkCover Authority, and
- Fire and Rescue NSW.¹⁶²

The types of incidents which must be reported are those that cause or threaten to cause material harm to the environment.¹⁶³ Material harm is harm that is not trivial and that involves actual or potential harm to the health or safety of human beings or ecosystems, or harm that results in actual or potential loss, or property damage, of an amount exceeding \$10,000. Loss includes the reasonable costs and expenses

¹⁵⁶ *Protection of the Environment Operations Act 1997* (NSW), ss. 114, 222.

¹⁵⁷ EPA Prosecution Guidelines, <http://www.environment.nsw.gov.au/legislation/prosguid.htm>.

¹⁵⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 226.

¹⁵⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 223.

¹⁶⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 227; *Protection of the Environment Operations (General) Regulations 2009* (NSW), cl. 82, sch. 6.

¹⁶¹ *Protection of the Environment Operations Act 1997* (NSW), s. 148.

¹⁶² *Protection of the Environment Operations Act 1997* (NSW), s. 148(8).

¹⁶³ *Protection of the Environment Operations Act 1997* (NSW), s 148(1).

that would be incurred in taking all reasonable and practicable measures to prevent, mitigate or make good harm to the environment.¹⁶⁴

The EPA website contains more information about the duty to [notify pollution incidents](#) including who to notify, when to notify, and examples of notifiable events.

The duty to notify applies to the person carrying out the activity, the occupier of premises, employers and employees, including their agents (who must notify their employer, and then the EPA if their employer cannot be contacted).¹⁶⁵

It is an offence to fail to notify the appropriate regulatory authority of a notifiable event. Maximum penalties were doubled in 2011 in response to the Orica incident.¹⁶⁶ Maximum penalties are:¹⁶⁷

- For a corporation – \$2 million and \$240,000 for each day the offence continues; and
- For an individual – \$500,000 and \$120,000 for each day the offence continues.

A person must notify even if they may incriminate themselves or their company.¹⁶⁸

Who prosecutes pollution offences?

Environment Protection Authority

The EPA can prosecute any offence under the POEO Act and its regulations.¹⁶⁹

The EPA has principal responsibility for prosecuting offences which relate to:¹⁷⁰

- Activities on scheduled premises;
- Pollution licences; and
- Activities carried on by the State or public authorities.

The EPA has issued

- [Prosecution Guidelines](#) which explain how it decides whether to prosecute a matter, and what sort of orders it will ask for;¹⁷¹ and
- [Guidelines](#) which concern new sentencing options for environmental offences committed against the POEO Act.¹⁷²

¹⁶⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 147.

¹⁶⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 148.

¹⁶⁶ <http://www.nsw.gov.au/sites/default/files/Orica-review.pdf>

¹⁶⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 152.

¹⁶⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 153.

¹⁶⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 217(1).

¹⁷⁰ The *Protection of the Environment Operations Act 1997* (NSW) lists these as 'excluded offences' and therefore does not permit other regulatory authorities to institute such proceedings, ss. 217(2), 218(6).

¹⁷¹ <http://www.epa.nsw.gov.au/legislation/20130141EPAProsGuide.htm>

¹⁷² http://www.epa.nsw.gov.au/legislation/envirou_courtorders.htm

Local councils

Local councils can also institute proceedings if they are the appropriate regulatory authority for the matter. See above, *Who is the appropriate regulatory authority?*¹⁷³

A local council can also institute proceedings if it is not the appropriate regulatory authority, but the council must obtain permission (leave) from the Court to do so.¹⁷⁴

Police officers

Police officers can institute proceedings for:

- A noise pollution offence;
- A littering offence; or
- An offence relating to the operation of a motor vehicle.¹⁷⁵

However, there are some offences (excluded offences), such as those relating to scheduled premises, pollution licences, or public authorities, which police officers cannot prosecute.¹⁷⁶

Members of the public

Any person can institute criminal proceedings in the Land and Environment Court for an offence against the POEO Act or Regulations with the permission (leave) of the Court.¹⁷⁷

The Court can only grant permission if the EPA has decided not to take any action in respect of the alleged offence, the EPA has been notified of the proceedings, and there is a strong case that an offence has been committed.¹⁷⁸

Which Court hears pollution prosecutions?

Tier 1 offences (most serious) are dealt with by the Land and Environment Court (in Class 5)¹⁷⁹ or the Supreme Court.¹⁸⁰

Tier 2 offences (mid-range offences) are heard before the Land and Environment Court (in Class 5)¹⁸¹ or a Local Court.¹⁸² However, if the Local Court hears the

¹⁷³ *Protection of the Environment Operations Act 1997* (NSW), s. 217(2).

¹⁷⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 219(1A). This provision was introduced to overturn the effect of the Court's decision in *Wyong Shire Council v Thomas Hughes Homes Pty Ltd* [2000] NSWLEC 234, where the Court dismissed a prosecution for unlawfully disposing of waste by a local council because the site was a scheduled premises.

¹⁷⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 218(4).

¹⁷⁶ *Protection of the Environment Operations Act 1997* (NSW), s. 218(6), although police can bring proceedings for excluded offences if they have permission (leave) from the Court, s. 219(1A).

¹⁷⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 219(1).

¹⁷⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 219(2).

¹⁷⁹ *Land and Environment Court Act 1979* (NSW), s. 21(a).

¹⁸⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 214.

¹⁸¹ *Land and Environment Court Act 1979* (NSW), s. 21(a).

¹⁸² *Protection of the Environment Operations Act 1997* (NSW), s. 215.

matter, the maximum fine that it can impose is \$11,000, despite the fact that a higher penalty may be permitted under the law.¹⁸³

Tier 3 offences do not go to Court, as they are enforced through penalty notices. However, if the person elects not to pay the fine, the matter can be heard either by the Land and Environment Court (in Class 5)¹⁸⁴ or a Local Court.¹⁸⁵

Time limits

Proceedings for serious offences (prescribed offences) must be commenced within 3 years of the date on which the offence is alleged to have been committed, or of the date that the alleged offence came to the attention of an authorised officer.¹⁸⁶

Prescribed offences include Tier 1 offences, offences relating to pollution licences, unlawfully transporting waste or unlawfully permitting land to be used as a waste facility.¹⁸⁷

For all other offences, the prosecution must be commenced within 12 months.¹⁸⁸

What penalties can the Court impose?

In addition to fines and imprisonment, the Court can order a person convicted of a pollution offence to take certain steps, including (but not limited to):¹⁸⁹

- Prevent, control, abate or mitigate any harm to the environment caused by the offence;¹⁹⁰
- Make good any resulting environmental damage to land (restoration order);¹⁹¹
- Publicise the offence and its environmental and other consequences and any other orders made against the person;¹⁹²
- Carry out a specified project for the restoration or enhancement of the environment in a public place for the public benefit;¹⁹³
- Pay a specified amount to an environmental organisation, either for a project or for general environmental purposes;¹⁹⁴ or
- Pay the prosecutor's legal costs, pay a specified amount to the Environmental Trust or a specified organisation for a specified project for the restoration or enhancement of the environment or for general environmental purposes.¹⁹⁵

¹⁸³ *Protection of the Environment Operations Act 1997* (NSW), s. 215(2).

¹⁸⁴ *Land and Environment Court Act 1979* (NSW), s. 21(a).

¹⁸⁵ *Protection of the Environment Operations Act 1997* (NSW), s. 215.

¹⁸⁶ *Protection of the Environment Operations Act 1997* (NSW), ss. 216(1), (2).

¹⁸⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 216(6).

¹⁸⁸ *Protection of the Environment Operations Act 1997* (NSW), ss. 216(1), 216(2).

¹⁸⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 244.

¹⁹⁰ *Protection of the Environment Operations Act 1997* (NSW), s. 245(a), (c).

¹⁹¹ *Protection of the Environment Operations Act 1997* (NSW), s. 245(b).

¹⁹² *Protection of the Environment Operations Act 1997* (NSW), s. 250(1)(a).

¹⁹³ *Protection of the Environment Operations Act 1997* (NSW), s. 250(1)(c).

¹⁹⁴ *Protection of the Environment Operations Act 1997* (NSW), s. 250(1)(e).

Case study: Court orders polluter to pay for weed management at Towra Point

[EPA v Caltex Refineries NSW Pty Ltd \[2008\] NSWLEC 194](#)

In 2008, the EPA prosecuted Caltex Refineries for releasing odour from its oil refinery in Kurnell, NSW. The odour incident occurred over a few days during December 2006. About 35 complaints were made by residents of a very strong, unpleasant odour like sulphur.

Caltex pleaded guilty to the charge of failing to operate its plant in a proper and efficient manner, as required by the conditions of its pollution licence.

In lieu of imposing a fine of \$78,000, the Court ordered Caltex to pay the Parks and Wildlife Group (part of the then NSW Department of Environment and Climate Change) \$78,000 to be used for the implementation of the Weed Management Strategy for Towra Point Nature Reserve.

Deemed liability of directors and managers

If a corporation commits an offence under the POEO Act or Regulations, the directors and anyone else who is concerned in the management of the company (senior management) are also deemed to have committed the same offence.¹⁹⁶

It is a defence if the director or manager:

- Was not in a position to influence the conduct of the company; or
- If they were in such a position, that they used all due diligence to prevent the offence.¹⁹⁷

Civil enforcement

What is civil enforcement?

Civil enforcement is where a person asks a court to enforce an Act or Regulations by imposing a civil remedy, rather than using criminal remedies to punish an offender (such as a fine or term of imprisonment).

Civil proceedings are often faster and simpler than criminal proceedings because a civil case only needs to be proved on the balance of probabilities, rather than beyond reasonable doubt. The standard of evidence required is therefore lower in civil proceedings.

Civil remedies include:

- A declaration that the POEO Act or Regulations have been breached;
- A declaration that a pollution licence is invalid;

¹⁹⁵ *Criminal Procedure Act 1986* (NSW), ch. 4, pt. 5. The Environmental Trust is established under the *Environmental Trust Act 1998* (NSW).

¹⁹⁶ *Protection of the Environment Operations Act 1997* (NSW), s. 169.

¹⁹⁷ *Protection of the Environment Operations Act 1997* (NSW), s. 169.

- An order suspending a pollution licence;
- An injunction restraining a person from carrying out an unlawful activity; and
- An order that a person fix any damage to the environment (remediation order).¹⁹⁸

Who can bring civil enforcement proceedings?

Any person can bring civil enforcement proceedings.¹⁹⁹ This means that there is no restriction on the EPA, local councils, or even members of the public, in bringing a civil action to enforce the POEO Act.

Civil enforcement proceedings are brought in Class 4 of the Land and Environment Court.²⁰⁰

Case study: Civil enforcement to stop pollution of the Georges River

[Macarthur Bushwalking and Cycling Club v Endeavour Coal and Illawarra Coal Holdings](#)

The community group Macarthur Bushwalking and Cycling Club brought a case in the Land and Environment Court because they were concerned that pollution from a coal mine operated by subsidiaries of BHP had been discharged into the Georges River for more than 10 years and that this pollution wasn't authorised by a pollution licence.

Just ten days after the case was filed in Court, the EPA issued a media release advising that it was looking to place limits on the pollution licence. This was formalised almost a year later, when the pollution licence was varied by the EPA. The community was heavily consulted throughout that process.

The variation to the licence in effect authorised the pollution. However, the EPA also took the important step of requiring BHP to stop polluting. Under its pollution licence, BHP was required to carry out a program of works to achieve 95% species protection in Brennans Creek and the Georges River by December 2016. The EPA also required ongoing monitoring of ecological impacts during the period that the works were being constructed.

Because the EPA did what the community asked it to do, there was no need to have a court hearing.

¹⁹⁸ *Protection of the Environment Operations Act 1997* (NSW), s. 252(7), 253.

¹⁹⁹ *Protection of the Environment Operations Act 1997* (NSW), s. 252 (5).

²⁰⁰ *Land and Environment Court Act 1979* (NSW), s. 20.

Glossary

Key terms used in this Fact Sheet

OEH means the NSW Office of Environment and Heritage

Environment Minister means the NSW Minister for the Environment

EPA means the NSW Environment Protection Authority (an independent statutory authority separate from OEH)

EP&A Act means the *Environmental Planning and Assessment Act 1979* (NSW)

POEO Act means the *Protection of the Environment Operations Act 1997* (NSW)

Pollution licence means an environment protection licence

Regulations means any one or more of the regulations made under the POEO Act