



# Pollution & Environmental Harm

## ***An introduction to Pollution and Environmental Harm***

*There are a large range of activities that can lead to pollution or cause environmental harm. Laws controlling these activities have strengthened in the last few decades, with penalties for some offences now up to \$1 million. The concept of environmental harm extends to activities which cannot be described as pollution, but which otherwise damage the environment.*

*This fact sheet explains the laws relating to pollution and environmental harm in Western Australia. See also [Fact Sheet 26: Air quality](#), [Fact Sheet 30: Contaminated sites](#), [Fact Sheet 28: Pesticides](#), [Fact Sheet 29: Industrial chemicals](#) and [Fact Sheet 25: Noise](#).*

## **What is pollution?**

Pollution is defined under the *Environmental Protection Act 1986 (WA)* ("the EP Act") as an alteration of the environment to its detriment or degradation, which involves an emission. An emission is defined as a discharge of waste, or an emission of noise, odour or electromagnetic radiation.

## **What is environmental harm?**

It is an offence under the EP Act to cause "material environmental harm" or "serious environmental harm". Environmental harm is a broadly-defined concept which may cover many different types of conduct affecting the environment.

"Environmental harm" is defined in section 3A(2) of the EP Act as harm to the environment involving damage to native vegetation or the habitat or native animals, or an alteration of the environment to its detriment or degradation.

"Material environmental harm" includes environmental harm that is neither trivial nor negligible or which results in damage or losses exceeding \$20,000.

"Serious environmental harm" includes environmental harm that is irreversible, high impact or wide-spread or occurs in an area of high conservation value. Environmental harm resulting in damage or losses exceeding \$100,000 is also classified as "serious environmental harm".

## **When is pollution or environmental harm against the law?**

Pollution or environmental harm can be against the law in two ways: firstly, when there is a breach of a requirement in legislation and secondly, when it breaches other peoples' common law rights.

Offences under the EP Act include:

- causing pollution or allowing pollution to be caused;

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- causing an unreasonable emission (defined as an emission which unreasonably interferes with the health, welfare, convenience, comfort or amenity of any person);
- causing an emission from Prescribed Premises without a works permit or pollution licence (see "Works Approvals" below); and
- causing serious environmental harm or material environmental harm.

The *Environmental Protection (Unauthorised Discharge) Regulations 2004* (WA) also make it an offence to discharge some common substances without approval, including heavy metals, highly acidic or alkaline solutions, dust, hydrocarbons, sediment, sewage, and visible smoke from burning things such as carpet, preserved timber or paint.

## Defences

It is a defence to a charge of causing pollution, causing an unreasonable emission or causing environmental harm if the pollution, emission or harm occurred in the course of carrying out a development which has received approval from the Minister for Environment under Part IV of the Act (See [Factsheet 5: Environmental Impact Assessment Law in Western Australia](#)). It is also a defence if the person holds and is acting in accordance with a relevant approval or licence issued under the EP Act, or if the harm occurred as a result of an accident or to prevent danger to human life or irreversible harm to the environment, or if the person who caused the harm took reasonable precautions and exercised due diligence.

Defences to environmental harm offences include:

- Actions done accordance with an authorisation or approval given under another statute.
- Actions carried out by a public authority in the exercise of a function conferred under another statute.
- Agricultural practices authorised under the *Agricultural Practices (Disputes) Act 1995*.
- Actions which have the benefit of a clearing permit or an exemption under the provisions relating to clearing of native vegetation (see *Factsheet 7: Clearing Native Vegetation*).

## Enforcement

If pollution or environmental harm has been caused and there is no defence, the Department of Environment and Conservation ("DEC") has various enforcement powers. For the most serious offences, only the CEO of DEC can use these powers, but for minor offences, authorised officers are also given powers. Members of the public, however, cannot use any of these powers and have no rights to enforce the EP Act or Regulations.

DEC's powers include being able to issue a written warning usually known as an Environmental Field Notice (it is DEC policy not to issue verbal warnings), issue infringement notices for minor offences, issued penalty notices for moderately serious offences, revoke or suspend approvals, issue a range of notices to prevent further harm (see below), amend conditions of approvals, and prosecute. The range of powers are set out in the DEC Enforcement and Prosecution Guidelines 2008. These Guidelines also set out when the DEC will use each of these powers, and the factors it takes into account in deciding what level of enforcement action to take. For example, DEC will consider things such as how much harm was done to the environment,

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whether the incident was reported to the DEC by the offender, environmental compliance history, and the need to create a deterrence effect.

Prosecutions for the most serious offences can be started at any time, but for lesser offences have to be started within 2 years of DEC becoming aware of the offence.

If a person is convicted of an offence against the EP Act, the court may make a number of different orders as well as imposing the penalty prescribed for the offence. Orders may require the offender to:

- pay reasonable costs, expenses or compensation;
- prevent, control, abate or mitigate any harm to the environment caused by the offence;
- prevent the continuance or recurrence of the offence;
- publicise the offence and its environmental impacts; or
- carry out a specified project for the restoration or enhancement of the environment.

## Environmental Protection and other Notices

Environmental Protection Notices ("EPNs") are orders that may be issued by the DEC where it has reasonable grounds to suspect that unlawful pollution or environmental harm has occurred, or is likely to occur if action is not taken to prevent it.

An EPN may require a person to investigate the occurrence or likely occurrence of pollution or environmental harm, or to take remedial action. It is then an offence for that person not to comply, and the EPN is also registered on the title to their land and future owners and occupiers. DEC has to give the person it intends to give the notice to 21 days to show cause why they should be issued with an EPN before it is issued, and then the person who receives the notice also has a right to appeal against it. Members of the public can also appeal about the conditions of an EPN.

An authorised person may also take direct action to prevent or abate the occurrence of pollution or environmental harm, and recover costs from the polluter.

## Environmental Protection Policies

The Environmental Protection Authority ("EPA") may prepare an Environmental Protection Policy ("EPP") where it considers this necessary or desirable for the protection of the environment or the prevention, control, or abatement of pollution or environmental harm.

An EPP may apply to the whole of the State, or only specified parts of the state. It can set out environmental quality objectives to be met and establish a program for attainment of these objectives. For example, *the Environmental Protection (Kwinana)(Atmospheric Wastes) Policy 1999* sets air quality standards for air 5m above the surface in the local government areas of Cockburn, Kwinana and Rockingham. An EPP can also create new environmental offences related to its objectives and impose penalties of up to \$250,000 for non-compliance.

Once a draft EPP has been prepared, the EPA must publish a notice in the Government Gazette. Further, the notice must be published once a week for three weeks in a state-wide daily newspaper.

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## State Environmental Policies

The EPA has the power to develop State Environmental Policies ("SEPs"). SEPs are a non-statutory instrument that are developed by the EPA, and then considered for approval (or otherwise) by the Minister for the Environment. SEPs differ from EPPs in that they do not have the force of law.

At the time of writing, only one SEP, the *State Environmental (Cockburn Sound) Policy 2005* is in force.

## Approvals

Generally, people wishing to undertake activities likely to cause pollution must obtain a works approval before setting up the activity and a pollution licence in order to continue the activity.

Both works approvals and pollution licences operate by regulating premises ("Prescribed Premises") which are identified by the activities that are carried out on the premises. Prescribed Premises include most premises known to cause, or create a risk of serious pollution (for example cattle feedlots, food processing, textile operations, mining operations, ore processing, smelting and refining, sewage facilities and incinerators). A full list of Prescribed Premises is contained in Schedule 1 of the *Environmental Protection Regulations 1987 (WA)* ("the EP Regulations").

Works approvals are also required to modify Prescribed Premises other than in the course of general maintenance.

As well as any conditions imposed upon works approvals or pollution licences, occupiers of Prescribed Premises must comply with any prescribed standards for an emission and take all reasonable and practicable measures to prevent or minimise emissions. Failure to comply with either of these requirements is an offence.

## Works approvals

A works approval is required to construct Prescribed Premises, or convert other premises into Prescribed Premises.

Upon receiving an application for a works approval, DEC must seek comments from any public authority or person with a direct interest in the subject matter of the application. A notice regarding the licence application must also be published in a state-wide newspaper and submissions invited from members of the public. If the works approval is related to a proposal which has been referred to the EPA for assessment, DEC must not grant the approval while the assessment process is pending (see [Fact Sheet 5: Environmental Impact Assessment in Western Australia](#)).

Works approvals are generally issued subject to conditions. These conditions may require the occupier of the premises to take any measures necessary for the prevention, control, abatement or mitigation of pollution or environmental harm. The conditions may also require the occupier to monitor and report on emissions or to comply with an environmental management plan. DEC has a wide ranging power to set conditions, and does not have to limit those conditions to only the environmental impacts of the "prescribed activity". It can also regulate other activities on the site. It is particularly important for the DEC to do this if clearing is involved in the activity, as the works approval or licence will provide the holder with an exemption from obtaining a clearing permit. Failure to comply with a condition imposed upon a works approval is an offence.

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## Pollution Licences

While works approvals are intended to regulate the work necessary to start or change a polluting activity, pollution licences are required to regulate polluting activities on an ongoing basis.

The procedure for applying for a pollution licence is similar to that for a works approval. These licence applications are also advertised in a state-wide newspaper and there is an opportunity for members of the public to make submissions. Pollution licences may be subject to the same sorts of conditions as works approvals.

## Amending works approvals and licences

DEC has certain limited powers to amend works approvals and pollution licences after issue, including the power to add new conditions or change prescribed standards to conform with approved policies or standards. DEC can revoke a works approval or pollution licence if it believes that the licence holder has breached the conditions of the licence, or if it finds that the information contained in the licence application was false or misleading in a material respect.

To amend, suspend or cancel a works approval or licence, DEC must give the licensee notice in writing allowing the licensee at least 21 days to show cause why that power should not be exercised.

Holders of works approvals and licences have an ongoing obligation to notify DEC of any material changes to their activities as described in their application documents .

## Appeals – Works Approvals and Pollution Licences

If DEC refuses to grant a works approval or pollution licence, the applicant for the approval or licence can appeal to the Minister for Environment. The applicant can also appeal against licence conditions.

Objectors can appeal on the merits against the conditions of a works approval of licence (ie they can ask for more strict conditions), but they cannot appeal against the decision to grant the works approval or licences as such.

All of the above appeals must be commenced within 21 days of the applicant being notified of DEC's decision.

An appeal can be commenced by any person sending a signed letter identifying the decision appealed against and setting out the grounds of appeal to the Minister. To decide an appeal, the Minister's Appeals Convenor will look at all of the available evidence and will seek a report from DEC before deciding whether to overturn or amend DEC's original decision.

## Registration

For some less serious types of polluting activities a system of registration is used to avoid the administrative complexities of pollution licences. The prescribed premises for which registration can be sought are set out in Schedule 2 of the EP Regulations. Occupiers of these types of premises may apply for registration. If

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the application meets the requirements under regulation 5B(2) of the Regulations, DEC must register the premises, and there is no provision for public consultation.

## Controlling pollution and environmental harm in Western Australia

The main body responsible for controlling pollution and environmental harm is DEC. In some limited cases, DEC has delegated its pollution and environmental harm control powers to other bodies. Local Government and the Department of Water have some pollution control powers over watercourses within catchment areas and water reserves (see [Fact Sheet 21: Rivers and Water Courses](#)).

## Monitoring

DEC has a Pollution Response Unit which is responsible for monitoring, preventing and providing advice on pollution. DEC may monitor pollution and will often do so when environmental problems are brought to their attention. Mostly pollution is self-monitored by the polluter and audited by DEC.

Works approvals and pollution licences may contain conditions requiring the holder of the approval or licence to conduct a specified monitoring programme, or conduct environmental risk assessment studies. The conditions may also require that results from a monitoring programme be provided in a report to DEC, and usually also require the holder provide an annual statement of compliance which identifies any non-compliances in the past 12 months. Members of the public can seek access to monitoring results and annual compliance statements by making a freedom of information request to DEC (see [Fact Sheet 40: Freedom of Information Law in Western Australia](#)).

## How you can become involved

- The Department of Environment and Conservation has an Emergency Pollution Response Hotline, Tel: 1300 784 782
- To report a fish kill, algal bloom or rubbish in the Swan or Canning Rivers, contact the Swan River Trust, Tel: (08) 9278 0400 (during office hours), 0419 192 845 (after hours emergency pollution response).
- Hazardous material release - call 000 and ask for Fire and Rescue.
- Become involved in the 'Clean up Australia' campaign [www.cleanup.com.au/au/](http://www.cleanup.com.au/au/)
- Monitor the West Australian newspaper for notification of significant proposals, works approvals and pollution licence applications. Make submissions to the EPA (significant proposals) or DEC (works approvals and licences).

## Contacts and further information

Office of the Environmental Protection Authority, Tel: (08) 6467 5000, website: [www.epa.wa.gov.au](http://www.epa.wa.gov.au)

Department of Environment and Conservation, Tel: (08) 6467 5000, website: [www.dec.wa.gov.au/](http://www.dec.wa.gov.au/). Copies of current pollution licences and works approvals can be viewed here.

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Office of the Appeals Convenor, Tel: (08) 6467 5190, website: [www.appealsconvenor.wa.gov.au](http://www.appealsconvenor.wa.gov.au)

National Pollution Inventory website: [www.npi.gov.au](http://www.npi.gov.au)

For copies EPPs and SEPs visit [www.epa.wa.gov.au](http://www.epa.wa.gov.au)

For copies of legislation (including regulations) visit: [www.slp.wa.gov.au](http://www.slp.wa.gov.au) (WA legislation only) or [www.austlii.edu.au](http://www.austlii.edu.au) (both WA and Commonwealth legislation)

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## The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- to provide community groups and individuals with legal advice and representation to help protect the environment;
- to promote law reform that improves environmental protection; and
- to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal and State Attorney-General's Departments.

However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

Environmental Defender's Office WA (Inc)

Suite 4, 544 Hay Street, Perth WA 6000

Tel: (08) 9221 3030

Fax: (08) 9221 3070

Freecall: 1800 175 542 (for WA callers outside the Perth metropolitan region)

Email: [edowa@edowa.org.au](mailto:edowa@edowa.org.au)

## Thank you to our donors

The EDO is grateful for the funding provided by the following organisations to create and maintain these fact sheets.



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