

Guideline

Environmental Protection Act 1994

Clean-up notice

The purpose of this document is to provide guidance and information to customers of the Department of Environment and Science, regarding clean-up notices, which are issued pursuant to Chapter 7 Part 5B of the Environmental Protection Act 1994.

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What is a clean-up notice?

A clean-up notice is a written notice issued by the Department of Environment and Science (the department) to a person who is reasonably believed to be a prescribed person, to ensure that a contamination incident (that has caused or is likely to cause serious or material environmental harm) is cleaned up. The legislative provisions in regard to clean-up notices are contained in sections 363F to 363L of the [Environmental Protection Act 1994](#) (the Act).

Am I a prescribed person?

You are a prescribed person for a contamination incident if you meet one of the following criteria¹:

- a person who caused or permitted the incident to happen;
- a person who, at the time of the contamination incident, was the occupier of the place where the incident occurred;
- a person, who at the time of the contamination incident, is or was the owner, or a person in control of, a contaminant involved in the incident;
- for a contamination incident mentioned in section 363F(b) of the Act relating to contaminated land, a person responsible for the land to which the incident relates;
- if a clean-up notice is issued to a corporation (the first corporation) and it fails to comply with the notice:
 - a parent corporation of the first corporation;
 - an executive officer of the first corporation.

Note: The occupier of a place includes the person apparently in charge of the place. This is the place from which the contamination incident arose. A place is defined as premises, another place on land or a vehicle.

A prescribed person may be required to take actions at locations offsite from the place of origin of the contamination incident. For example, if the contamination incident spreads from the site of the incident into nearby watercourses or onto neighbouring land.

For example:

Company A operates a transport company. Company B consigns a load of chemicals to Company A, which loads it on to a truck operated by Mr C at the depot operated by Company A. During the loading, Mr C's negligence causes the chemicals to spill into a drain leading to a waterway. Serious environmental harm occurs as a result. A clean-up notice could be issued to Mr C (who caused the incident to happen); or to Company A (which was the occupier of the premises where the incident happened); or to Company B (which was the owner of the chemicals involved in the incident).

The department will choose the most appropriate person to clean up the incident, depending on their capacity, resources and degree of responsibility. If someone who is not responsible for an incident is issued with a cleanup notice, they can recover any costs incurred in complying with the notice from the person who was responsible.

¹ Section 363G of the Act.

³ Section 363F of the Act.

What is a contamination incident?

A contamination incident² occurs when the department is satisfied that:

- an incident involving contamination of the environment has caused or is likely to cause serious or material environmental harm; or
- the carrying out of an activity on contaminated land, the happening of an event of contaminated land or a change in the condition of contamination land has caused or is likely to cause the land or any other land to become contaminated land; or
- a combination of these two has occurred.

A contamination incident may be a series of incidents that together or separately caused or are likely to cause serious or material environmental harm.³

A contaminant can be:

- a gas, liquid or solid;
- an odour;
- an organism (whether dead or alive), including a virus;
- energy, including noise, heat, radioactivity and electromagnetic radiation; or
- a combination of contaminants.

Material environmental harm

'Material environmental harm' is defined as environmental harm (other than environmental nuisance):⁴

- that is not trivial or negligible in nature, extent or context;
- that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount (\$5000), but less than the maximum amount (\$50,000); or
- that results in costs of more than the threshold amount (\$5,000) but less than the maximum amount (\$50,000) being incurred in taking appropriate action to:
 - prevent or minimise the harm; and
 - rehabilitate or restore environment to its condition before the harm.

Serious environmental harm

'Serious environmental harm' is defined as environmental harm (other than environmental nuisance):⁵

- that is irreversible, of a high impact or widespread;
- caused to an area of high conservation value or special significance;
- that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than the threshold amount (\$50,000); or

³ As set out in the *Acts Interpretation Act 1954* that the singular includes the plural.

⁴ Section 16 of the Act.

⁵ Section 17 of the Act.

- that results in costs of more than the threshold amount (\$50,000) being incurred in taking appropriate action to:
 - prevent or minimise harm; and
 - rehabilitate or restore the environment to its condition before harm.

When considering whether the harm is trivial or negligible, the context of the harm must be considered together with the long term effects of the harm. Where the consequences of the harm are uncertain, the precautionary principle should be used to help determine the level of harm. This means that when the health of humans and the environment is at stake, it may not be necessary to wait for scientific certainty to take protective action. The burden of proof rests with the department to demonstrate the threat of environmental harm is a reality and that a proportionate precautionary measure is necessary.

Notification of environmental incidents – duty to notify

The duty to notify of environmental harm is a statutory requirement that ensures the administering authority and other relevant persons are made aware of incidents that may have caused or threaten material or serious, and that appropriate action can be taken to minimise the extent of environmental harm caused. Duty to notify obligations are set out in sections 320 to 320G of the Act. Further guidance material is also available on DES's website, including the duty to notify guideline ([EM467](#))⁶ and duty to notify form ([EM468](#)).

Why have I been issued a clean-up notice?

You (the prescribed person) have been issued a clean-up notice, because the department has formed a reasonable belief that a contamination incident has occurred or is occurring. It is highly likely that the department will have made contact with you prior to issuing a clean-up notice, for the purpose of conducting a site inspection to view and assess the contamination incident.

A clean-up notice includes requirements for the prescribed person to take action, to⁷:

- prevent or minimise contamination (e.g. action to contain, remove, disperse or destroy the contaminants);
- rehabilitate or restore the environment because of an incident, including by taking steps to mitigate or remedy the effects of the incident;
- assess the nature and extent of the environmental harm, or the risk of further environmental harm, from the incident, including by inspecting, sampling, recording, measuring, calculating, testing or analysing;
- keep the department informed about the incident or the actions taken under the notice, including by giving to the department stated reports, plans, drawings or other documents.

The requirements of a clean-up notice are prepared on a case-by-case basis and will include a timeframe for the completion of each requirement. Requirements to take offsite actions may also be included, if the contamination incident spreads from the site of the incident into nearby watercourses or onto neighbouring land.

⁶ The EM number is a unique reference for this particular document. You are able to search the department's website (www.des.qld.gov.au) and enter EM and the associated number to locate the document you require.

⁷ Section 363H of the Act.

What are my responsibilities upon receiving a clean-up notice?

Following receipt of a clean-up notice, you are obligated to complete the requirements stipulated on the notice, within the required timeframes.

A requirement might include monitoring, sampling, recording and reporting. A final report may be required to confirm that you have met and fulfilled each of the requirements of the clean-up notice.

What happens if I am not the owner of the land to which the clean-up notice relates?

If you are issued a clean-up notice for land that you do not own, you are still responsible for completing the requirements of the notice. You can complete the work yourself, or engage a contractor to undertake the work on your behalf. However, to enter the land, you need to either:

- obtain the consent of the owner and occupier of the land; or
- have given at least five days written notice to the owner or occupier of the land that you, or a contractor engaged by you, intend to take action on the land.⁸

The Act instructs you or a contractor engaged by you, to take all reasonable steps to cause as little inconvenience and do as little damage as is practicable in the circumstances of actioning the clean-up notice.⁹

Who can I contact?

The clean-up notice you have received includes the name and telephone number of a departmental officer that you can contact for assistance in relation to the notice or the matters surrounding the issuing of the notice.

Is a clean-up notice able to be amended?

A clean-up notice may be amended by the department if there have been minor errors or omissions identified. The department will advise you by way of written correspondence when a minor amendment has occurred to correct those errors.

More serious errors that include errors of calculation, typing errors, errors of punctuation or of formatting which give rise to unintended changes of meaning can also be corrected by the department. If these are corrected the department will advise you by way of written correspondence.

Significant amendments that affect your rights or liabilities will be detailed to you by way of a new notice, accompanied by a cover letter clearly stating the changes that have made in the new notice. Significant amendments include, for example, imposing stricter requirements or an extension of time for requirement due dates.

What happens if I do not action the requirements of a clean-up notice?

Failure to comply with a clean-up notice is an offence under the Act, unless you have a reasonable excuse. It is a reasonable excuse not to comply if the notice requires information or the production of a document that might incriminate the individual to whom it was issued. A reasonable excuse must be sufficient in the circumstances of the actions required to be taken in the clean-up notice. For example, a reasonable excuse may be that the actions cannot physically be done or that to undertake the works in the way specified would cause more environmental harm than the positive benefits from the clean-up. It would not be a reasonable excuse to claim lack of funds to perform the clean-up, unless every avenue to obtain the funds has been exhausted. In such circumstances, the person should have taken all reasonable and practicable measures to prevent or minimise environmental harm being caused.

⁸ Section 363J of the Act.

⁹ Section 363J(4) of the Act.

Several compliance options and penalties are available to the department if a person fails to comply with a clean-up notice.

The department may action the requirements of a clean-up notice

If you have not complied with a clean-up notice, or the decision to issue a clean-up notice is stayed in court,¹⁰ an authorised person¹¹ under the Act, or a contractor acting on instruction from an authorised person, may undertake any of the actions stated in the clean-up notice to ensure that the contamination is cleaned up.¹²

The authorised person or contractor is required to obtain the consent of the owner and occupier of the land prior to entering the land, or have given at least five business days written notice that they intend to enter the land.

If the department has to action the clean-up notice issued to you, the department may consider recovering costs by issuing you with a Cost Recovery Notice.

Court Order

If you fail to comply with a clean-up notice, the department may apply to a magistrate for an order to enter the land to take the actions required under the clean-up notice.¹³ If an application to a magistrate is made, the department must give written notice of the application to:

- the owner of the land;
- if the owner is not the occupier—the occupier; and
- the recipient of the clean-up notice.

Cost Recovery Notice

The department may issue a cost recovery notice to you in the following circumstances:

- if you have failed to comply with a clean-up notice and an authorised person or contractor takes any of the actions stated in the clean-up notice pursuant to section 363K of the Act; or
- if a decision to issue a clean-up notice is stayed (i.e. temporarily stopped or suspended) by the court through the appeal process, and during the period of the stay, an authorised person or contractor takes any of the actions stated in the clean-up notice pursuant to section 363K of the Act, and either the stay ends without an appeal decision or the court upholds the decision to issue the notice.

If either of the above circumstances applies, a cost recovery notice may claim a stated amount for costs or expenses reasonably incurred:

- for taking an action stated in the clean-up notice; or
- for monitoring compliance with the provisions of the clean-up notice.

For further information refer to the cost recovery notice guideline ([EM1056](#)).

Penalties

The following penalties apply for failing to comply with a clean-up notice:

¹⁰ Under section 535A of the Act.

¹¹ Section 445 of the Act sets out how a person becomes an authorised person. An authorised person in this instance will generally be an employee of the department who has been appointed as an authorised person.

¹² Section 363K of the Act.

¹³ Section 458 of the Act.

- The maximum penalty for an individual wilfully contravening a clean-up notice is 6250 penalty units or five years imprisonment.
- The maximum penalty for a corporation wilfully contravening a clean-up notice is 31,250 penalty units.
- The maximum penalty for an individual contravening a clean-up notice is 4500 penalty units.
- The maximum penalty for a corporation contravening a clean-up notice is 22,500 penalty units.

As an alternative to prosecution, and in accordance with the department's [enforcement guidelines](#), the department may issue a penalty infringement notice (PIN) for the offence of contravening a clean-up notice.

The State Penalties Enforcement Regulation 2014 prescribes the number of penalty units for an offence. Section 3 of the Penalties and Sentences Regulation 2015 prescribes the monetary value of a penalty unit.

Defences

There are certain circumstances which may be considered defences for failing to comply with a clean-up notice, which include:

- the recipient of the notice is not a prescribed person; or
- the contamination incident was caused by a natural disaster (not including an event that can be prevented by human action) and the recipient had taken all reasonable measures to prevent the incident, having regard to all the circumstances including the inherent nature of the risk and the probability of the natural disaster; or
- the contamination incident was caused by a terrorist act or other deliberate act of sabotage by someone other than the recipient and the recipient had taken all reasonable measures to prevent the incident, having **regard to all the circumstances including the inherent nature of the risk and the nature of the recipient's** connection with the incident.

These defences are based on the general environmental duty,¹⁴ which requires a person to take all reasonable and practicable measures to prevent or minimise environmental harm when carrying out an activity. As such, proving the defence rests with the person who is claiming the defence.

It is also a defence for the recipient of a clean-up notice to show:

- if the recipient is a parent corporation of the first corporation, that the parent corporation has taken all reasonable steps to ensure that the first corporation complied with the notice served on the first corporation;
- if the recipient is an executive officer of the first corporation that the person:
 - has taken all reasonable steps to ensure that the first corporation has complied with the notice served on the first corporation; or
 - was not in a position to influence the conduct of the first corporation in relation to its compliance with the notice.

Review of decisions and appeals

The provisions regarding review of decisions and appeals may be found in sections 519 to 539 of the Act.

Pursuant to section 521(13) the procedures for internal reviews of decisions do not apply to a clean-up notice and as such, a decision to issue a clean-up notice is not able to be internally reviewed by the department.

However, a person who is dissatisfied with the decision to issue a clean-up notice may be able to appeal against that decision to the relevant court within 22 business days after receiving notice of the decision.

¹⁴ Section 319 of the Act.

A person whose interests are or would be adversely affected by a decision of the department may also be able to request a statement of reasons for a decision or a statutory order review under the *Judicial Review Act 1991*. For further information about reviews and appeals see the information sheet - Internal review and appeal to the Planning and Environment Court ([EM1866](#)).

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