

Guideline

Environmental Protection Act 1994

Environmentally Relevant Activities Compliance and Enforcement

This guideline provides an overview of compliance and enforcement by the Department of Environment and Science (the department) under the Environmental Protection Act 1994.

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Introduction

The Department of Environment and Science (the department) is responsible for managing the health of the environment to protect Queensland's unique ecosystems and for identifying and conserving the state's built heritage.

The department's role is to act as a strong environmental regulator which supports sustainable economic development in Queensland. In fulfilling this role, the department is committed to meeting the expectations of the community to manage the health of the environment, as well as the expectations of industry to streamline approval processes and reduce the regulatory burden. It does this by administering a range of environmental regulations and laws, providing timely approvals and ensuring compliance with those approvals.

The release of the department's updated Regulatory Strategy in June 2014 reflected its commitment to the government, the community and industry.

It also reflected a significant and fundamental shift in the way environmental and heritage regulatory activities will be undertaken by the department.

As outlined in the Regulatory Strategy, the department's regulatory application process will be significantly streamlined over time, while compliance activities will be increased and enforcement actions will be stronger, where required, and more consistent.

The Regulatory Strategy also acknowledged that the department's expertise is environmental regulation, such as setting the standards to identify what level of impact from industry is appropriate. Industry is best placed to work out how to meet those standards and they have the responsibility to ensure that the environmental impacts from their activity are appropriately managed. The department will increasingly focus its efforts on ensuring industry complies with the commitments made and standards set.

This important delineation in the roles of the department and industry is fundamental to the department's new strategic approach in developing and delivering its regulatory activities. The department will set the standards and make clear its expectations for acceptable performance, but operators are responsible for making sure that those expectations are met.

For further information, view the department's [Regulatory Strategy](#).

Compliance and enforcement framework

The department has undertaken significant work to revitalise and reshape its proactive compliance methodology and framework to provide improved utilisation of compliance resources to target the highest risks to the environment and monitor performance of clients. These important changes will provide a fundamental shift in how the department provides better environmental outcomes for Queensland. In accordance with the Regulatory Strategy, the department will be targeted and transparent in deciding which industries or activities will be the focus of its compliance activities.

The department will be targeted by identifying the areas where breaches of the legislation pose the greatest risk to the environment or heritage places and taking action to reduce that risk. It will be transparent by publishing information about which areas it is focusing on and what it is doing about them. The department is moving away from annual compliance planning and reporting towards a new dynamic framework which will allow a more rapid and timely response to emerging trends or changes in risk. The new framework will continue to provide accountability and transparency with the added benefit of allowing greater flexibility to respond to changing risks to the environment and identify areas where immediate action is needed to address poor performance or mitigate environmental harm.

The department will monitor client performance based on risk. Where individual clients represent a higher risk to the environment because of their poor performance, the department will check their compliance more

frequently. Where a client consistently demonstrates good performance and manages its risk appropriately, the department will acknowledge that good performance and lower risk by conducting less frequent inspections.

To support this new compliance approach, the department is upgrading its systems to collect and analyse more detailed information to improve compliance planning. This will enable the department to determine which industries and customers are not meeting their expected environmental outcomes and to focus efforts on working with these customers to achieve compliance.

The Compliance Steering Committee, comprised of representatives from each operational compliance area of the department, will provide governance for the new compliance framework. This will ensure a consistent, appropriate and strategic approach to compliance and enforcement activities across the state.

Regular updates on the department's compliance activities will continue to be provided to the public. These updates will highlight how the department has achieved its goals of protecting the environment and monitoring and responding to our customers' environmental performance. In addition, the department will remain focused on its ongoing commitment to improve public accessibility to compliance information.

The information overleaf explains how the department delivers on the main objectives of its compliance and enforcement framework as identified in the Regulatory Strategy. Other topics in this document will address some of the specific tasks or activities which underpin this framework. In many cases there are additional guidelines available which provide more specific information about a particular topic. This is referenced throughout the document where relevant.

The department administers over 25 pieces of legislation to manage the health of the environment and to protect Queensland's unique ecosystems and identify and conserve our built heritage, including:

- *Coastal Protection and Management Act 1995*
- *Environmental Protection Act 1994*
- *Nature Conservation Act 1992*
- *Queensland Heritage Act 1992*
- *Water Act 2000* (Chapter 3)
- *Waste Reduction and Recycling Act 2011*
- *Wet Tropics World Science and Management Act 1993*.

As the Queensland Government's environmental regulator, the department's approach to ensuring compliance with its legislation is to:

- educate individuals, industry and governments about the laws and how to comply with them;
- encourage voluntary compliance with obligations;
- monitor compliance;
- reward good performers;
- respond to breaches of the legislation with consistent and proportionate enforcement action.

These activities can happen in two ways—they can be reactive in response to a complaint or incident, or they can be proactive. These planned, proactive activities are detailed below.

The department acknowledges the growing importance of building an improved voluntary compliance culture within industry.

To assist industry improve its compliance practices the department will set clear expectations about acceptable standards of environmental performance, as well as publish easy-to-understand guidance material and information about how to meet those expectations.

This information will assist industry to better understand its responsibilities in achieving good environmental practices, and give operators every opportunity to know what they need to do to meet their obligations.

For those industry members who choose not to comply with their obligations, the department will be consistent in taking prompt, strong enforcement action. This action will demonstrate to industry members that do act responsibly and the broader community that there are consequences for poor performance.

In addition, the department will consider the performance of operators when developing its compliance activities each year. This information is combined with a range of other available information about the risks of particular activities to ensure that the department's proactive activities are targeted.

Enforcement guidelines

It is the goal of the department to foster a positive culture of compliance within industry.

To ensure clients do the right thing the department will make available easy-to-understand education resources and information guidelines to help them better understand their responsibilities.

Whilst the vast majority of clients are responsible and endeavour to achieve, or go beyond, their environmental requirements, there will be occasions where some clients fail to meet their obligations.

If the department finds that a client has broken the law, it will take action to bring the client back into compliance with its obligations. This may mean providing an opportunity for the client to voluntarily fix the problem, or taking enforcement action in accordance with the department's enforcement guidelines.

This enforcement action can include warnings, penalty infringement notices and prosecutions. Where necessary to stop unlawful harm to the environment or a heritage place, the department will require someone to do, or not do, certain things to prevent harm from occurring. This may include stopping an activity or suspending an approval until the department is satisfied that the activity will be properly managed.

The enforcement guidelines have been developed to ensure that the enforcement responses of the department are:

- proportionate to the conduct involved;
- consistent with past responses to similar conduct; and
- completed in a timely fashion.

These guidelines assist the department in choosing an enforcement response, and inform those regulated by the department about the standards that are expected when their activities affect Queensland's natural assets.

The enforcement guidelines aim to foster a corporate and community culture of positive action, consultation and co-operation with the department. The department approaches enforcement, taking into account matters such as:

- public interest considerations;
- determining who is liable for prosecution or other enforcement action; and
- voluntary compliance.

There are various administrative and statutory enforcement tools available in response to non-compliance, including:

- administrative responses (such as warning notices);

- infringement notices;
- court orders; and
- prosecution.

For more information, view the department's Enforcement Guidelines available from the department's website at www.ehp.qld.gov.au.

Compliance tools

Inspections

Compliance inspections play an integral role in helping the department ascertain whether clients are complying with their conditions and other legal obligations, and monitoring their performance in managing the environmental risks of the activity. A compliance inspection is a systematic, independent and documented assessment of an environmentally relevant activity (ERA) or other activity to assess compliance with conditions in the relevant approval and/or the Act, its regulations and any other document that sets a standard of environmental performance. Included in this assessment is an analysis of whether the outcomes or standards set for the activity are operating appropriately to manage the environmental risk of the activity.

There are a number of other reasons why the department carries out compliance inspections, including the following:

- Inspections can reveal strategic or systemic issues with a particular industry or client group, and can allow the department to address those issues before they become larger problems.
- They increase the department's profile in the community, and demonstrate that the department is actively managing activities that pose a threat to environmental values. This increased profile can also deter other people from breaching their obligations.

Compliance inspections are fact-finding exercises, which aim to gather information that allows the department to fulfil its regulatory role. Inspections are not tools designed to penalise bad behaviour, however enforcement action may result from an inspection where operators are not complying with their environmental standards.

Environmental evaluation

Ecological processes and environmental interactions are highly complex. Such complexity can make environmental decision making difficult. Environmental evaluations provide an important way of gaining environmental information so that rational and informed decisions can be made.

An environmental evaluation is a compliance tool designed to evaluate an activity or event that has caused, or is likely to cause, environmental harm in order to facilitate a solution to the problem.

The legislative provisions relating to environmental evaluations can be found in sections 321–329 of the *Environmental Protection Act 1994* (the Act). The Act provides that an environmental evaluation is used to determine:

- the source, cause or extent of environmental harm being caused, or likely to be caused, by the activity or event; and
- whether a transitional environmental program (TEP) is needed to manage the issue.

Environmental evaluation is defined in the dictionary of the Act as either an:

1. environmental audit; or
2. environmental investigation.

A person given a notice to conduct or commission an environmental evaluation must commission an audit or investigation into the matters stated in the notice, and submit a report on that evaluation to the department.

Environmental evaluations are best used where officers do not know the cause, nature or extent of a problem or the solution to a problem. They answer the questions 'what is happening', and 'what is the solution?'

Environmental evaluations require the person responsible for the problem to investigate (or commission someone to investigate) the problem and submit a report to the department. They do not in themselves fix the problem, but they give the department the information needed to then decide what needs to be done about the problem.

The information in an environmental report is often used to decide whether a TEP, environmental protection order (EPO), amendment to an environmental authority (EA) or other compliance action is needed to address the problem.

Some advantages of using an environmental evaluation include:

- they require the recipient to carry out an evaluation by a specified date;
- the recipient and any auditor are required to sign a statutory declaration confirming that the information in the report is not false or misleading; and
- it is an offence for the recipient not to comply with the notice to carry out the environmental evaluation.

Before determining whether to use a statutory tool, an officer should seek to identify the relevant issues or facts associated with a matter. This includes gathering and documenting those issues or facts which need to be considered for the department to make a decision. The strength of evidence necessary to establish a 'fact' or 'truth' may vary according to the seriousness of the issues involved. The more serious the issue, the stronger the evidence required.

Administrative decisions, such as the decision to issue a notice to conduct or commission an environmental evaluation, are made based upon the balance of probabilities. This means that the decision-maker must be able to determine whether, based upon the information available, it was more likely than not that the event occurred or will occur.

Who can issue a notice to conduct or commission an environmental evaluation?

A notice to conduct or commission an environmental evaluation can be issued by the department.

Decisions made by individuals to issue a notice that do not have the delegated authority to make the decision on behalf of the department may be found to be invalid.

When the department requires an environmental evaluation

Environmental audit

An environmental evaluation means either an audit or an investigation and is used to determine:

- the source, cause or extent of environmental harm being caused, or likely to be caused, by the activity or event; and
- the need for a transitional environmental program (TEP) for the activity or event.

An environmental audit is site specific and addresses serious or potentially serious environmental harm problems that cannot be evaluated by normal inspections. The department may require an audit about an EA or other prescribed matters.

Audits about environmental authorities

If the department is reasonably satisfied that an audit is necessary or desirable, the holder of an EA may be required to commission an environmental audit about the environmentally relevant activity (ERA) which is the subject of the EA and provide an environmental report to the department.

Examples of when an environmental audit for an EA may be required include:

- to determine:
 - whether the conditions of the EA have been complied with;
 - the environmental harm the activity is causing compared with the environmental harm authorised;
 - whether a plan of operations for an EA complies with the conditions of the EA;
 - the accuracy of a final rehabilitation report given to the department by the EA holder.

There may be other circumstances when an audit is considered necessary or desirable concerning an EA to determine the source, cause or extent of environmental harm being caused, or likely to be caused by the activity or event.

Audits about other prescribed matters

The department may also require an environmental audit about other prescribed matters.

If the department is satisfied that a person is or has been contravening:

- a regulation;
- an environmental protection policy (EPP);
- a TEP;
- a direction notice;
- a noise standard;
- provisions relating to depositing a prescribed water contaminant in waters, in a roadside gutter or stormwater drainage, or at another place where it might move into waters, a roadside gutter or stormwater drainage;
- provisions relating to air contamination; or
- provisions relating to fuel standards.

A written notice (an audit notice) may be given to the person requiring the person to:

- commission an audit about the matter; and
- give the department an environmental report about the matter.

The audit must be carried out by an approved auditor, who is an individual approved by the Chief Executive as an auditor under Chapter 12 Part 3A Division 2 of the Act. The auditor must be a third party auditor (i.e. must not have a direct or indirect financial or other interest in a matter or thing relevant to the exercise of the function). This is to ensure that there is no conflict of interest for the auditor in performing their approved function.

Please note: The department has not approved any environmental auditors under chapter 12, part 3A, division 2 of the EP Act at this time. A project is currently underway to scope the potential use of environmental auditors across the department's business. It will include the application process, code of conduct and monitoring of functions and accredited auditors. It is anticipated to be completed by July 2014 and include extensive consultation with industry. Further information on this will be placed on the department's website.

Audits by the department

The department also has the power to carry out, or commission a person to carry out, the auditor's functions. The department may decide to do the audit, or prepare the report, or both.

If the department decides to conduct the audit it must give the holder of the EA an information notice about the decision to conduct the audit. The information notice must state:

- the decision;
- the reasons for the decision; and
- the review or appeal details.

Once the department has prepared the environmental report about the audit, the department must give the EA holder a copy of the report within 10 business days.

In the event that the department carries out the audit, the department may be able to recover the costs it incurred in carrying out the auditor's functions from the relevant EA holder if the audit relates to an EA for a resource activity (section 326A).

A resource activity is one that involves:

- geothermal activity;
- a GHG (greenhouse gas) storage activity;
- a mining activity; or
- a petroleum activity.

Environmental investigation

Environmental investigations are designed to examine serious or potentially serious environmental problems that are not necessarily site specific.

If the department is satisfied on reasonable grounds that:

- an event causing environmental harm has occurred while an activity was being carried out; or
- an activity or proposed activity is causing, or is likely to cause, environmental harm;

a written notice (an investigation notice) may be given to the person who has carried out, is carrying out or is proposing to carry out the activity, requiring the person to:

- conduct or commission an investigation about the event or activity; and
- give the department an environmental report about the investigation.

Initial monitoring may be required to assist the decision-maker in determining whether, based upon the information available, it is more likely than not that environmental harm occurred or is likely to occur.

An investigation notice may require the environmental investigation be carried out, and the environmental report be prepared by, a suitably qualified person. The notice must also include a requirement that a declaration from the suitably qualified person be submitted as part of the environmental investigation report.

Before issuing a notice to conduct or commission an environmental evaluation, officers should consider whether another any other tool may be more suitable to use. For instance, it may be possible that the required information can be obtained by using a notice to provide relevant information under section 451 of the Act. Or it may be more appropriate to enter land for the purpose of finding out or confirming the source of a release pursuant to section 453, or for a preliminary investigation to be carried out under section 454 of the Act.

Requirements of an environmental evaluation

The notice to conduct or commission an environmental evaluation must set out in writing the matters that the recipient is required to address in the evaluation. The matters must be aimed at determining the source, cause or extent of environmental harm being caused by the activity or event that the notice relates to. The recipient cannot be required to conduct or commission an evaluation into matters that are not relevant to finding out about environmental harm.

The notice must not require the recipient to do things that are not in the nature of an evaluation. For example, the notice may require the recipient to conduct monitoring or sampling but may not require the recipient to implement a plan or carry out works. If officers require the recipient to take actions in addition to carrying out an environmental evaluation, an EPO should be issued as well as the notice.

The notice may not require the recipient to submit interim reports.

Penalties for non-compliance with a notice to conduct or commission an environmental evaluation

Failing to comply with a notice to conduct or commission an environmental evaluation is an offence unless the person has a reasonable excuse.

- The maximum penalty for an individual is 300 penalty units.
- The maximum penalty for a corporation is 1500 penalty units.

Should a person fail to comply with a notice to conduct or commission an environmental evaluation, the department may:

- carry out, or commission a person to carry out, an auditor's function and recover the costs it incurred as a debt;
- decide to commence legal proceedings.

For further information regarding environmental evaluations, see the environmental evaluations guideline ([ESR/2016/2515](#)).¹

When does the department consider and act upon an environmental report?

When a notice to conduct or commission an environmental evaluation has been issued, the recipient of the notice must submit an environmental report to the department.

For more information see the notice to conduct or commission an environmental evaluation guideline using the search term ([ESR/2016/2515](#)). Section 326G of the Act states that the department must accept an environmental audit report because auditors have first gone through an approval process under the Act. For an environmental investigation, the department is required to make a decision whether to accept or refuse an environmental investigation report. After receiving an environmental investigation report, the department has 20 business days in which to consider the report and decide whether to accept it, unless it decides to extend the time required to make a decision by written notice (section 326G(7)).

If the department fails to decide whether or not to accept an environmental report within 20 business days, or if a request for further information was made under section 326F, within 20 business days after the further

¹ This is the publication number. The publication number can be used as a search term to find the latest version of a publication at www.ehp.qld.gov.au.

information is received, it is taken to be a decision by the department that it has refused to accept the report (section 329).

The department's options after it receives an environmental report

If the environmental report is about an environmental audit, the department must accept the report (section 326G(2)). This is because of the framework provided in the Act for the certification of auditors. A third party is used to assist both the government and industry to competently undertake activities or deliver outcomes on their behalf in a form of co-regulation. In order to be an approved auditor, the department needs to be satisfied that these third parties have the expertise to undertake these functions and meet minimum standards that satisfy and uphold regulatory requirements.

If the environmental report is about an environmental investigation, the department has the following options:

- accept the report;
- reject the report and require another environmental evaluation and a further report; or
- require further information to be provided in order to decide whether to approve the environmental report.

Accept the report

If the department accepts the environmental report under section 326G, it may do one or more of the following:

- require the recipient to prepare and submit a TEP;
- if the recipient holds an EA, amend the conditions of the EA;
- serve an EPO on the recipient;
- take any other action it considers appropriate.

The recipient is the person or holder of an EA who received the notice to conduct or commission an environmental evaluation.

If the department accepts the environmental report and intends to use one of the alternatives listed above, officers will need to refer to the appropriate guideline for that tool for further instructions.

Require another environmental evaluation

If the environmental report does not address the relevant matters for the environmental investigation, as set out in the original notice to conduct or commission an environmental evaluation, the department may, by giving written notice, require another environmental evaluation and a further report under section 326I(2).

Require further information

Section 326F enables the department to request, by written notice, additional relevant information for an environmental report about an environmental investigation. This could be used, for example, where the environmental report does not adequately address the matters in the investigation notice but where another environmental evaluation and report is not necessary. The request for information must be made within 10 business days after the report is received.

The department must accept an environmental report about an environmental audit. Whilst there is no information request for that type of report, as there is for an environmental investigation, if the report does not address the information in the audit notice, the department may use other statutory tools, including issuing an information notice under section 451 or take other enforcement action for non-compliance with the audit notice.

How does the department know if the environmental report is satisfactory?

The original notice to conduct or commission an environmental evaluation lists the department's requirements. Officers must look at each requirement in the notice one by one and consider whether the environmental evaluation carried out is appropriate and whether the environmental report has adequately addressed each requirement.

To assist in deciding whether the environmental evaluation and report are adequate, officers must look at the original breach or non-compliance which led to the use of the environmental evaluation tool. Officers must consider the following factors:

Sufficiency of information

Does the report provide sufficient information to ascertain the source, cause and extent of the environmental harm being caused, or the extent of the harm likely to be caused, by the activity or event? Alternatively, does the report provide enough information to determine whether a TEP is required for the activity or event?

Inform future actions

Is there enough information in the environmental report to enable the selection and use of appropriate tools to stop the environmental harm or prevent further environmental harm? In the alternative, is there enough information to prevent further breaches or contraventions?

Comprehensiveness

When considering the environmental report, identify if the report:

- includes a statutory declaration as required by the Act from the recipient of the notice and, if required, the auditor commissioned to prepare a report;
- adequately reports on the matters relating to the environmental evaluation;
- contains sufficient information and detail to meet all of the requirements listed in the notice to conduct or commission an environmental evaluation; and
- addresses all of the relevant matters for the environmental evaluation to which the report relates.

Make a decision and record the reasons

Officers are required to determine whether or not the department accepts the environmental report, what further action is required and to record the reasoning behind the decision.

If the department decides to accept the environmental report, it will not be necessary to complete the assessment report for this tool. If another tool is used in response to an accepted environmental report, officers should refer to the relevant guideline for that tool and to the department's enforcement guidelines.

If the department is not satisfied with the environmental report

If the department is satisfied that the report does not adequately address the relevant matters, it may require the person to conduct or commission another environmental investigation and submit a report. Officers should consider whether requiring another environmental investigation is the best course of action, given that the initial notice did not produce a satisfactory report. Officers should take into account that the recipient must meet the cost of conducting or commissioning the environmental investigation and report, together with the cost and inconvenience to the person and the possible impacts on their business activities.

The purpose of an environmental evaluation is to ascertain the source, cause or extent of environmental harm being caused and to decide whether or not a TEP is required. The issuing of a notice to conduct or commission another environmental evaluation should not be used as a punitive measure against the recipient. If the original environmental report does not adequately address all of the relevant matters, it may be that the required

information could be obtained by using other means. Examples are a requirement for further information under section 326F, or a notice requiring relevant information issued under section 451 of the Act.

An investigation notice may require the environmental investigation be carried out, and the environmental report prepared by, a suitably qualified person. The notice must also include a requirement that a declaration from the suitably qualified person be submitted as part of the environmental investigation report.

If further information is required

If the department is satisfied that further information is necessary it may, by giving written notice, require the recipient to provide the information. This request must be made within 10 business days after receiving the environmental investigation report.

Within 20 business days after the further information is received, the department must decide whether to accept or refuse to accept the report (again, only if the report does not adequately address the relevant matters).

Extension of time for decisions on submission of environmental reports

The department may decide to extend the time it requires to decide whether or not to accept an environmental report if there are special circumstances for extending the time. Before the extension starts the department must give the recipient an information notice about the decision that states:

- the decision;
- the reasons for the decision; and
- the review or appeal details.

The department must also advise the recipient of the new timeframe it requires for deciding whether or not to accept the environmental report within five business days of making that decision.

If the department requires the recipient to provide further information about the environmental report, then a decision to accept or reject the environmental report must be made within 20 business days after the further information is received.

The Act is silent regarding the maximum period the department may extend the time it requires to make a decision about the report. Accordingly, officers must use their discretion when deciding how long the extension of time should be. Any extension of time should be reasonable and should not affect the department taking any further action. The department may decide, if necessary, whether any further extensions are required.

The decision and the reasons for extension must be recorded on the department's file.

Penalties exist for non-compliance with a notice

Failing to comply with a requirement to conduct or commission another environmental investigation and submit a report is an offence.

- The maximum penalty for an individual is 300 penalty units.
- The maximum penalty for a corporation is 1500 penalty units.

Whilst the Act does not provide a penalty for failing to comply with a requirement for further information under section 326G, recipients should be aware that the department may do one or more of the following:

- require the recipient to prepare and submit a TEP;
- if the recipient holds an EA, amend the conditions of the EA
- serve an EPO on the recipient;
- take any other compliance or enforcement action it considers appropriate.

For further information regarding the department considering and acting on environmental reports, see the guideline ([ESR/2016/2515](#)).

Transitional environmental programs

Section 330 of the Act provides that a TEP is a specific program which, when complied with, achieves compliance with the Act for the activity to which the TEP relates by doing one or more of the following:

- reducing environmental harm caused by the activity;
- detailing the transition of the activity to an environmental standard;
- detailing the transition of the activity to comply with:
 - a condition (including a standard environmental condition) of an EA;
 - a development condition; or
 - a prescribed condition for carrying out a small scale mining activity.

The legislative provisions in respect to TEPs can be found in Chapter 7, Parts 3 and 4 (sections 330 to 357) of the Act.

It is important to note that a TEP comes into effect once the department has issued a written notice of approval (with or without conditions).

‘Environmental harm’ is any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.

It may be caused by an activity whether the harm is a direct or an indirect result of the activity or whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors.

An ‘environmental value’ is defined in section 9 of the Act to be:

- a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or
- another quality of the environment identified and declared to be an environmental value under an EPP or regulation.

TEPs are specific programs that achieve compliance by reducing environmental harm or detailing the transition to an environmental standard. The department may require a person or public authority to prepare and submit for approval a draft TEP in the following circumstances:

- as a condition of an EA; or
- as a development condition of a development approval (DA), if:
 - an activity is causing or may cause unlawful environmental harm;
 - it is not practicable for someone to comply with an EPP or regulation on its commencement;
 - a condition of an EA or DA has been contravened; or
 - a prescribed condition for carrying out a small scale mining activity has been contravened.

TEPs are a useful tool to use when it is known what needs to be done to achieve a solution to an environmental problem, and the solution is likely to take a long period of time. A TEP is not considered the most appropriate tool where an emergency exists.

Where an emergency exists an emergency direction should be considered. For further information see the emergency powers guideline ([ESR/2016/2300](#)).

TEPs should not be approved where the operator of an activity is out of compliance because of a choice or decision that the operator has made about managing its environmental risk. For example, if an operator chooses to under-invest in a control measure and that control measure fails, the department will not approve a TEP to allow the operator to return to compliance. To do so would be to reward a decision which put the environment at risk, and penalises operators who have invested in appropriate control measures.

A TEP may not be appropriate where an operator has been in non-compliance with the Act for an extended time or where a TEP will seriously undermine the environmental outcomes operators are required to achieve. For example, if an operator has never complied with their EA conditions and has been given previous opportunities to remedy the non-compliance (through warnings or other compliance actions), a TEP should not generally be approved, as this would enable the operator to continue the non-compliance whilst other operators have been complying with their obligations. The department aims to keep a level playing field to ensure operators are not gaining a commercial advantage over other operators who are meeting their environmental obligations.

TEPs can be used to progressively achieve compliance. For example a TEP could be used where an operator of an activity is unable to meet effluent discharge limits because of a number of mitigating circumstances. The operator may use a TEP where it will take some time to implement measures on the treatment train that will bring the effluent discharge into compliance with the EA. The TEP will state the length of time that the upgrades will take and how these measures will achieve compliance. If numerous TEPs are granted on one receiving environment, they must be drafted conservatively with respect to applications from other operators to ensure the department is considering the cumulative environmental impacts.

A TEP also should not involve an extensive investigation to work out what needs to be done. This should be done by an environmental evaluation (EE) before the TEP is approved.

Once approved, a TEP gives the holder or a person acting under the approval the ability to do, or not do, the thing under the TEP despite, and without being in contravention of:

- a regulation;
- an EPP;
- their EA or DA;
- a prescribed condition (small scale mining activity); or
- an accredited environmental risk management plan (ERMP).

This means that officers must be satisfied that it is more likely than not that the activities proposed in a draft TEP will be sufficient to bring the person into compliance.

Who can enter into a TEP?

A person may enter into a TEP voluntarily, may give a program notice to the department under section 350 of the Act, or may be required to submit a draft TEP by the department.

The term 'person' includes an individual, public authority or corporation.

When to use a TEP

TEPs are intended to be used where a significant change or changes are needed to be made by a person to achieve compliance with the requirements of the Act.

Requirement to submit a draft TEP

There are certain circumstances when the department may require a person to prepare and submit a draft TEP for approval. These circumstances are set out in section 332 of the Act.

Program notices

A person may give the department a program notice under section 350 of the Act about an act or omission (the relevant event). The program notice must declare the person's intention to prepare and submit a TEP for the activity. The department must give a receipt of program notice to the person, setting a day, not more than three months from the date on which the program notice is received, by which a draft TEP must be provided.

Voluntary TEP

Section 333 of the Act provides that a person may also, at any time, submit a draft TEP to the department for an activity the person is carrying out or proposes to carry out.

Fees associated with TEPs

A fee is payable to the department for:

- assessment of a draft TEP;
- assessment of an annual return for a TEP;
- amendment of a TEP; and
- monitoring compliance with a TEP.

The fees are set in the department's operational policy transitional environmental program fees. Fees are generally charged at an hourly rate for time spent after the first two hours.

Penalties for non-compliance with a notice requiring a draft TEP

Failure to comply with a notice requiring a draft TEP is an offence, unless the person has a reasonable excuse.

- The maximum penalty for an individual is 100 penalty units.
- The maximum penalty for a corporation is 500 penalty units.

Penalties for a contravention of a requirement of a TEP

Failure to comply with a requirement of an approved TEP is an offence.

- The maximum penalty for an individual is 4500 penalty units.
- The maximum penalty for a corporation is 22,500 penalty units.

The holder of an approved TEP, or a person acting under a TEP, must not **wilfully** contravene a requirement of the program.

- The maximum penalty for an individual is 6250 penalty units or five years imprisonment.
- The maximum penalty for a corporation is 31,250 penalty units.

The holder of an approval of a TEP must ensure that everyone acting under the program complies with the program. If another person acts under the TEP and fails to comply with a requirement, then the holder also commits an offence, namely, the offence of failing to ensure the other person complies with the program, with the penalty for the holder the same as the offender.

Penalties for contravention of a condition of approval

Failure to comply with a condition of an approved TEP is an offence, unless the person has a reasonable excuse.

- The maximum penalty for an individual is 4500 penalty units.
- The maximum penalty for a corporation is 22,500 penalty units.

Wilfully contravening a condition of an approved TEP is an offence.

- the maximum penalty for an individual is 6250 penalty units or five years imprisonment.
- the maximum penalty for a corporation is 31,250 penalty units

Other penalties

Failure to give the department an annual return within 22 business days after each anniversary of the day of approval of the TEP is an offence.

- The maximum penalty for an individual is 100 penalty units.
- The maximum penalty for a corporation is 500 penalty units.

If the holder of an approved prescribed TEP proposes to dispose of the place or business to which the program relates to someone else (the buyer), the holder must give written notice of the existence of the TEP to the buyer before agreeing to dispose of the place or business. A prescribed TEP is a program that does not relate to an EA.

Failure to give written notice of the existence of the TEP to the buyer before agreement is an offence.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Failure to give written notice of the disposal to the department, within 10 business days after agreeing to dispose of the place or business, is an offence.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Failure to give the department written notice of ceasing to carry out the activity to which a TEP relates, within 10 business days of ceasing the activity, is an offence.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Other obligations for the holder of an approved TEP

Contaminated land

It is a requirement of the Act that if an owner or occupier of land becomes aware a notifiable activity (as defined in schedule 3 and schedule 4 of the Act) is being carried out on the land, or that the land has been, or is being, contaminated by a hazardous contaminant, the owner or occupier must, within 22 business days after becoming so aware, give written notice to the department in the approved form.

Failing to give the department written notice in relation to a notifiable activity is an offence.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Failing to give the department written notice in relation to a hazardous contaminant is an offence.

- The maximum penalty for an individual is 100 penalty units.
- The maximum penalty for a corporation is 500 penalty units.

Other obligations under the Act

In addition to the requirements found in the conditions of this certificate of approval, the holder must also meet their obligations under the Act, and the regulations made under the Act. For example:

- the holder must comply with the following provisions of the Act:
 - general environmental duty (section 319); and
 - duty to notify environmental harm (sections 320 - 320G);
- the holder must also ensure that they do not commit offences of:
 - causing serious or material environmental harm (sections 437 - 439);
 - causing environmental nuisance (section 440);
 - depositing prescribed water contaminants in waters and related matters (section 440ZG); and
 - placing contaminant where environmental harm or nuisance may be caused (section 443).

Penalties apply for each of these offences and the department will determine the appropriate compliance and enforcement response in accordance with its enforcement guidelines.

For further information regarding TEPs, see the transitional environmental program guideline ([ESR/2016/2277](#)).

Environmental protection orders

The Act is designed to protect the environment using a variety of regulatory tools. Most of these aim to elicit a cooperative response from those who are damaging the environment. However in some cases, where cooperation has failed, it is necessary to legally force people and industry to undertake an activity or stop an activity. In such cases, an EPO can be used.

An EPO is an order that may be issued by the department to impose a reasonable requirement upon a person which is relevant to a matter or thing mentioned in section 358. This can include requiring the person to:

- not start or stop a stated activity indefinitely, for a stated period or until further notice from the department;
- carry out a stated activity only during stated times or subject to stated conditions; or
- take stated action by a stated date.

The issue of an EPO is governed by Chapter 7, Part 5 of the Act.

EPOs are a useful tool to use when it is known what action needs to be taken and the timeframe during which the action needs to be undertaken. An EPO should not be used where extensive work is required over a long period of time. A TEP or an environmental evaluation can be used to determine what is causing harm, what needs to be done to rectify it and the appropriate regulatory tool to respond to, or manage, the issue.

An EPO is appropriate where there is a breach of an environmental condition or a need to ensure that an activity is carried out in a way to meet the general environmental duty.

Issuing an EPO

A decision to issue an EPO must be made by a person with the delegated authority to do so. Decisions made by individuals who do not have the delegated authority to make the decision may be invalid.

When the department issues an EPO

Section 358 of the Act specifies that an EPO can be issued to a person in the following circumstances:

- if the person does not comply with a requirement to conduct or commission an environmental evaluation and submit it to the department;
- if the person does not comply with a requirement to prepare a TEP and submit it to the department;
- if following an environmental evaluation, the department is satisfied that an activity or event being carried out, or that is likely to be carried out, or is proposed to be carried out by the person, is causing, or is likely to cause, unlawful environmental harm;
- to secure compliance with:
 - the general environmental duty;
 - an EPP;
 - a condition of an EA or a DA or;
 - a prescribed condition for carrying out a small scale mining activity;
 - a condition of a site management plan;
 - an audit notice;
 - a surrender notice;
 - a rehabilitation direction;
 - a regulation;
 - an accredited ERMP;
- if the person is, or has been, contravening a provision relating to:
 - direction notices (section 363E);
 - noise standards (section 440Q);
 - depositing prescribed water contaminants in waters (section 440ZG);
 - air contamination (Chapter 8, part 3E);
 - fuel standards (Chapter 8, part 3F).

Penalties for non-compliance with an EPO

Failing to comply with an EPO is an offence unless the person has a reasonable excuse.

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

Alternatively and in accordance with the department's [enforcement guidelines](#), the department may issue a penalty infringement notice (PIN) for the offence. The State Penalties and Enforcement Regulation 2014 prescribes the PIN amount for the offence.

Other penalties

Failure to provide written notice of disposal of the place or business to which the EPO relates to someone else (the buyer) is an offence.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Failure to provide written notice within 10 business days of ceasing the activity to the department is an offence.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

For further information regarding EPOs, see the environmental protection order guideline ([ESR/2016/2520](#)).

Direction notice

A direction notice is a statutory tool which may be used by the department if it is reasonably satisfied that there has been a contravention of certain prescribed provisions of the Act. A direction notice requires a person contravening one of the prescribed provisions to remedy the contravention.

The purpose of a direction notice is to provide the person with an opportunity to remedy the situation before any further action is taken. Where a contravention of the prescribed provisions has resulted in serious or material environmental harm, a direction notice is not appropriate and other enforcement tools provided for by the Act should be considered.

Direction notices can be issued for offences relating to unlicensed environmentally relevant activities (ERAs) (section 426), environmental nuisance (section 440) for contravention of a noise standard (section 440Q), and for depositing prescribed water contaminants and related matters (section 440ZG). Direction notices can also be issued for contravening a provision of an accredited ERMP if the person is carrying out an agricultural ERA.

Direction notices can be issued if someone is committing an offence or if they have committed an offence and it is likely that they will continue or repeat the offence. Direction notices cannot be issued if an offence has happened and it is not likely that the offence will be repeated. In other words they are designed to make sure that an ongoing offence stops, or that an offence does not happen again.

A direction notice may only be issued if the matter relating to the contravention can be remedied, it is known what action should be taken and if it is appropriate to give the person an opportunity to remedy the matter.

When to use a direction notice

A direction notice may be issued by an authorised person.

Before issuing a direction notice, an authorised person should check whether the responsibility for dealing with environmental nuisance complaints and breaches of noise standards or water contaminant provisions have been devolved to local government. These provisions are not devolved to local government if the provision is contravened by a State or local government entity, the ERA is operated by a State or local government entity, or the ERA is not prescribed as being devolved (i.e. it is an ERA regulated by the State).

When an authorised person can use a direction notice

A direction notice may be issued for a contravention of any of the following provisions of the Act (each of which is a *prescribed provision*):

- section 426 – offence of carrying out an ERA without an environmental authority (EA);
- section 440 – offence of causing environmental nuisance;
- section 440Q – offence of contravening a noise standard;

- section 440ZG – depositing prescribed water contaminants in water and related matters;
- A provision of an accredited ERMP for an agricultural ERA when the person contravening the provision is the person carrying out the agricultural ERA.

Section 363B states that an authorised person may issue a written notice (a *direction notice*) to a person, requiring the person to remedy the contravention, if the authorised person is satisfied on reasonable grounds that:

- a person:
 - is contravening a prescribed provision; or
 - has contravened a prescribed provision in circumstances that make it likely the contravention will continue or be repeated;
- a matter relating to the contravention can be remedied; and
- it is appropriate to give the person an opportunity to remedy the matter.

In the context of the direction notice, remedy includes cleaning up, fixing or rectifying any environmental harm (including nuisance) done by the person contravening the prescribed provision.

A direction notice may be given in writing or, if it is not practicable to issue a written notice, the direction may be made orally and confirmed by a written direction notice as soon as practicable.

The fact that a person has been given an oral direction, and is therefore aware of the contravention, is a consideration in the time given to the person to remedy the contravention by written notice.

Penalties for non-compliance with a direction notice

Failure to comply with a direction notice is an offence unless the person has a reasonable excuse.

- The maximum penalty for an individual for wilfully contravening a direction notice is 1665 penalty units.
- The maximum penalty for a corporation for wilfully contravening a direction notice is 8325 penalty units.
- The maximum penalty for an individual contravening a direction notice is 600 penalty units.
- The maximum penalty for a corporation contravening a direction notice is 3000 penalty units.

Alternatively, in accordance with the department's [enforcement guidelines](#), the department may issue a PIN for the offence. The State Penalties and Enforcement Regulation 2014 prescribes the PIN amount for the offence.

Other penalties

The department may also consider alternative compliance or enforcement action in relation to the offences that are the subject of the direction notice.

For further information regarding direction notices and other penalties, see the direction notice guideline ([ESR/2016/2274](#)).

Clean-up notice

A clean-up notice is a written notice which may be issued by the department to a person reasonably believed to be a prescribed person for a contamination incident.

The legislative provisions in regard to clean-up notices may be found in sections 363F–363L of the Act.

Clean-up notices may be issued to ensure that a contamination incident (that has caused or is likely to cause serious or material environmental harm), is cleaned up. Clean-up notices can be issued to a wider range of people than an EPO, and can be issued to someone who caused or permitted a contamination incident.

The clean-up notice is intended to operate separately from other powers under the Act, including emergency powers and EPOs. The emergency powers under section 467 of the Act can only be used for urgent action and cannot be used for longer term clean-up. If actions are urgently required, the department may still use the emergency powers in section 467. The department may also issue a clean-up notice to the same person for the same incident to ensure that non-urgent actions are undertaken.

Who is a prescribed person?

A prescribed person for a contamination incident includes each of the following (section 363G):

- 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;
- 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; and
 - an executive officer of the first corporation.

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.

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), 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 wide range of people who can be issued with a clean-up notice means that officers can 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 clean-up notice, they can recover any costs incurred by them in complying with the notice from the person who was responsible.

What is a contamination incident?

The Act defines a contamination incident as an incident involving contamination of the environment, that the department is satisfied has caused, or is likely to cause, serious or material environmental harm. The *Acts Interpretation Act 1954* states that the singular includes the plural, so a contamination incident may in fact be a series of incidents that together or separately caused or are likely to cause serious or material environmental harm.

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.

Environmental harm

'Environmental harm' is any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.

It may be caused by an activity whether the harm is a direct result of the activity or whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors.

An 'environmental value' is defined in section 9 of the Act to be:

- a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or
- another quality of the environment identified and declared to be an environmental value under an EPP or regulation.

Material environmental harm

Section 16 of the Act defines 'material environmental harm' as environmental harm (other than environmental nuisance):

- 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 (\$5000) 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

Section 17 of the Act defines 'serious environmental harm' as environmental harm (other than environmental nuisance):

- that is irreversible, of a high impact or widespread;
- caused to an area of high conservation value or special significance, such as the Great Barrier Reef World Heritage Area;
- 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
- 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.

When should the department use a clean-up notice?

Section 363H of the Act enables the department to issue a clean-up notice where it reasonably believes a contamination incident has occurred or is occurring. A clean-up notice is issued to a prescribed person for a contamination incident to require the person to take action to:

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

What options exist for responding to non-compliance with a clean-up notice?

If the recipient of a clean-up notice fails to comply with the notice or the operation of the decision to issue a clean-up notice is stayed under section 535, an authorised person, or person acting under the direction of an authorised person (the contractor), may take any of the actions stated in the clean-up notice.

The authorised person or contractor may enter land on which the actions are required to be taken:

- with the consent of the owner and occupier of the land; or
- if the authorised person has given at least five business days written notice, complying with section 363J(3).

If the recipient of a clean-up notice fails to comply with the notice, an officer may apply to a magistrate for an order to enter the land to take the actions required under the clean-up notice (section 458). 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.

The department may issue a cost recovery notice to the recipient of a clean-up notice in the following circumstances:

- if a person who has been given a clean-up notice fails to comply with it and an authorised person or contractor takes any of the actions stated in the clean-up notice pursuant to section 363K; or
- if a decision to issue a clean-up notice is stayed by the court whilst the recipient appeals the decision, 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, and either the appeal ends without an appeal decision or the court's decision confirms the decision to issue the clean-up notice.

If either of the above circumstances apply, 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 by the recipient with the clean-up notice.

For the further information see the cost recovery notice guideline ([ESR/2016/2273](#)).

Penalties for non-compliance with a clean-up notice

Failure to comply with a clean-up notice is an offence unless the recipient has a reasonable excuse.

It is a reasonable excuse not to comply with a notice if it requires information or the production of a document that might incriminate an individual to whom it was issued. A reasonable excuse must be reasonable 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 precautions to prevent or minimise environmental harm being caused.

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

Defences

In a proceeding regarding non-compliance with a clean-up notice, it is a defence for the recipient of the clean-up notice to show that the:

- recipient of the clean-up notice is not a prescribed person;
- 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 which requires a person to take all reasonable and practicable measures to prevent or minimise environmental harm when carrying out an activity. As such, the proof of 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 it 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.

For further information regarding clean-up notices, see the clean-up notice guideline ([ESR/2016/2521](#)).

Cost recovery notice

A cost recovery notice is a written notice that requires the recipient to pay all reasonable expenses the department incurred in relation to the clean-up of the contamination incident.

The notice can be issued to:

- a person who failed to comply with a clean-up notice;
- a prescribed person who failed to comply with an emergency direction; or
- a prescribed person on whose behalf the state took emergency action.

Where the recipient of a clean-up notice does not take the actions required, the department has the power to undertake the work where there is a significant risk of damage to persons, property or the environment. This operates whether a stay during an appeal of the decision to issue a clean-up notice is in place or not.

The issuing of cost recovery notices is governed by sections 363M to 363O of the Act.

The department may issue a written notice to recoup costs and expenses incurred:

- if the recipient of a clean-up notice fails to comply with the notice and the department takes the action specified in the clean-up notice;
- in monitoring the compliance of the recipient with the provisions of the clean-up notice; or
- in taking an action under the department's emergency powers provided for in chapter 9, part 4 of the Act.

Issuing a cost recovery notice is only appropriate where the department has acted on behalf of a recipient or prescribed person under a clean-up notice or emergency direction. It enables the department to recover both external and internal costs if there was a non-compliance with a notice or direction. This would include the cost of an authorised person's time spent managing the post-incident environmental clean-up.

For further information refer to the clean-up notice guideline ([ESR/2016/2521](#)) and the emergency powers guideline ([ESR/2016/2275](#)).

Who is a prescribed person?

A prescribed person in this context is the person who is responsible for complying with the notice. The issue of a cost recovery notice is not intended to imply that a prescribed person caused the contamination incident. A prescribed person for a contamination incident includes the following (section 363M):

- 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; or
- a person who, at the time of the contamination incident, is or was the owner, or person in control of, a contaminant involved in the incident; if a cost recovery notice is issued to a corporation (the first corporation) and it fails to pay the amount claimed by the notice:
 - a parent corporation of the first corporation; and

- an executive officer of the first corporation.

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

Who can issue a cost recovery notice?

Cost recovery notices can only be issued by someone who has delegated authority.

When the department issues a cost recovery notice

The Act specifies that a cost recovery notice can be used in each of the following circumstances:

- if a prescribed person who has been given a clean-up notice fails to comply with it and a person or contractor authorised by the department carries out the actions stated in the clean-up notice;
- if a decision to issue a clean-up notice is stayed whilst the recipient appeals the decision, and during the period of the stay an authorised person or contractor carries out the actions stated in the clean-up notice, and either:
 - the appeal ends without an appeal decision; or
 - the decision confirms the decision to issue the clean-up notice; or
- if an authorised person acts under an emergency direction to take action regarding environmental harm caused by a contamination incident.

When a cost recovery notice has been issued to the recipient, the costs claimed in the notice must be linked to the actions that have been carried out by, or on behalf of, the department. Any cost claimed must be defensible.

The department will need to explain how it formulated the dollar value it is claiming and provide evidence of the costs reasonably incurred. This may be done by providing an itemised list of costs incurred which is substantiated by appropriate invoices. All relevant invoices, receipts and other documents that establish amounts paid should be kept as evidence of the expenses. If time spent by authorised persons in taking any of the actions in a clean-up notice, or in taking action under an emergency direction, is to be claimed, a detailed account of the actions taken and time spent must be recorded.

When the costs incurred will not be payable

There are certain circumstances when the amount claimed is not payable, as specified in section 363N(5) of the Act. These include:

- if the recipient of the cost recovery notice is not a prescribed person;
- if the contamination incident was caused by a natural disaster and the recipient had taken all reasonable measures to prevent the incident; or
- if the contamination incident was caused by a terrorist act or other deliberate act of sabotage by someone other than the recipient and, taking all of the circumstances onto account, the recipient had taken all reasonable measures to prevent the incident.

In some cases, the amount claimed may also not be payable if the cost recovery notice is issued to a corporation that fails to pay the amount claimed in the notice and the prescribed person is an executive officer of the corporation.

In this instance, the amount will not be payable if:

- the executive officer took all reasonable steps to make sure the corporation paid the amount claimed in the notice; or

- the executive officer was not in a position to influence the corporation in regard to paying the costs claimed in the notice.

Prior to issuing a cost recovery notice, the department will consider whether any of the above circumstances apply. Officers should ensure that the intended recipient of the notice is the prescribed person for the contamination incident.

Penalties exist non-compliance with a cost recovery notice

If the recipient does not pay the amount in the cost recovery notice within 30 days after the notice is issued, the department may claim the amount from the recipient as a debt. The recipient may be subject to other civil action.

For further information regarding cost recovery notices, see the cost recovery notice guideline ([ESR/2016/2273](#)).

Emergency powers

Where an emergency arises, authorised persons have a number of powers which may deal with the emergency but should also be aware there are further powers which are designed to specifically address emergency situations. For example, if a toxic waste storage tank ruptures then action will likely be required immediately to mitigate the damage. Section 467 of the Act provides authorised persons with the powers to act immediately in emergency situations.

What is an emergency direction?

Where an authorised person is satisfied on reasonable grounds that an emergency exists, they may take or direct someone to take stated action.

An emergency direction is a direction to a person to take stated reasonable action within a stated reasonable time, including releasing a contaminant into the environment. Alternatively, an authorised person may take the action or authorise another person to take the action.

It is important to note that an emergency direction can only be issued for an emergency that is actually occurring. It is not appropriate to issue an emergency direction to deal with an anticipated emergency event.

The legislative provisions relating to emergency powers can be found in chapter 9, part 4 of the Act.

How an emergency direction is initiated

The decision to give an emergency direction may be initiated proactively by the department in the event that it considers that an emergency exists, and that the emergency requires a reasonable action to be taken, including the release of a contaminant.

A client (individual or company) can also contact the department and request that an emergency direction be given to them. For example, a direction may require the person to release a contaminant into the environment in order to protect the health or safety of persons.

If time permits, clients are encouraged to contact the department prior to requesting an emergency direction so that they can fully understand the information that they must provide. A list of all departmental business centres can be found on the department's website at www.ehp.qld.gov.au.

What is an emergency?

The Act states that an 'emergency' exists if:

- either human health or safety is threatened; or serious or material environmental harm has been or is likely to be caused; and
- urgent action is necessary to:

- protect the health or safety of persons; or
- prevent or minimise the harm; or
- rehabilitate or restore the environment because of the harm.

As a direction is given in an emergency there are no particular requirements to consider (such as the standard criteria when issuing an EPO) other than being satisfied an emergency exists.

Material and serious environmental harm

‘Environmental harm’ is defined in section 14 of the Act as any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.

It may be caused by an activity whether the harm is a direct or an indirect result of the activity or whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors.

An ‘environmental value’ is defined in section 9 of the Act as:

- a quality or physical characteristic of the environment that is conducive to ecological health or public amenity or safety; or
- another quality of the environment identified and declared to be an environmental value under an EPP or regulation.

Section 16 of the Act defines ‘material environmental harm’ as environmental harm (other than environmental nuisance) that:

- is not trivial or negligible in nature, extent or context;
- 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
- 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.

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.

Section 17 of the Act defines ‘serious environmental harm’ as environmental harm (other than environmental nuisance):

- that is irreversible, of a high impact or widespread;
- caused to an area of high conservation value or special significance, such as the Great Barrier Reef World Heritage Area;
- 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
- 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.

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 risk, it may not be necessary to wait for scientific certainty to take protective action.

What are a reasonable action and a reasonable time?

Reasonable action

An emergency direction may allow environmental harm to occur which would otherwise be unlawful. An authorised person must sufficiently investigate the facts and circumstances surrounding the situation to justify the decision to issue an emergency direction.

A request by persons seeking an emergency direction may be considered by the department. Decisions to give an emergency direction will be made once the department has all necessary information to make a sound judgement based on all known facts and legislation. The time taken to process requests will be dependent on the complexity and urgency of the matter. Applicants will be kept informed on the progress and outcomes of their applications by authorised persons within the department on a regular basis.

Reasonable time

Urgency is a key element of whether an emergency exists. The Macquarie Dictionary provides a definition of urgent as being 'pressing; compelling or requiring immediate action or attention; imperative'.

Where an emergency direction has been given, the time within which the action must be taken has to be appropriate in light of what the action requires.

To ensure that the time stated is an enforceable condition of the emergency direction, ensure that the condition is time specific, such as by specifying a date and time ('by 4pm, 1 January'), a specific period ('within seven days of service of this notice') or a specific event ('when a bushfire comes within 500 metres of flammable contaminants').

An authorised person must complete an assessment report to document the reasons for making the decision and also complete the emergency direction. If there is no time to complete the assessment report beforehand, the authorised person may issue an emergency direction without it, but he or she must make notes of the reasons and evidence and complete the assessment report as soon as possible. It should be noted in the assessment report that it was completed retrospectively and why.

What is a contaminant?

The Act defines a 'contaminant' to include a gas, liquid or solid; an odour; an organism (whether alive or dead), including a virus; or energy, including noise, heat, radioactivity and electromagnetic radiation; or a combination of contaminants.

What happens if a contaminant is released without an emergency direction?

In the event that a contaminant is released without an emergency direction, and such a release causes unlawful environmental harm, offences may have been committed.

Wilfully and unlawfully causing serious environmental harm is an offence.

- The maximum penalty for an individual is 6250 penalty units or five years imprisonment.
- The maximum penalty for a company is 31,250 penalty units.

Unlawfully causing serious environmental harm is also an offence.

- The maximum penalty for an individual is 4500 penalty units for an individual.
- The maximum penalty for a company is 22,500 penalty units.

Can a draft transitional environmental program be submitted requesting an emergency release?

A TEP is a regulatory tool under the Act and is used by the department to either reduce environmental harm or move an activity through transition from non-compliance to compliance with an environmental authority or other instrument. When complied with, a TEP achieves compliance with the Act for the activity to which the TEP relates to.

A TEP is not considered to be the most appropriate tool for an emergency direction to release a contaminant. Any TEP applications made to the department for a release of contaminant may still be considered.

For more information about the use of TEPs, please see the transitional environmental program guideline ([ESR/2016/2277](#)).

Who can give an emergency direction?

An emergency direction may be given by an authorised person. An authorised person is a person who has been appointed by the chief executive, enabling them to perform certain functions and exercise particular powers under the Act. Appointments are only made if, in the opinion of the chief executive, the person has the necessary expertise or experience. An authorised person may be an appropriately qualified public service officer, an employee of the department or a person declared by regulation.

Authorised persons are issued with identity cards. Before exercising a power in relation to someone else, the authorised person must first produce their identity card for the person's inspection or have their identity card displayed so that it is clearly visible to the person. If, for any reason, it is not practicable to produce or display their identity card, the authorised person must produce the identity card for inspection by the person at the first reasonable opportunity.

How an emergency direction is given

The Act specifies that an emergency direction may be given verbally or by written notice. However, if the direction is given verbally, it needs to be followed up as soon as practicable with service of a written notice.

Can conditions form part of an emergency direction?

The Act specifies that an authorised person may impose reasonable conditions on an emergency direction. Conditions set out in an emergency direction are a legal requirement. Therefore failure to comply with a condition may be an offence. Conditions can require a person to do an act, refrain from doing certain things or take action to manage the consequences of certain activities, or can set limits on what can and cannot be done.

Any conditions that form part of an emergency direction should be SMART: specific, measurable, achievable, relevant and time specific. When setting conditions authorised persons must ensure that they are enforceable and comply with the general rules of administrative decision making by taking all relevant considerations into account and ensuring that sufficient evidence exists to justify imposing the conditions.

Penalties for non-compliance with an emergency direction

Under section 478 of the Act, a person to whom an emergency direction is given must comply with the direction (including all conditions of the direction) unless the person has a reasonable excuse for not complying.

The person must also take all reasonable and practicable precautions to prevent or minimise:

- environmental harm being caused;
- the risk of death or injury to humans and animals; and
- loss or damage to property.

Wilfully and unlawfully falling to comply with an emergency direction is an offence.

- The maximum penalty for an individual is 6250 penalty units or five years imprisonment.

- The maximum penalty for a company is 31,250 penalty units.

Unlawfully failing to comply with an emergency direction is also an offence.

- The maximum penalty for an individual is 4500 penalty units.
- The maximum penalty for a company is 22,500 penalty units.

A person who takes an action in compliance with an emergency direction does not commit an offence merely because the person takes the action, with the exception of the offence of failing to help an authorised person under section 473 and the offence of failing to comply with the emergency direction under section 478.

Under section 442 of the Act, a person must not release, or cause to be released, a prescribed contaminant into the environment other than under an authorised person's emergency direction.

- The maximum penalty for an individual for wilfully releasing a prescribed contaminant is 1665 penalty units.
- The maximum penalty for a company for wilfully releasing a prescribed contaminant is 8325 penalty units.
- The maximum penalty for an individual for releasing a prescribed contaminant is 600 penalty units.
- The maximum penalty for a company for releasing a prescribed contaminant is 3000 penalty units.

A 'prescribed contaminant' means a contaminant prescribed by an EPP or a regulation. These may include, for example scrap metal, ashes, gravel, clinical waste, plant matter and oil.

What happens if something is seized or damaged when exercising emergency powers?

Section 486 of the Act provides that if an authorised person, or a person authorised by them, seizes or damages anything in the exercise of a power (including emergency powers under section 467), the authorised person must immediately give written notice of the particulars of the seizure or damage.

The notice must be given to the person from whom the thing was seized or the person who appears to be the owner of the thing that was damaged. If this is not possible, the authorised person must leave the notice at the place where the seizure or damage happened, ensuring that the notice is left in a reasonably secure way and in a conspicuous position. The authorised person must notify his or her supervisor of the particulars of the items seized or damaged as soon as practicable and retain a copy of the notice on the departmental file.

Compensation, costs and expenses

A person may claim compensation in court proceedings if they incur loss or expense because of the exercise or purported exercise of an emergency power.

The department must reimburse a person's reasonable costs and expenses incurred in complying with an emergency direction, unless that person is a prescribed person for a contamination incident, for example a person who caused or permitted the incident to happen which gave rise to the use of emergency powers.

Information notice and requirement to answer questions or produce documents

Notice requiring relevant information

A notice requiring relevant information under section 451 of the Act is a notice that can be issued by the department to obtain information relevant to the administration or enforcement of the Act. Relevant information includes any knowledge the person may have of a matter, as well as any documents that contain information relating to the matter.

Who can be issued with a notice requiring relevant information?

In administering and enforcing the Act, the department may require a person to give it relevant information. A notice may be given to any person who the department suspects on reasonable grounds to have knowledge of a matter, or has possession or control of a document dealing with a matter, for which the information is required.

A notice will state:

- the person to whom it is issued;
- the information required;
- the time within which the information is to be given to the department;
- why the information is required; and
- the review or appeal details.

A person must not give the department or an authorised person a document containing information that the person knows, or ought reasonably to know:

- is false or misleading; or
- contains incomplete information.

A person must also not state anything to an authorised person that the person knows is false or misleading or omit anything from a statement made to an authorised person, without which the statement is, to the person's knowledge, misleading.

Requirement to answer questions

An authorised person may require a person to answer questions under section 465 of the Act about a suspected offence against the Act. An authorised person may:

- require a person to answer a question about the suspected offence; or
- by written notice, require the person to attend a stated reasonable place at a stated reasonable time, to answer questions about the suspected offence.

A person can only be required to give information if the authorised person suspects, on reasonable grounds that:

- an offence against the Act has happened; and
- a person may be able to give information about the offence.

If an authorised person issues a notice to require the person to attend a place at a stated time, to answer questions about a suspected offence, the notice will:

- identify the suspected offence;
- state that the authorised person believes the person may be able to give information about the suspected offence; and
- include a warning that it is an offence to fail to comply with the requirement, unless the person has a reasonable excuse.

A person must not state anything to an authorised person that the person knows is false or misleading or omit anything from a statement made to an authorised person, without which the statement is, to the person's knowledge, misleading.

Requirement to produce documents

Under section 466 of the Act, an authorised person may require a person to produce a document required to be held or kept under the Act or a development condition of a development approval for inspection by the authorised person.

An authorised person may keep a produced document to take an extract from, or make a copy of, the document.

An authorised person must return the document to the person as soon as practicable after taking the extract or making the copy.

A person must not give the department or an authorised person a document containing information that the person knows, or ought reasonably to know:

- is false or misleading; or
- contains incomplete information.

Penalties for non-compliance

Failing to comply with a notice under section 451 of the Act requiring relevant information is an offence unless the person has a reasonable excuse. It is a reasonable excuse for an individual if complying with the notice might tend to incriminate the individual.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Failing to answer questions or attend at a stated place at a stated time, to answer questions under section 465 of the Act is an offence unless the person has a reasonable excuse. It is a reasonable excuse for an individual if answering the question might tend to incriminate the individual.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Failing to produce a document under section 466 of the Act is an offence unless the person has a reasonable excuse.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Giving the department or an authorised person a document containing information that the person knows, or ought reasonably to know is false or misleading (in a material particular); or contains incomplete information (in a material particular) is an offence.

- The maximum penalty for an individual is 4500 penalty units or two years imprisonment.
- The maximum penalty for a corporation is 22,500 penalty units.

Stating anything to an authorised person that a person knows is false or misleading (in a material particular), or omitting anything from a statement made to an authorised person which makes the statement false or misleading (in a material particular), is an offence.

- The maximum penalty for an individual is 4500 penalty units or two years imprisonment.
- The maximum penalty for a corporation is 22,500 penalty units.

Warnings

The department has a wide range of enforcement measures available for managing compliance with the legislation it administers. These enforcement measures include the discretion to issue verbal warnings and warning letters in response to breaches of legislation.

The majority of minor non-compliances can be dealt with by way of educating the community and industry regarding their environmental obligations. Warnings are an effective means to ensure that a person is made aware of their responsibilities. A warning is suitable for minor instances of non-compliance where the warning is likely to encourage voluntary and prompt compliance. To determine the seriousness of a breach of the legislation administered by the department, officers should, for example, refer to:

- the objectives of the relevant legislation, including the type of harm the offence provision is designed to deter or prevent;
- the actual or potential harm or impact of the offence;
- the level of culpability of the alleged offender; and
- the department's enforcement guidelines.

Officers detecting alleged offences should carefully assess each case to determine the most appropriate course of action to be taken in the circumstances. As a means of assisting officers in this process, the enforcement guidelines are adopted as a guiding principle in determining those circumstances considered appropriate for the issue of a warning.

The issue of a warning should generally be confined to an alleged offence where:

- a PIN is not considered appropriate;
- the offence/breach is a one-off situation;
- the offence/breach is considered minor or technical in nature;
- the operator is otherwise compliant;
- the operator has not previously been issued with a PIN or a warning for a similar offence;
- the harm or potential harm to the environment is considered minimal; and
- the issue of a warning is likely to be a deterrent.

Penalty infringement notices

Background

Infringement notices are a way of dealing with common breaches of the law where the impacts are not serious enough for court action. Some of these could be traversing a State forest without a permit, exceeding noise limits, working outside given hours, emitting black smoke from chimneys, or failing to carry out monitoring. The *State Penalties Enforcement Regulation 2014* nominates the infringement notice offences and penalties under the law.

The infringement notice system modifies the traditional legal system. A notice is served because it appears an offence has been committed, however payment of the penalty does not lead to the recording of a criminal conviction. Non-payment of the fine is not dealt with by a jail sentence but is recoverable as a civil debt. On the other hand, if a person elects to have the matter heard, proceedings are commenced in the criminal jurisdiction of the Magistrates Court.

Infringement notices can be issued by authorised persons. These can include officers from organisations such as local governments and the department. The department has no direct control over how authorised persons

from other organisations carry out their duties. However, for fairness and consistency, the department's authorised officers will implement the infringement notice guidelines set out here.

Operation

Just as there is discretion to use any other enforcement tool, there is discretion whether to serve an infringement notice. Any discretion by individual officers must take into account the intention of the legislation and the Enforcement Guidelines.

Infringement notices are designed primarily to deal with one-off breaches that can be remedied easily. They are usually a first response when a preventable breach is discovered. Issuing successive infringement notices for multiple statutory breaches is generally inappropriate, unless the breaches are unrelated. In such circumstances, even though each breach might be comparatively minor, there is probably a major and continuing compliance problem. Such a problem needs to be dealt with through other enforcement measures if a past infringement notice has not motivated the recipient to successfully address the underlying issue.

The legislation does not set a time by which infringement notices have to be issued. Since serving a notice might be the first notification a person has of an alleged breach, it should be issued promptly out of fairness and courtesy.

The *State Penalties Enforcement Act 1999* gives the department the discretion to withdraw an infringement notice after serving the notice. This allows for two possibilities:

- one possibility is that a more serious breach of the law might have taken place without the authority's knowledge when the notice was issued. The notice can be withdrawn to allow the more serious breach to be pursued; or
- alternatively, a second possibility is that a mistake of fact was made and the notice should not have been issued. In such a case, the *State Penalties Enforcement Regulation 2000* allows the authority to withdraw the notice, even if the penalty has been paid.

Withdrawal provisions should be seen as a safety net, not a mechanism to be applied regularly.

Summary

Infringement notices are generally appropriate when the following conditions are met:

- where the breach is minor;
- where the facts are apparently indisputable;
- where the breach is a one-off situation easily remedied;
- when inspection discovers a breach that normal operating procedures should have prevented; and
- where the issuing of an infringement notice is likely to act as a deterrent.

Infringement notices should not be issued in the following circumstances:

- child under the age of 17;
- where large-scale habitat or environmental damage has occurred;
- where the breach is continuing and not within the alleged offender's ability to remedy quickly;
- where the penalty seems inadequate for the severity of the offence;
- where the extent of the harm to the environment cannot be assessed immediately;
- where the evidence is so controversial or insufficient that court action is unlikely to succeed;
- where there has been substantial delay since the alleged breach;

- where another authority has issued a notice for the same or similar offence in the same period;
- where a notice, direction or order has been issued by the department to do specified work within a time limit and the limit has not expired;
- where multiple breaches have occurred, unless all are minor; or
- where the offence took place under a proposal approved by the department.

Court orders

Many of the Acts administered by the department provide a power to seek orders from a court to ensure compliance with legislative requirements. These orders may take a variety of forms, including declaratory orders, enforcement orders, restraint orders or orders resulting from a criminal prosecution. Court orders are amongst the strongest enforcement tools available to the department and are only sought where other alternatives have failed or where the conduct is of such a serious nature that the department considers it necessary. Public interest considerations are considered by the department when deciding whether court orders are appropriate.

Declarations

Where there is uncertainty regarding if an activity is unlawful in relation to the provisions of an Act administered by the department, the Act may provide an avenue to seek a declaration from the court. A declaration is a formal statement of legal rights enabling or disallowing an activity. Seeking a court declaration enables an activity to proceed with a clear statement of the legal situation.

Enforcement and restraint orders

Where there is an existing ongoing or potential unlawful activity under legislation administered by the department, the legislation may provide that a court may issue either a restraint order or an enforcement order. Enforcement orders are applied in the case of a development offence under the *Planning Act 2016*. Restraint orders may be issued for a threatened or anticipated offence against relevant legislative provisions.

Generally the legislation provides the court with very broad powers when issuing orders. For example the court may, in some cases, direct the company or person to:

- A. stop an activity that either constitutes, or will constitute, the offence;
- B. do anything to comply with the law;
- C. cease activities that are in contravention of the law;
- D. do anything required to stop committing an offence; and/or
- E. rehabilitate or restore an area.

When making a restraint or enforcement order, the court will specify the time required for compliance with the order. It is usually an offence for a person to contravene a court order. In order to stop frivolous or vexatious applications for restraint or enforcement orders, the court has the discretion to make an order in relation to costs.

General environmental offences

Offences related to environmentally relevant activities

Environmentally relevant activities (ERAs) are industrial activities with the potential to release contaminants into the environment. ERAs are defined in schedule 2 of the Environmental Protection Regulation 2008.

Offences related to ERAs are:

Section	It is an offence to	Maximum penalty individual	Maximum penalty corporation
426(1)	Carry out an ERA unless the person holds, or is acting under an EA for the activity *	4500 penalty units	22,500 penalty units
427	Operate under an EA if not a registered suitable operator if the person has become the holder of the EA under a non-assessable transfer under resource legislation	100 penalty units	500 penalty units
426(2) 426(3) 429	* This does not apply in certain circumstances, including where a person is carrying out an agricultural ERA, a small scale mining activity or certain geothermal activities. This also does not apply to the Coordinator-General or another person acting on behalf of the Coordinator-General, in exercising the powers under the <i>State Development and Public Works Organisation Act 1971</i> . Special provisions also apply for interstate transporters of controlled waste		

Offences related to environmental requirements

Section	It is an offence to	Maximum penalty individual	Maximum penalty corporation
430(2)	Wilfully contravene a condition of an EA	6250 penalty units or 5 years imprisonment	31,250 penalty units
430(3)	Contravene a condition of an EA	4500 penalty units	22,500 penalty units
431(2)	Where another person is acting under an EA and they wilfully contravene or contravene a condition of an EA, the holder also commits an offence for failing to ensure the other person complies with the conditions of the authority. The maximum penalty is the same as if it were the holder of, or the person acting under an EA who committed the offence		
432(1)	Wilfully contravene a requirement of a TEP if the person is the holder of an approval of a TEP, or a person acting under a TEP	6250 penalty units or 5 years imprisonment	31,250 penalty units
432(2)	Contravene a requirement of a TEP if the person is the holder of an approval of a TEP, or a person acting under a TEP	4500 penalty units	22,500 penalty units
432A	Wilfully contravene a condition of an approval of a TEP without reasonable excuse	6250 penalty units Or	31,250 penalty units

		5 years imprisonment	
432A	Contravene a condition of an approval of a TEP without reasonable excuse	4500 penalty units	22,500 penalty units
433(2)	Where another person is acting under a TEP and they wilfully contravene or contravene a condition of an EA, the holder also commits an offence for failing to ensure the other person complies with the program. The maximum penalty is the same as if it were the holder of, or the person acting under a TEP who committed the offence.		
434(1)	Wilfully contravene a site management plan	6250 penalty units or 5 years imprisonment	31 penalty units
434(2)	Contravene a site management plan	4500 penalty units or 5 years imprisonment	22,500 penalty units

Offences related to conditions

Section	It is an offence to	Maximum penalty individual	Maximum penalty corporation
435A(2)	Wilfully contravene prescribed conditions for a small scale mining activity that is authorised under a prospecting permit	6250 penalty units or 5 years imprisonment	31,250 penalty units
435A(3)	Contravene prescribed conditions for a small scale mining activity that is authorised under a prospecting permit	4500 penalty units	22,500 penalty units

Offences related to environmental harm

Section	It is an offence to	Maximum penalty individual	Maximum penalty corporation

437(1)	Wilfully and unlawfully cause serious environmental harm	6250 penalty units or 5 years imprisonment	31,250 penalty units
437(2)	Unlawfully cause serious environmental harm	4500 penalty units	22,500 penalty units
438(1)	Wilfully and unlawfully cause material environmental harm	4500 penalty units or 2 years imprisonment	22,500 penalty units
438(2)	Unlawfully cause material environmental harm	1665 penalty units	8325 penalty units
440(1)	Wilfully and unlawfully cause an environmental nuisance *	1665 penalty units	8325 penalty units
440(2)	Unlawfully cause an environmental nuisance *	600 penalty units)	3000 penalty units
440(3)	* This does not apply to environmental nuisance caused by safety and transport noise, government and public infrastructure and nuisance regulated by other laws.		

Offences related to noise standards

Section	It is an offence to	Maximum penalty individual	Maximum penalty corporation
440Q(1)	Wilfully and unlawfully contravene a noise standard Noise standards apply to: Building work Regulated devices Pumps Air-conditioning equipment Refrigeration equipment Indoor venues Open-air events Other amplified devices Power boat sports in waterway Operating power boat engine at premises Blasting	1665 penalty units	8325 penalty units

	Outdoor shooting ranges		
440Q(1)	Unlawfully contravene a noise standard	600 penalty units	3000 penalty units
440Q(2)	A person does not contravene a noise standard by causing an environmental nuisance caused by safety and transport noise, government and public infrastructure and nuisance regulated by other laws		

Offences related to water contamination

Section	It is an offence to	Maximum penalty individual	Maximum penalty corporation
440ZG(a)	Unlawfully deposit a prescribed water contaminant in waters, or in a roadside gutter or stormwater drainage, or at another place that e.g. may wash into an adjacent roadside gutter*	600 penalty units	3000 penalty units
440ZG(b)	Unlawfully release stormwater run-off into waters, a roadside gutter or stormwater drainage that results in earth build up*	600 penalty units	3000 penalty units
	* If the deposit or release is done wilfully	1665 penalty units	8325 penalty units

Offences related to releases from boats into non-coastal waters

Section	It is an offence to	Maximum penalty individual	Maximum penalty corporation
440ZI(1)(b)	Release oil, a noxious liquid substance or a harmful substance *	300 penalty units	1500 penalty units
440ZJ(1)(b)	Release sewage *	300 penalty units	1500 penalty units
440ZK(1)(b)	Deposit rubbish *	300 penalty units	1500 penalty units
440ZI(1)(a), 440ZJ(1)(a), 440ZK(1)(a)	* If the deposit or release is done wilfully	835 penalty units	4175 penalty units

Offences related to air contamination

Section	It is an offence to	Maximum penalty individual	Maximum penalty corporation

440ZL(5)(b)	Sell solid fuel-burning equipment for use in a residential premises unless a certificate of compliance has been issued for the equipment and a plate/s has been attached to the equipment under the prescribed standard *	600 penalty units	3000 penalty units
440ZL(2)	Fail to attach a plates/s to the equipment before selling or transferring the equipment to another person if the person is the manufacturer and an accredited entity issues a certificate of compliance for solid fuel-burning equipment *	600 penalty units	3000 penalty units
440ZL(3)	Use, or transfer to another person, certified equipment if the person knows a plate attached to the equipment has been defaced, altered or removed or there has been a material modification or alteration of other related equipment *	600 penalty units	3000 penalty units
440ZL(5)(a)	* If the contravention is done wilfully	1665 penalty units	8325 penalty units

Offences related to fuel standards

Section	It is an offence to	Maximum penalty individual	Maximum penalty corporation
440ZQ(1)	For a person who manufactures or imports fuel to supply the fuel in the State if the fuel does not comply with a Commonwealth fuel determination standard (other than the supply of fuel supplied for use in a motor vehicle used only for motor racing on a racing circuit or track under a registration certificate for that activity)	165 penalty units	825 penalty units
440ZR(2)	For a person who manufactures or imports fuel to supply the fuel in the low volatility zone in the summer period if the Reid vapour pressure of the fuel is more than 76kPa where the ethanol content of the fuel is more than 9% but not more than 10% by volume	165 penalty units	825 penalty units
440ZR(3)	For a person who manufactures or imports fuel to fail to ensure that, for each summer month, the volumetric monthly average Reid vapour pressure of the fuel supplied by the person in the low volatility zone is not more than 74kPa where the ethanol content of the fuel is more than 9% but not more than 10% by volume	165 penalty units	825 penalty units
440ZS(2)	For a person who manufactures or imports fuel to supply the fuel in the low volatility zone in the summer period if the Reid vapour pressure of the fuel is more than 69kPa	165 penalty units	825 penalty units

440ZS(3)	For a person who manufactures or imports fuel to fail to ensure that, for each summer month, the volumetric monthly average Reid vapour pressure of the fuel supplied by the person in the low volatility zone is not more than 67kPa	165 penalty units	825 penalty units
440ZT	A person may apply to the department for an exemption from complying		
440ZY(2)	Fail to keep records (for 2 years after the supply of the fuel) relating to fuel that is prescribed under a regulation by a person who manufactures or imports the fuel in relation to fuel supplied in the State if a Commonwealth fuel standard determination applies to the fuel and the person is not required to keep records for the supply of the fuel under s66 of the <i>Fuel Quality Standards Act 2000</i> (Cth)	50 penalty units	250 penalty units

Other offences

Section	It is an offence to	Maximum penalty individual	Maximum penalty corporation
442(1)	Wilfully release, or cause to be released, a prescribed contaminant into the environment, other than under an authorised person's emergency direction	1665 penalty units	8325 penalty units
442(1)	Release, or cause to be released, a prescribed contaminant into the environment, other than under an authorised person's emergency direction	600 penalty units	3000 penalty units
443	Wilfully cause or allow a contaminant to be placed in a position where it could reasonably be expected to cause serious or material environmental harm	4500 penalty units or 2 years imprisonment	22,500 penalty units
443	Cause or allow a contaminant to be placed in a position where it could reasonably be expected to cause serious or material environmental harm	1665 penalty units	8325 penalty units
443A	Wilfully cause or allow a contaminant to be placed in a position where it could reasonably be expected to cause environmental nuisance	1665 penalty units	8325 penalty units
443A	Cause or allow a contaminant to be placed in a position where it could reasonably be expected to cause serious or environmental nuisance	600 penalty units	3000 penalty units
444	Interfere with any monitoring equipment under the Act or a development condition of a development approval	165 penalty units	825 penalty units

78	Apply nitrogen or phosphorous to soil on the relevant agricultural property when carrying out an agricultural ERA unless conditions have been complied with or they have an accredited ERMP for the agricultural ERA which states certain things	100 penalty units	500 penalty units
83(1)	Fail to make or cause to be made an agricultural ERA record and keep that record and to keep the relevant primary documents for that record for at least 5 years	100 penalty units	500 penalty units
86	Fail to comply with a production requirement in relation to an agricultural ERA	100 penalty units	500 penalty units

Other information

Section 2B of the Penalties and Sentences Regulation 2005 prescribes the monetary value of a penalty unit. Officers should refer to the [Compliance Support intranet page](#) and the [Penalty Infringement Notices intranet page](#) for the current penalty unit values and further information. Unless the Act prescribes a maximum penalty unit for an individual and a corporation, the penalty unit listed is the maximum for an individual. If a corporation is found guilty of the offence, the court may impose a maximum fine of an amount equal to five times the maximum fine for an individual.

Investigation and enforcement

Authorised persons

An authorised person is a person who has been appointed by the chief executive, enabling them to perform certain functions and exercise particular powers under the Act. Appointments are only made if, in the opinion of the chief executive, the person has the necessary expertise or experience. An authorised person may be an appropriately qualified public service officer, an employee of the department or a person declared by regulation.

Authorised persons are issued with identity cards. Before exercising a power in relation to someone else, the authorised person must first produce their identity card for the person's inspection or have their identity card displayed so that it is clearly visible to the person. If, for any reason, it is not practicable to produce or display their identity card, the authorised person must produce the identity card for inspection by the person at the first reasonable opportunity.

Powers of authorised persons

Outside the provisions of the Act, an authorised person retains the same rights as a member of the public, including the liberty to go where a member of the public can go and the freedom to speak to people. In terms of an authorised person's right to enter upon premises other than under the Act, and authorised person has the same right as the public to enter and be on public land. For private land, where a business is being conducted which is open to the public (e.g. a shopping centre), a general licence exists to allow people to enter. In relation to private homes, in the absence of signs to the contrary a presumed licence exists to allow persons to enter upon the property in order to contact the occupiers of the property.

Powers of entry for places or vehicles

Under the Act, powers are granted to authorised persons (and other specified persons) to enter a place or a vehicle in certain circumstances. The table below sets out some of the powers of authorised persons under the Act.

Public place means any place the public is entitled to use or is open to, or used by, the public (whether or not on payment of an admission fee).

Premises includes a building and the land on which a building is situated.

Land includes:

- the airspace above the land; and
- land that is, or is at any time, covered by waters; and
- waters.

Vehicle includes a train, boat and an aircraft.

Consent to entry

If an authorised person intends to seek the consent from an occupier of a place to enter the place, the authorised person must inform the occupier:

- of the purpose of the entry;
- that anything found and seized may be used in evidence in court; and
- that the occupier is not required to consent.

For the purpose of asking the occupier of a place for consent to enter, an authorised person may, without consent or a warrant:

- enter land around the premises at the place to the extent that it is reasonable to contact the occupier; or
- enter part of the place that members of the public would ordinarily be allowed to enter.

If the consent is given, the authorised person may ask the occupier to sign an acknowledgment of the consent.

What an authorised person can do when they enter a place or vehicle

What an authorised person is authorised to do following entry depends on the particular sections of the Act, and if powers are authorised by a warrant, what the warrant says. The table below sets out some of the powers of authorised persons under the Act.

Powers of an authorised person under the EP Act	
Under what circumstances	Powers after entry
<p>General power of entry</p> <p>An authorised person may enter a place if:</p> <ul style="list-style-type: none"> • the occupier consents to the entry and, if the entry is for exercising a power under Chapter 7, Part 5B (clean-up notice) or Chapter 7, Part 8 (contaminated land) of the Act, its owner consents; • it is a public place and the entry is made when the place is open to the public; • it is a place to which an environmental authority relates and the entry is made when: <ul style="list-style-type: none"> ○ the activity to which the authority relates is being carried out; 	<ul style="list-style-type: none"> • search any part of the place or vehicle; • inspect, examine, test, measure, photograph or film the place or vehicle or anything in or on the place or vehicle; • take samples (including extracting a sample for further analysis) of any contaminant, substance or thing; • record, measure, test or analyse the release of contaminants into

<ul style="list-style-type: none"> ○ the place is open for conduct of business; ○ the place is otherwise open for entry; ● it is a place to which an agricultural environmentally relevant activity (ERA), a prescribed condition for a small scale mining activity relates and the entry is made when— <ul style="list-style-type: none"> ○ the activity, or the activity which the condition relates, is being carried out; ○ the place is open for conduct of business; ○ the place is otherwise open for entry; ● it is a place where an industry is conducted and the entry is made when— <ul style="list-style-type: none"> ○ the place is open for conduct of business; ○ is otherwise open for entry; ● the entry is authorised by a warrant; ● for land mentioned in chapter 7, part 5B (clean-up notice) or Chapter 7, part 8 (contaminated land)—the entry is authorised by an order of a magistrate under section 458; or ● the authorised person may enter the place under section 453 (entry to search, test, sample etc. for release of contaminant), 454 (entry of land for preliminary investigation) or 455 (entry of land for access). <p>Entry or boarding of vehicles</p> <p>An authorised person may enter or board a vehicle if they have reasonable grounds for suspecting:</p> <ul style="list-style-type: none"> ● it is being or has been used in the commission of an offence against the Act; ● it is or a thing in it may provide evidence of an offence; or ● it relates to the transporting of waste. 	<p>the environment from the place or vehicle;</p> <ul style="list-style-type: none"> ● take extracts from or make copies of any documents (this power does not apply for a preliminary investigation or site investigation); ● take into or onto the place any persons, equipment and materials that are reasonably required to exercise the powers; ● install or maintain any equipment and materials in or on the place or vehicle that is reasonably required to conduct a monitoring program for the release of contaminants; ● require the occupier of the place, or any person to give reasonable help for the exercise of the powers mentioned above; ● by notice to a person in control of a vehicle, require the person to take the vehicle to a stated reasonable place by a stated reasonable time and if necessary, to remain in control of the vehicle at the place for a reasonable time to enable the exercise of the powers above.
<p>Environmental harm</p> <p>Entry to land may occur if the authorised person reasonably believes that unlawful environmental harm has been caused by the release of a contaminant.</p> <p>Land for this section means a parcel of land other than any part on which a building is erected.</p>	<p>An authorised person may enter land for the purpose of finding out or confirming the source of the release of the contaminant. For example, to search, test or sample for the release of a contaminant.</p>

<p>Contaminated land</p> <p>May enter land if the department believes on reasonable grounds land is contaminated land.</p>	<p>Conduct a preliminary investigation with the agreement of the owner and occupier or if the department has given at least 5 days written notice to the owner and occupier.</p> <p>The general power to take extracts from, or make copies of, any documents on the place or vehicle does not apply to preliminary investigations.</p>
<p>Entry of land for access</p> <p>If it is necessary or desirable for an authorised person to cross other land (access land) to enter the primary land under sections 452 (general entry of place) 453 (entry to search, test, sample etc. for release of contaminant), 454 (entry of land for preliminary investigation)</p>	<p>Enter the access land and take into, or over it, anything reasonably required to exercise the general powers for places and vehicles under section 460.</p> <p>Prior to entry, must either have the consent of the owner of the access land or have given the occupier at least 5 business days written notice.</p> <p>Consent or notice is not required if the authorised person reasonably believes that there is imminent risk of environmental harm being caused to or from the primary land and the authorised person has told or attempted to tell the occupier that they are permitted to enter</p>
<p>Warrant for entry to a place in relation to evidence</p> <p>Entry for a place may be obtained via a warrant from a magistrate under section 456 or section 457 (if the application for the warrant is made other than in person because of urgent or other circumstances).</p>	
<p>Order to enter land to conduct investigation or conduct work</p> <p>An authorised person may apply to a magistrate for an order to enter land.</p>	<ul style="list-style-type: none"> • to carry out work on the land; • to take the actions required under a clean-up notice; • to conduct a site investigation of contaminated land; and • to conduct work to remediate land on the contaminated land register.

It is an offence for a person to obstruct an authorised person in the exercise of their powers under the Act without a reasonable excuse.

- The maximum penalty for an individual is 165 penalty units.
- The maximum penalty for a corporation is 825 penalty units.

Power to seize evidence

An authorised person who enters a place with a warrant may seize the evidence for which the warrant was issued.

An authorised person who enters a place with the occupier's consent may seize the particular thing for which the entry was made if the authorised person believes on reasonable grounds that the thing is evidence of an offence against the Act.

An authorised person who enters a place with a warrant or the occupier's consent may also seize another thing if the authorised person believes on reasonable grounds:

- the thing is evidence of an offence against the Act; and
- the seizure is necessary to prevent the thing being:
 - concealed, lost or destroyed; or
 - used to commit, continue or repeat the offence.

If an authorised person enters a place other than with a warrant or with the occupier's consent or boards a vehicle, they may seize a thing if the authorised person believes on reasonable grounds:

- the thing is evidence of an offence against the Act; and
- the seizure is necessary to prevent the thing being:
 - concealed, lost or destroyed; or
 - used to commit, continue or repeat the offence.

Procedure after seizure of evidence

As soon as practicable after a thing is seized by an authorised person, the authorised person must give a receipt for it to the person from whom it was seized.

The receipt must describe generally each thing seized and its condition.

If for any reason it is not practicable to give a receipt to the person at the time of seizure, the authorised person must:

- leave the receipt at the place of seizure; and
- ensure the receipt is left in a reasonably secure way and in a conspicuous position.

The authorised person must allow a person, who would be entitled to the seized thing if it were not in the authorised person's possession, to inspect it, and if it is a document, to take extracts from it or make copies of it.

The authorised person must return the seized thing to its owner at the end of:

- one year; or
- if a prosecution for an offence involving it is started within the one year – the prosecution for the offence and any appeal from the prosecution.

Despite the time limits specified above, if the authorised person is satisfied that the retention of the seized thing as evidence is no longer necessary, the authorised person must return the seized thing to its owner immediately.

However, an authorised person may keep the seized thing if the authorised person believes, on reasonable grounds, it is necessary to continue to keep it to prevent its use in committing an offence.

If the owner of the seized thing is convicted of an offence against the Act, the court may order that the thing is forfeited to the State or local government.

Damage to property and compensation

Where damage is caused to someone's property during the exercise of power to enter a place or vehicle, authorised persons need to ensure that the damage is fully documented (including photographs and notes), to ensure that any compensation claimed by a person is limited to any damage caused by the department.

The authorised person must immediately give written notice of the particulars of the damage to the person who appears to be the owner of the thing.

Payment of compensation may be claimed in court proceedings, other than for a contamination incident.

Powers to require name and address, answer questions and produce documents

If a person is found to be committing an offence against the Act, or if there is a reasonable belief that they have committed an offence against the Act, an authorised person may require the person to state their name and address. When making the requirement, the authorised person must warn the person that it is an offence to fail to state the person's name and address, unless the person has a reasonable excuse.

If an authorised person suspects that the name and address given are false, they may require the person to provide evidence of the correctness of the name and address given.

A requirement under section 465 to answer questions or produce documents may be made by an authorised person to obtain information about a suspected offence. A requirement under section 466 to produce documents may be made by an authorised person to obtain documents required to be held or kept under the Act. For more information see the section 'Information notice and requirement to answer questions or produce documents' above.

A person must not give the department or an authorised person a document containing information that the person knows, or ought reasonably to know:

- is false or misleading in a material particular; or
- contains incomplete information in a material particular.

A person must also not state anything to an authorised person that the person knows is false or misleading in a material particular or omit anything from a statement made to an authorised person, without which the statement is, to the person's knowledge, misleading.

Penalties for failing to give name and address, answer questions or produce documents

It is an offence to fail to comply with a requirement to give name and address or to give evidence of the correctness of a name or address unless the person has a reasonable excuse for not complying.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Failing to answer questions or attend at a stated place at a stated time, to answer questions under section 465 of the Act is an offence unless the person has a reasonable excuse.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Failing to produce a document under section 466 of the Act is an offence unless the person has a reasonable excuse.

- The maximum penalty for an individual is 50 penalty units.
- The maximum penalty for a corporation is 250 penalty units.

Giving the department or an authorised person a document containing information that the person knows, or ought reasonably to know is false or misleading in a material particular; or contains incomplete information in a material particular is an offence.

- The maximum penalty for an individual is 4500 penalty units or two years imprisonment.
- The maximum penalty for a corporation is 22,500 penalty units.

Stating anything to an authorised person that a person knows is false or misleading in a material particular, or omitting anything from a statement made to an authorised person which makes the statement false or misleading in a material particular, is an offence.

- The maximum penalty for an individual is 4500 penalty units or two years imprisonment.
- The maximum penalty for a corporation is 22,500 penalty units.

Other enforcement powers of authorised persons

Authorised persons have additional powers in an emergency.

An authorised person may direct any person to take specified reasonable action within a specified reasonable time, or take the action, or authorise another person to take the action if they are satisfied on reasonable grounds that an emergency exists.

For further information on the powers of authorised persons in emergencies, see the emergency powers guideline ([ESR/2016/2275](#)).

Appeal rights

Reviews and appeal

The provisions regarding reviews of decisions and appeals are found in sections 519–539 of the Act.

A person who is dissatisfied with certain decisions of the department, may be able to apply to have the department review that original decision.

Generally, a request to have a decision reviewed must be:

- made within 10 business days of the decision being notified to the person;
- supported by enough information to enable the department to decide the application for review; and
- made using the application for review of an original decision form ([ESR/2015/1573](#)).

Where an application has been made for a decision to be reviewed, the applicant may also apply to the relevant court for a stay of the decision to secure the effectiveness of the review.

Once the original decision has been reviewed, a person who is dissatisfied with the review decision may be able to appeal against that decision to the relevant court within 22 business days after receiving notice of the review decision.

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*.

Further information about reviews and appeals see the information sheet, Internal review and appeals ([ESR/2015/1742](#)).

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Date: 23 January 2015

Version history

Version	Effective date	Description of changes
1.00	23 January 2015	Initial Upload.
1.01	19 June 2016	Footer updated.
2.00	1 July 2016	The document template, header and footer have been updated to reflect current Queensland Government corporate identity requirements and comply with the Policy Register.
2.01	30 August 2017	Minor amendments to reflect the repealed <i>Sustainable Planning Act 2009</i> and the commencement of the <i>Planning Act 2016</i> .
2.02	20 August 2018	The document template, header and footer have been updated to reflect current Queensland Government corporate identity requirements and comply with the Policy Register.

Disclaimer

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