

Guideline

Environmental Protection Act 1994

Cost Recovery Notice

This document is intended to assist Environmental Services officers (officers) to issue a cost recovery notice pursuant to chapter 7, part 5C of the Environmental Protection Act 1994 (the Act).

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What is a 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 a 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.

Is this the appropriate statutory tool?

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)¹ and the emergency powers guideline (ESR/2016/2275)¹.

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:

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.des.qld.gov.au.

- 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 into 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.

If 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 ensure that the intended recipient of the notice is the prescribed person for the contamination incident.

How the department issues a cost recovery notice

Officers must complete an assessment report to document the decision as well as completing the cost recovery notice.

Step 1—Completion of the assessment report

Before completing the cost recovery notice, officers are required to complete a cost recovery assessment report that sets out the facts and circumstances relating to the matter and documents the decision-making process used by the department in determining to issue a cost recovery notice.

The assessment report is not intended to replicate the department file. Rather it is designed to capture all critical aspects that have led to the department's decision. Accordingly, an authorised person is encouraged to limit the information included to relevant points only.

1. Brief history of the matter

Briefly outline any historical information relevant to this decision. This information should be presented in succinct, chronological dot points and should include how the department came to carry out the actions that incurred the costs that are being claimed.

2. Grounds for issuing a cost recovery notice

Section 363N(1) of the Act provides that a cost recovery notice can only be issued in certain circumstances.

A cost recovery notice may be given to the recipient of a clean-up notice if:

- the recipient has failed to comply with the clean-up notice; and
- an authorised person or contractor takes any of the actions stated in the clean-up notice;

or

- the recipient has appealed the decision to issue a clean-up notice and the operation of the decision is stayed;
- an authorised person or contractor carries out the actions stated in the clean-up notice during the period of the stay; and
- the appeal ends without an appeal decision or the decision confirms the decision to issue the clean-up notice.

A cost recovery notice may also be given to a prescribed person for a contamination incident if an authorised person acts under an emergency direction relating to the environmental harm caused or likely to be caused by the contamination incident.

3. Expand upon the grounds

The purpose of this section is to clearly identify what the department must 'prove' before deciding to use a cost recovery notice. This should include the statutory requirements that must be met by the department prior to issuing a cost recovery notice.

Each ground (including alleged non-compliance) should be allocated a separate number.

4. Detail the matters considered

The purpose of the table in the assessment report is to link the grounds to the information gathered and the conclusions formed. This is achieved by identifying:

- the specific ground;
- the information which has been considered; and
- the conclusion that has been reached by the officer after considering the information sourced.

The information to be documented can include:

- receipts for costs incurred;
- notes recorded in an officer's official notebook;
- photographs;
- copies of relevant documents; and
- any observed actions and direct testimony received from individuals.

When considering the facts and circumstances, officers are encouraged to give attention to the accuracy and relevance of available evidence, historical details, professional expertise and the weight attributed to any direct testimony provided.

Copies copy of any relevant supporting documents are attached to this assessment report. For example:

- a copy of the assessment report recording the original decision to issue the clean-up notice;
- a copy of the written notice of an emergency direction given under section 467;
- any relevant invoices provided by authorised contractors to the department; and
- if the cost of authorised person salaries are to be included in the cost recovery notice, a log of time spent.

5. Calculate the monetary value

Officers are required to identify the monetary amount being sought and show the calculations used to determine this amount. Costs and expenses claimed must be defensible and reasonable in the circumstances. This can include labour, equipment and administrative costs and expenses. All amounts claimed must be recorded in the table in the assessment report and a copy of the relevant documentation for each cost claimed must be attached.

6. Provide for natural justice

Prior to the department making a decision which may adversely impact on an individual or group the department must:

- **Notify**—the individual that the department is considering making adverse findings;
- **Respond**—provide the individual with an opportunity to respond to any possible negative findings; and

- **Consider**—any representations that are made before finalising the decision.

The seriousness of the matter will largely dictate the process by which natural justice is provided and is likely to vary from case to case. Accordingly, officers are encouraged to use their discretion in determining how to best ensure natural justice is afforded and the amount of time provided to the affected person to respond.

While in some circumstances it may be appropriate for an officer to discuss the above information with the affected person during a site inspection or a telephone interview and to take contemporaneous notes, in more serious circumstances a written notification which includes a specific closing date for submissions should be used.

Regardless of the manner in which natural justice is afforded, any information provided by the affected person is to be documented. The summary of information should include how natural justice was provided as well as any representations or submissions provided by the affected person.

7. Recommendation

The environmental officer is required to make a recommendation in relation to the alleged breach.

Example

The department is of the opinion that Mr JP Citizen failed to comply with the clean-up notice issued on 1 August 2013. Accordingly, a contractor was hired by the department to carry out the actions stated in the clean-up notice. In order for the department to recover monies spent due to Mr Citizen's failure to comply with the clean-up notice, it is recommended that a cost-recovery notice be issued.

Administrative decisions 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 probable than not that the event occurred.

8. Approval

The assessment report is to be approved by an appropriately delegated officer.

Step 2—Cost recovery notice drafted

The notice must meet a number of legislative requirements in order to be legally binding. Section 363N(3) of the Act provides that a cost recovery notice must include the following information:

- the name of the recipient;
- a description of the contamination incident;
- the place at or from which the department is satisfied the incident happened;
- the amount claimed;
- a description of costs and expenses giving rise to the claimed amount;
- that, if the recipient does not pay the amount to the department within 30 days after the day the notice is issued, the department may claim the amount from the recipient as a debt;
- the name, address and contact details of the department;
- the review or appeal details.

The cost recovery notice must be signed by the decision-maker in conjunction with the assessment report which records the formal decision.

Information regarding the review and appeal process is included in the template notice. A copy of the information sheet—internal review and appeal to the Planning and Environment Court (ESR/2015/1572)² should be attached to the cost recovery notice.

Multiple recipients

If a cost recovery notice is issued to two or more recipients (section 360O):

- a copy of the notice must be given to each recipient;
- the amount claimed in the notice is payable by the recipients 'jointly and severally'.

The fact that the notice is payable by the recipients jointly and severally means that the department may collect the entire amount payable from any one of the recipients or collect various amounts from any or all of them. It also means that a person who complies with the cost recovery notice, but was not the person who caused or allowed the contamination incident, may recover the cost of complying with the cost recovery notice from the person who caused or allowed the incident.

Recipient of a cost recovery notice

Each statutory notice must clearly identify who is the recipient of the notice. It is the recipient of the notice who is required to comply with the notice. Officers should avoid identifying or stating more than one person on a notice as this may affect the validity of the notice.

If the intended recipient of a notice is a company, officers should state only the company name and registered address in the notice. A letter *may* be sent to the director of the company attaching a *copy* of the notice, however the recipient of the notice and the entity that is required to comply is the company identified in the notice.

If both an individual person and a company are to be the subject of the same notice, individual notices should be served on each party. *For example.* 'Mr Bloggs' in his personal capacity is the recipient of notice 1 and 'Bloggs and Others Pty Ltd', being the company that Mr Bloggs is employed by, is the recipient of notice 2.

Service of a cost recovery notice

Service means delivery to the party who is the subject of the notice. Authorised persons are encouraged to use their discretion as to the most appropriate form of service, having regard to the recipient in question. Methods of service are provided for in sections 39 and 39A of the *Acts Interpretation Act 1954*. Where the Act requires a document to be served on (which includes given, delivered or sent to) a person, the document may be served:

- on an individual:
 - by delivering it to the person personally; or
 - by leaving it at, or by sending it by pre-paid registered post to, the place of residence or business of the person.
- on a body corporate:
 - by leaving it at, or sending it by pre-paid registered post to, the head office, a registered office or a principal office of the body corporate.

² 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.des.qld.gov.au.

The date, time and method of service should be documented by a contemporaneous file note. Depending on the method used, a photocopy of the addressed, prepaid envelope should be taken or any facsimile or email confirmations should be retained on the department's file.

Follow-up by the department

It is important that the matter is appropriately followed-up to make sure that the person to whom the cost recovery notice is issued has paid the amount claimed in the notice. Follow-up is to be scheduled by the relevant officer and confirmed with the business area manager. The manager is responsible for ensuring follow-up is undertaken within the agreed timeframe.

The recipient of a cost recovery notice must pay the amount claimed to the department within 30 days after the day the notice is issued, or the department may claim the amount from the recipient as a debt. At the end of the 30-day period officers should check whether the amount has been paid or not. If not, appropriate steps should be taken to recover the debt.

Officers are encouraged to utilise tools such as diary reminders to ensure the matter is followed up in a timely manner.

Record-keeping responsibilities

Officers must record all allegations of non-compliance in the department's electronic data management system. This includes creating a complaint report/compliance activity, uploading copies of any relevant documents, updating run sheets with commentary on actions and recording any enforcement decision data (this includes a decision to take no further action).

A hard copy of the cost recovery notice, the signed assessment report and any accompanying documents must be placed on the paper file. The department is required to make, and record, an informed decision about all allegations of non-compliance.

It is important that officers adequately respond to and report on all inquiries in order to assist in building a comprehensive compliance history.

Amendments to an issued cost recovery notice

If minor changes to the cost recovery notice or an extension of time are required, the recipient of the notice should be notified in writing.

If significant changes are required, officers should, in order to avoid confusion, repeal (revoke) the original notice, and issue a new one on the same grounds with the necessary changes. It is important to note that the recipient will have a new appeal rights and should be advised accordingly.

The repeal and issue of a new cost recovery notice should be carried out in the same way, and subject to the same conditions as the issuing of the original notice. Accordingly, a new assessment report should be completed and endorsed by the appropriate delegate.

It is preferable if the decision is made by the original decision-maker. If this is not possible the decision should be made by a person with the appropriate delegation who holds a position equal to or higher than that of the original decision-maker.

Officers should also update and record the changes or the decision to repeal and reissue the notice in the department's electronic data management system and place hard copies of any documentation on the paper file.

Review of decisions and appeals

The provisions regarding review of decisions and appeals may be found in sections 519 to 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. A decision to issue a cost recovery notice is an original decision and can be reviewed. If a cost recovery notice is issued, a dissatisfied person is the recipient of the notice.

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)³.

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.

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 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*.

For further information about reviews and appeals see the information sheet—internal review and appeal to the Planning and Environment Court (ESR/2015/1572)³.

Penalties for 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.

Approved by:

Kelli Ready
Director
Environmental Services and Regulation
Department of Environment and Science

Enquiries

Permit and Licence Management
Ph: 13 QGOV (13 74 68)
Fax: (07) 3896 3342
Email: palm@des.qld.gov.au

Date: 24 January 2014

³ 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.des.qld.gov.au.

Version history

Version	Effective date	Description of changes
1.01	24 January 2014	Initial upload.
2.00	14 July 2016	The document template, header and footer has been updated to reflect current Queensland Government corporate identity requirements and comply with the Policy Register.
2.01	14 August 2018	The document template, header and footer has been updated to reflect current Queensland Government corporate identity requirements and comply with the Policy Register.

Disclaimer

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