



Tasmania

DEPARTMENT of
PRIMARY INDUSTRIES,
WATER *and* ENVIRONMENT

Enforcement Policy

for the

Environmental Management and Pollution Control Act 1994

Environmental Policy Section

Environment Division

DEPARTMENT OF PRIMARY INDUSTRIES, WATER
AND ENVIRONMENT

May 2004

Acknowledgments

The Environment Division within the Department of Primary Industries, Water and Environment (DPIWE) wishes to acknowledge that it has drawn much of this policy document from the Model Enforcement Policy prepared by Dr. Brian Robinson as part of his review of the Enforcement and Prosecution Guidelines of the Department of Environmental Protection of Western Australia. DPIWE wishes to thank Dr Robinson and the Western Australian Department of Environmental Protection for their kind permission to reproduce this Model Policy with appropriate modifications to suit the Tasmanian statutory and regulatory framework. DPIWE also wishes to acknowledge information it has drawn from the Environmental Defenders Office publication *The Environmental Law Handbook* and from compliance and enforcement policies published by other Australian jurisdictions.

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ENFORCEMENT POLICY

1. Purpose of this Policy

This policy applies to the enforcement of the provisions of the *Environmental Management and Pollution Control Act 1994* (EMPCA) and its subordinate legislation by the Department of Primary Industries, Water and Environment (DPIWE). It sets out the principles, criteria and measures that DPIWE will use to enforce the provisions of the Act. It is not intended to apply to Council Officers who also have enforcement powers under EMPCA.

2. Application

This policy is to guide decision-making about the application of enforcement measures under the Act. It does not relate to decisions about the suite of other instruments and tools within the Act that can be used to achieve compliance in partnership with the person responsible for an environmentally relevant activity. These tools include Environment Improvement Programs (EIP), environmental agreements and financial assurances. The Act includes criteria or tests as to the circumstances when it is appropriate to use these instruments.

Environment Protection Notices (EPN) can be used in a number of ways to ensure compliance. They can be used as a pro-active measure to prevent a breach of the Act from occurring. This is generally approached in a collaborative or partnership way with the person(s) responsible for the environmentally relevant activity. They also can be used if a breach of the Act has occurred to prevent further harm, require remediation or put systems in place to further prevent occurrences of the breach. It is this second role that is relevant to this Policy. Section 6.2 outlines in more detail the enforcement role of an EPN.

3. Introduction

The Legislative Framework for Environment Management in Tasmania

The Department of Primary Industries, Water and Environment (DPIWE) has responsibility for the administration of the *Environmental Management and Pollution*

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Control Act 1994 (EMPCA) and its subordinate legislation. EMPCA is based on the concept of performance-based legislation, and includes a contemporary array of statutory tools to achieve its objectives.

The fundamental basis of EMPCA is the prevention, reduction and remediation of environmental harm, which is defined very broadly in Section 5 of the Act as,

"any adverse effect on the environment (of whatever degree or duration) and includes an environmental nuisance" (the latter is defined as 'the emission of a pollutant that unreasonably interferes with, or is likely to interfere with, a person's enjoyment of the environment').

The key offences, and some of the other statutory provisions, are limited to circumstances where environmental harm is caused by pollution.

Environmental harm and the general environmental duty are the two driving concepts underpinning the Act. There are three categories of environmental harm – serious harm, material harm and environmental nuisance. The general environmental duty means that a person must take all reasonable and practicable steps to prevent or minimise environmental harm.

The main purpose of enforcement is to achieve compliance with the legislation by:

- identifying breaches of the Act
- bringing them to the attention of the offender
- applying penalties (either directly or through the courts) and
- providing deterrence.

Enforcement should be taken, where required, by DPIWE in the public interest to protect the environment from pollution and environmental harm. Enforcement is one of a range of responsibilities under the Act, which DPIWE administers. Other responsibilities include conducting environmental assessments, ensuring appropriate conditions and restrictions are included in permits issued by planning authorities

under the *Land Use Planning and Approvals Act 1993* (LUPAA), ensuring that action is taken to prevent and remediate environmental harm, administering regulations, policies and co-operative environmental agreements.

Discretion exists as to when enforcement is required and which measures are appropriate for particular situations. This Policy is intended to guide the making of decisions in relation to enforcement.

4. Principles

The following principles will be taken into account when considering whether enforcement action is required in the public interest:

Outcome Focus

The objective of all enforcement action will be to achieve a defined and measurable outcome.

Proportionality

Enforcement action will be taken in proportion to the magnitude of the offence taking into account implications for the administration of the Act more generally.

Responsiveness and flexibility

Decisions on enforcement action will be responsive to the situation in both timing and extent with flexibility retained to respond to additional information or change in circumstances.

Transparency and clarity

All non-trivial breaches will be subject to enforcement consideration and this will be communicated to the alleged offender. A transparent process will determine the type of enforcement measure to be taken, so that any disagreement can be based upon fact. The enforcement action will be clear to enable all parties to understand what constitutes compliance.

Equity, fairness and consistency

Respect for the law requires that it be administered in a way that is fair, consistent and with equity.

Due process

Enforcement action must be carried out within the limitations of the powers conferred under the Act and the processes provided under the Act, subsidiary legislation or published policy.

Cost-effectiveness

As part of a continuum of administrative measures, enforcement powers are to be exercised when they are likely to produce the desired outcome in a cost-effective manner. The desired outcome includes meeting the other principles in this policy and the implications for the administration of the Act more generally (including consideration of deterrence and precedent) as well as the environmental outcome in a particular case.

Compatibility with other policy

Environment management and pollution control is carried out within the context of wider Government policy and other statutory requirements (both internal and external). In particular enforcement should be carried out in a seamless manner with policies on sustainable development, land use planning and public health.

5. General Criteria for Enforcement

The need and type of enforcement action will be considered on the basis of considering the following general criteria and applying the aforementioned principles.

- The seriousness of the incident having regard to the damage to the environment caused or likely to be caused, impact on people and the implications for the administration of EMPCA more generally. For example, seriousness would include severity, extent, duration and location of that damage or potential for damage to the environment or the undermining of an administrative process designed to prevent environmental harm.

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- Whether there has been a clearly identified *prima facie* breach of the Act.
- Whether there has been failure to comply with any formal request, lawful direction or notice given by an inspector or authorised officer.
- The culpability of the person, whether it be a corporation or employee or individual person, including any mitigating or aggravating circumstances.
- The previous history of the person, with particular regard to the environment, including the frequency of the offence.
- The level and nature of public concern.
- The prevalence of the alleged offence and the need for deterrence of the offence.
- The precedent which may be set by any failure to take enforcement action.
- Due diligence procedures already in place and used by the person.
- Voluntary actions by the person to mitigate any damage to the environment and put in place mechanisms to prevent any recurrence.
- The measures necessary to ensure compliance with EMPCA and those most likely to achieve the best environmental outcome.
- Failure to notify or delayed notification of the incident by the person to the DPIWE (Environment Division). Note that there is a statutory requirement under EMPCA to notify the Director of Environmental Management.
- The co-operation given to DPIWE by the person and willingness to commit to appropriate remedial action.

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- The length of time since the incident.
- Where more than one party has been involved, whether enforcement measures have been taken or are intended against others in relation to the same incident.
- The enforcement approach adopted to similar incidents in the past taking into account the specific circumstances;
- The age, intelligence, antecedents, background, physical or mental health of the offenders and witnesses; and
- whether there were any aggravating or mitigating circumstances.

6. Enforcement Measures

The decision as to whether to take enforcement action and which enforcement measure is the most appropriate will be based upon the general criteria listed in section 5 as well as the specific criteria listed under each of the following enforcement measures. The process of selecting the enforcement measure(s) should follow the systematic process outlined in the Department's internal guidelines and the reasons for the choice of enforcement measures should be clearly documented. While the criteria for enforcement will vary on a case-by-case basis, the overall aim for taking enforcement action is to achieve the desired environmental outcome.

If an investigation finds that an offence under EMPCA or its subordinate legislation may have occurred and either negotiation has failed or is deemed inappropriate, then enforcement action will be considered in the form of one or more of the following measures:

6.1 Warnings

A warning is not a sanction in itself, but will convey to the recipient that they have done something wrong and put them on notice that a sanction may be applied in the future. A warning may be an appropriate response where:

- the environmental damage or potential damage is minimal;

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- the breach of an administrative instrument or legislative provision is of a minor or technical nature;
- a warning is fair and appropriate having regard to the history of the offender and nature of the breach;
- environmental harm may occur if action is not taken; and
- the matter is one, which can quickly and simply be put right.

In deciding whether a warning is an adequate response the general criteria for enforcement will be considered and, in particular the compliance history of the person, and the steps taken to ameliorate the damage and prevent any recurrence.

While a warning may be issued orally, it will normally be followed up in writing to ensure that a person clearly understands what actions they are required to undertake to fulfil their obligations under the Act. Written warnings reiterate and reinforce a oral warning while formally documenting the incident and the subsequent direction(s) for cessation of an activity and/or actions for remediation or repair.

Where a warning is not complied within specified period further enforcement measures may be pursued.

6.2 Environment Protection Notices

Environment Protection Notices (EPN) impose requirements for the protection of the environment on a person responsible for an activity that may cause environmental harm in two ways. They are:

1. to assist with compliance of the Act by taking steps to prevent, control and reduce environmental harm within a specified time period. This involves working collaboratively with the person(s) responsible for the environmentally relevant activity to minimise the risk of environmental harm from occurring. This is the compliance role of an EPN and is NOT part of this Policy.
2. To require the responsible person to cease an activity causing environmental harm and to take remedial action within a specified period. This is the enforcement role of an EPN and relevant to this Policy.

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Applying the general criteria in section 5 with respect to enforcement action, an Environmental Protection Notice could be served on persons responsible for an environmentally relevant activity by the Director of Environmental Management if any of the following specific criteria have been met:

- environmental harm is being or likely to be caused; or
- to require the person responsible for an activity that may cause environmental harm to cease an activity causing environmental harm and to take remedial action within a specified time period.

A fee can be charged to recover the costs associated with issuing an EPN. This fee is not a fine or a penalty but a means of recovering costs.

Failure to comply with an EPN is an offence for which an infringement notice can be issued. It should also be noted that issuing an EPN does not preclude a prosecution or civil proceedings from being pursued.

6.3 Civil Enforcement

Civil enforcement proceedings may be taken before the Resource Management and Planning Appeal Tribunal under section 48 of the EMPCA where a person –

- has engaged, or is engaging, or is proposing to engage in conduct which contravenes the Act; or
- has refused or failed, or is refusing or failing, or is proposing to refuse or fail to take action required under the Act; or
- has caused environmental harm by contravening the Act or another Act.

The Tribunal is the principal forum for enforcing planning and environmental controls in Tasmania. The proceedings may be taken by the Director of Environmental

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Management, a council or anyone who in the opinion of the Tribunal has “a proper interest” in the matter.

The orders available to the Tribunal in such proceedings include orders in the nature of injunctive relief, under which the respondent can be ordered, either temporarily or permanently, to refrain from conduct or threatened conduct in contravention of the Act. They also include the power to order compliance with an EPN, or to make good a contravention of or failure to comply with the Act. The range of orders available to the Tribunal is set out in sections 48(5) to (7).

Civil enforcement proceedings are likely to be considered by the Director where –

- swift or urgent action is needed to prevent significant harm to the environment, and other potential responses are not considered adequate to deal with the threat; or
- other types of enforcement action have been taken, without success; or
- other types of enforcement action are seen as providing an insufficient or insufficiently timely response; or
- the proceedings give access to relief which is not be available as an adjunct to prosecution action, or by other means – compare in particular sections 48(5) and 63 of the Act.”

6.4 Prosecution by Environmental Infringement Notices (EIN)

EMPCA provides for certain offences to be dealt with by way of an infringement notice and the payment of a fine. An infringement notice can be issued only for prescribed offences that are listed in the *Environmental Management and Pollution Control (Infringement Notices) Regulations 1996*.

The recipient of an infringement notice has the option of paying the fine or, by not paying the fine, electing to have the matter dealt with by a court. A prosecution can

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be initiated if an infringement notice is not paid. There is also the option to withdraw an EIN and proceed to a prosecution by way of a brief of evidence.

After applying the general criteria outlined in section 5, the following specific criteria will be considered when deciding whether an EIN is an appropriate form of enforcement:

- the offence is one that may be dealt with by imposition of an infringement notice under the Infringement Notice Regulations;
- the facts are apparently indisputable;
- the evidence discloses a *prima facie* case against the person with reasonable prospects of success should the matter go to court;
- the breach is relatively easily remedied; and
- issuing of an infringement notice is likely to be a deterrent.

Repetition of behaviour that attracts an EIN penalty may signify the need for tougher enforcement and prosecution may be pursued in these situations.

6.5 Prosecution by Court Action

Prosecutions will be initiated, consistent with the principles and criteria of this Policy, where there is evidence of *prima facie* breaches of the Act and on a case-by-case basis. Prosecution will be pursued where in the opinion of the Director of Environmental Management, it is the most appropriate response to achieve the best environmental outcome. The Director of Public Prosecutions will advise the Director of Environmental Management whether the available evidence supports court action – that is, whether there is a reasonable prospect of conviction.

After applying the general criteria in section 5, the following specific criteria for deciding to initiate a prosecution will be considered:

- whether the issue of court orders are necessary to prevent a recurrence of the offence;
- the availability and effectiveness of any alternatives to prosecution;
- whether there are any counter-productive features to a prosecution;
- whether the consequences of a conviction would be unduly harsh or oppressive.
- the length and expense of a court hearing;

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- whether the offender had been dealt with previously by non-prosecutorial means;
- whether the breach is a continuing or second offence;
- whether proceedings are to be instituted against others arising out of the same incident;
- whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so; and
- the likely outcome in the event of a finding of guilt.

Some general considerations in selecting the appropriate defendant for prosecution are:

- who was primarily responsible for the offence – that is, who committed the act, who formed the intention and who created the material circumstances leading to the breach;
- where a person is liable because the law creates strict liability – what was the role of the potential defendant; and
- the likely effectiveness of court orders against the potential defendant.

7. Monitoring and Review

Information about the outcome of applying this Policy will assist DPIWE with keeping the policy up to date, relevant and effective. The experiences learned in implementing the policy can be used to:

- evaluate the Policy;
- increase the effectiveness of guidelines;
- ensure internal accountability;
- create deterrence; and
- ensure public accountability.

8. Communications

Details about enforcement activities will be published on the DPIWE's web-site and in the Department's Annual report.

9. Guidelines

Internal guidelines on the practical implementation of this Policy, including guidelines on field investigation, enforcement decision-making and prosecution, will

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be prepared for use by DPIWE officers. These guidelines will be continually monitored and reviewed in relation to their effectiveness and relevance and may be modified by direction of the Director of Environmental Management at any time.