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# Environmental Protection Regulatory Tools



**EHA**

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## 1. Acronyms and Key Terms

Acronym	Definition/Explanation
DA	Development approval.
EHO	Environmental Health Officer.
EIS	Environmental Impact Statement.
EPAct	The <i>Environmental Protection Act 1994</i> .
EPO	Environmental Protection Order.
EPP	Environmental Protection Policy.
EPReg	<i>Environmental Protection Regulation 2008</i> .
ERA	Environmentally Relevant Activity.
GED	General Environmental Duty.
PIN	Penalty Infringement Notice.
SPA	<i>Sustainable Planning Act 2009</i> .
TEP	Transitional Environmental Program.

## 2. Introduction

The *Environmental Protection Act 1994* and associated subordinate legislation contain numerous regulatory tools, each with a different purpose. Having a lot of tools enables an Authorised Person to select a tool that is customised to deal with the issue they are facing. However, with a large number of tools comes the added complexity of remembering which tool does what, the process to follow, etc. It is particularly difficult to remember the process to follow when applying an infrequently used tool.

The purpose of this training is to support local government staff to gain deeper knowledge of the environmental protection regulatory tools available, how and when to use each tool and importantly when not to use a particular tool. It is hoped that with deeper knowledge and an opportunity to discuss each tool in a workshop setting, local government Environmental Health Officers (EHOs) and Environmental Protection Officers will be more confident in tackling any issue in the future in an efficient and effective manner.

### 2.1. Key concepts in the *Environmental Protection Act 1994*

The object of the EPAAct is:

... to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (*ecologically sustainable development*). (s.3 EPAAct)

Section 5 of the EPAAct states:

If, under this Act, a function or power is conferred on a person, the person must perform the function or exercise the power in the way that best achieves the object of this Act.

This is consistent with the requirements of s.14A of the *Acts Interpretation Act 1954* which states that preference will be given to the interpretation of a provision in an Act that will best achieve the purpose of that Act. This is important because as decision-makers and Authorised Persons we are responsible for ensuring that we interpret and apply the EPAAct and associated subordinate legislation in a way that best achieves the object of the Act, i.e. ecologically sustainable development.

### 3. Direction Notices

#### 3.1. Overview

Direction notices can be used to regulate:

- ✓ Environmental nuisance (s.440).
- ✓ Noise standards (s.440Q).
- ✓ Prescribed water contaminants (s.440ZG).

Direction notices cannot be used to regulate:

- ✗ Matters excluded in schedule 1 EPAct including:
  - Nuisances regulated under local laws;
  - Public health risks; and
  - Any matter covered by a development approval.
- ✗ ERAs.
- ✗ Not suitable for incidents that cause material or serious environmental harm (e.g. large scale or irreversible damage to the environment).

#### 3.2. Legislation

EPAct Section	Summary
s.15	<p>Environmental nuisance is defined as an 'unreasonable interference or likely interference with an <u>environmental value</u> caused by:</p> <ul style="list-style-type: none"> <li>▪ Aerosols, fumes, light, noise, odour, particles or smoke;</li> <li>▪ An unhealthy, offensive or unsightly condition because of contamination; or</li> <li>▪ Another way prescribed by regulation.</li> </ul> <p><u>Note</u>: this definition is important when applying s.440.</p>
s.363A	<p>A direction notice can be issued for contravening a prescribed provision, i.e.:</p> <ul style="list-style-type: none"> <li>▪ s.440 Offence of causing environmental nuisance;</li> <li>▪ s.440Q Offence of contravening a noise standard; or</li> <li>▪ s.440ZG Depositing prescribed water contaminants in waters and related matters.</li> </ul> <p>A direction notice can also be issued for contravening a provision of an accredited environmental risk management plan (ERMP) for an agricultural ERA (N.B. – not devolved to local government).</p>
s.363B	<p>An authorised person <u>may</u> issue a direction notice if he/she is satisfied on reasonable grounds that:</p> <ul style="list-style-type: none"> <li>▪ a person/company is contravening a prescribed provision or has contravened a prescribed provision in circumstances that make it likely the contravention will continue or be repeated (i.e. it must be likely that the contravention will be continued or repeated);</li> <li>▪ a matter relating to the contravention can be remedied; and</li> <li>▪ it is appropriate to give the person/company an opportunity to remedy the matter.</li> </ul> <p>A direction notice requires the person/company to remedy the contravention.</p> <p>If it is not practicable to serve a written notice, the requirement can be made orally and</p>

EPAct Section	Summary
	confirmed by a written direction notice as soon as practicable.
s.363C	<p>Before issuing a direction notice for causing environmental nuisance (s.440) involving an emission of aerosols, fumes, light, noise, odour, particles or smoke, the following matters must be considered:</p> <ul style="list-style-type: none"> <li>▪ the general emission criteria listed in s.363C(3); and</li> <li>▪ if the emission is noise, the noise emission criteria listed in s.363C(4).</li> </ul> <p>Having regard to the above criteria, the authorised person must consider whether it would be appropriate to issue a direction notice or to first try to resolve the matter in another way.</p>
s.363D	<p>A direction notice must include all the items listed in s.363D(1) and the reasonable steps the authorised person considers necessary to remedy the contravention, or avoid further contravention, of the prescribed provision.</p> <p>A direction notice must include:</p> <ul style="list-style-type: none"> <li>▪ That the authorised person believes: <ul style="list-style-type: none"> <li>○ the person is contravening a prescribed provision; or</li> <li>○ has contravened a prescribed provision in circumstances that make it likely the contravention will continue or be repeated;</li> </ul> </li> <li>▪ the particular prescribed provision that is being or has been contravened;</li> <li>▪ how the prescribed provision is being or has been contravened;</li> <li>▪ the time by which contravention must be remedied considering the following: <ul style="list-style-type: none"> <li>○ the action required to remedy the contravention;</li> <li>○ the risk to human health or the natural environment, or risk of loss or damage to property, posed by the contravention; and</li> <li>○ how long the person has been aware of the contravention (including, if applicable, the time since an oral direction was given);</li> </ul> </li> <li>▪ that it is an offence to fail to comply with the direction notice unless the person has a reasonable excuse;</li> <li>▪ the maximum penalty for failing to comply with the direction notice;</li> <li>▪ reasonable steps the authorised person considers necessary to remedy the contravention, or avoid further contravention, of the prescribed provision; and</li> <li>▪ the recipient's review or appeal details.</li> </ul> <p>The time by which the person must remedy the contravention must be reasonable having regard to the items listed in s.363D(2).</p>
s.363E	<p>It is an offence not to comply with a direction notice unless the person has a reasonable excuse.</p> <p>Maximum penalty: 300 penalty units.</p>
s.440	<p>Offence of causing environmental nuisance.</p> <p>This provision does not apply to an environmental nuisance listed in Schedule 1, Part 1.</p>
s.440K	Definitions relating to noise standards.
s.440L	Meaning of audible noise.
s.440M	A reference to 'making noise' relating to a noise standard includes causing a noise to be made.

EPA Act Section	Summary
s.440N	A noise level that is a stated number of decibels or a stated number of decibels above the background level, refers to noise of that level measured at an 'affected building'.
s.400O	A local government may make a local law that prescribes noise standards. If a local law is in force, the local law provision applies as the noise standard (i.e. the EPA Act noise standards do not apply).
s.440P	The default noise standards detailed in the EPA Act apply if there is no provision in a local law that regulates that noise.
s.440Q	It is an offence to contravene a noise standard. Maximum penalty: 300 penalty units. Refer to Part 1 of Schedule 1 for exclusions to this provision.
s.440R	Default noise standard for building work.
s.440S	Default noise standard for regulated devices.
s.440T	Default noise standard for pumps.
s.440U	Default noise standard for air-conditioning equipment.
s.440V	Default noise standard for refrigeration equipment.
s.440W	Default noise standard for indoor venues.
s.440X	Default noise standard for open-air events.
s.440Y	Default noise standard for amplifier devices other than at indoor venue or open-air event.
s.440Z	Default noise standard for power boat sports in waterways.
s.440ZA	Default noise standard for operating a power boat engine at premises.
s.440ZB	Default noise standard for blasting.
s.440ZC	Default noise standard for outdoor shooting ranges.
s.440ZD	Definitions relating to water contamination.
s.440ZE	Meaning of deposit.
s.440ZF	Prescribed water contaminants may be detailed in a regulation.
s.440ZG	A person must not unlawfully deposit a prescribed water contaminant: <ul style="list-style-type: none"> <li>▪ in waters;</li> <li>▪ in a roadside gutter or stormwater drainage; or</li> </ul>

EPAct Section	Summary
	<ul style="list-style-type: none"> <li>▪ at another place and in a way that the contaminant could reasonably be expected to wash, blow, fall or otherwise move into waters, a roadside gutter or stormwater drainage.</li> </ul> <p>A person must not unlawfully release stormwater run-off into waters, a roadside gutter or stormwater drainage that results in the build-up of earth in waters, a roadside gutter or stormwater drainage.</p> <p>Maximum penalty: 835 penalty units (if deposit is wilful) or 300 penalty units.</p>
s.520	A 'dissatisfied person' for an original or review decision includes the recipient of a direction notice.
s.540	The Administering Authority must keep a number of registers, including a register of direction notices.
Schedule 1	<p>Exclusions relating to environmental nuisance or environmental harm.</p> <p>Part 1 – Environmental nuisance excluded from ss.440 and 440Q include:</p> <ul style="list-style-type: none"> <li>▪ safety and transport noise including a safety signal from a reversing vehicle (e.g. reversing beepers on trucks); and noise from the ordinary use of a public or State-controlled road.</li> <li>▪ government activities and public infrastructure including <u>maintaining</u> a public road, State-controlled road, railway or other infrastructure for public transport; <u>maintaining</u> public infrastructure (e.g. water, sewerage, telecommunication or electricity system); performing a function under the <i>Disaster Management Act 2003</i>; or a State or local government preventing, removing or reducing the risk to public health from a public health risk under the <i>Public Health Act 2005</i>.</li> <li>▪ Nuisances regulated by other laws including local laws; noise covered by Chapter 19 Part 3 of the <i>Police Powers and Responsibilities Act 2000</i>; an emission from a workplace; a public health risk; development carried out under an approval issued under the <i>Sustainable Planning Act 2009</i> that authorises the environmental nuisance; fireworks; and smoking within the meaning of the <i>Tobacco and Other Smoking Products Act 1998</i>.</li> </ul> <p>Part 2 – Exclusions from environmental harm and environmental nuisance include:</p> <ul style="list-style-type: none"> <li>▪ Non-domestic animal noise; and</li> <li>▪ Particular cooking odours.</li> </ul>
Schedule 2	<p>Original decisions</p> <p>The decision to issue a direction notice under s.363B is an original decision.</p>

EReg Section	Summary
Chapter 3, Part 3	Details how to measure noise.

EReg Section	Summary
s.77	Prescribed water contaminants are listed in Schedule 9 of the EReg.
Schedule 9	Lists the prescribed water contaminants.

### 3.3. Tips

- ✓ Make sure an exclusion listed in Schedule 1 of the EPAct doesn't apply.
- ✓ When applying s.440 ensure that there is an unreasonable interference or likely interference with an environmental value.
- ✓ Make sure you include the "reasonable steps the authorised person considers necessary to remedy the contravention, or avoid further contravention, of the prescribed provision" (s.363D(3)) in the direction notice.

### 3.4. Flow Chart

Refer to next page.



## 4. Cancelling or Suspending a Registration Certificate

### 4.1. Overview

A registration certificate is required to operate a Chapter 4 Activity (i.e. a devolved ERA).

A registration certificate can be cancelled or suspended if:

- ✓ The operator of an ERA has been given an annual notice and the notice has not been complied with.
- ✓ The registered operator is convicted of an environmental offence after the registration certificate was issued.
- ✓ The registration certificate was issued because of materially false or misleading information.

A registration certificate cannot be cancelled or suspended for:

- ✗ Non-compliance with development conditions.

### 4.2. Legislation

EPAct Section	Summary
s.73I	<p>The Administering Authority may cancel or suspend a registration certificate if:</p> <ul style="list-style-type: none"> <li>▪ the certificate was issued because of a materially false or misleading representation or declaration, made either orally or in writing;</li> <li>▪ the registered operator is, after the issue of the registration certificate, convicted of an environmental offence; or</li> <li>▪ the operator has been given an annual notice and the notice has not been complied with.</li> </ul>
s.73J	<p>If the Administering Authority proposes to cancel or suspend a registration certificate, the Administering Authority must give the registered operator a proposed action notice stating:</p> <ul style="list-style-type: none"> <li>▪ the proposed action the Administering Authority proposes taking;</li> <li>▪ the grounds for the proposed action;</li> <li>▪ the facts and circumstances that are the basis for the grounds;</li> <li>▪ if the proposed action is to suspend the registration certificate—the proposed suspension period (which may be fixed by reference to a stated event); and</li> <li>▪ that the operator may make, within a stated period (at least 20 business days after the operator is given the proposed action notice), written representations to show why the proposed action should not be taken.</li> </ul>
s.73K	<p>The Administering Authority must consider any written representations made within the period stated in the notice given under s.73J.</p>
s.73L	<p>After considering any written representations, if the Administering Authority still believes a ground exists to take the proposed action it may:</p> <ul style="list-style-type: none"> <li>▪ if the proposed action was to suspend the registration certificate for a stated period - suspend the registration certificate for no longer than the stated period;</li> <li>▪ if the proposed action was to cancel the registration certificate: <ul style="list-style-type: none"> <li>○ cancel the registration certificate; or</li> <li>○ suspend it for a fixed period.</li> </ul> </li> </ul> <p>The action the Administering Authority decides to take is called the 'proposed action decision'. If the Administering Authority at any time decides not to take the proposed action, it must promptly give the registered operator written notice of that decision.</p>

EPAct Section	Summary
s.73M	<p>Within 10 business days after making the decision to cancel or suspend a registration certificate, the Administering Authority must give the registered operator an Information Notice about the decision (i.e. notice of proposed action decision).</p> <p>The decision takes effect on the later of the following:</p> <ul style="list-style-type: none"> <li>▪ the day the notice is given to the registered operator; or</li> <li>▪ a later date stated in the notice.</li> </ul> <p>If the decision was to cancel or suspend the registration certificate because of the conviction of the operator for an offence, the cancellation or suspension does not take effect until:</p> <ul style="list-style-type: none"> <li>▪ the period to appeal against the conviction ends;</li> <li>▪ if the appeal is made against the conviction - the appeal is finally decided or is otherwise ended; and</li> <li>▪ has no effect if the conviction is quashed on appeal.</li> </ul>
s.73N	<p>When the decision to cancel or suspend a registration certificate has taken effect, the Administering Authority must, within 10 business days:</p> <ul style="list-style-type: none"> <li>▪ take the action; and</li> <li>▪ record the details of the action in the appropriate register.</li> </ul> <p>If the action is to suspend the registration certificate:</p> <ul style="list-style-type: none"> <li>▪ the register must state when the suspension period starts and ends; and</li> <li>▪ the suspension ends when the suspension period is stated to end.</li> </ul>
s.73T	<p>It is <u>not</u> an offence to operate an ERA without a registration certificate if one of the situations listed in s.73T apply.</p>
s.427	<p>It is an offence for a person to carry out a Chapter 4 Activity unless the person is a registered operator for the activity or is acting under a registration certificate for the activity.</p> <p>This section is subject to s.73T.</p>
Schedule 2, Part 2	<p>Original decisions for court appeals include the decision to cancel or suspend a registration under s.73L.</p>

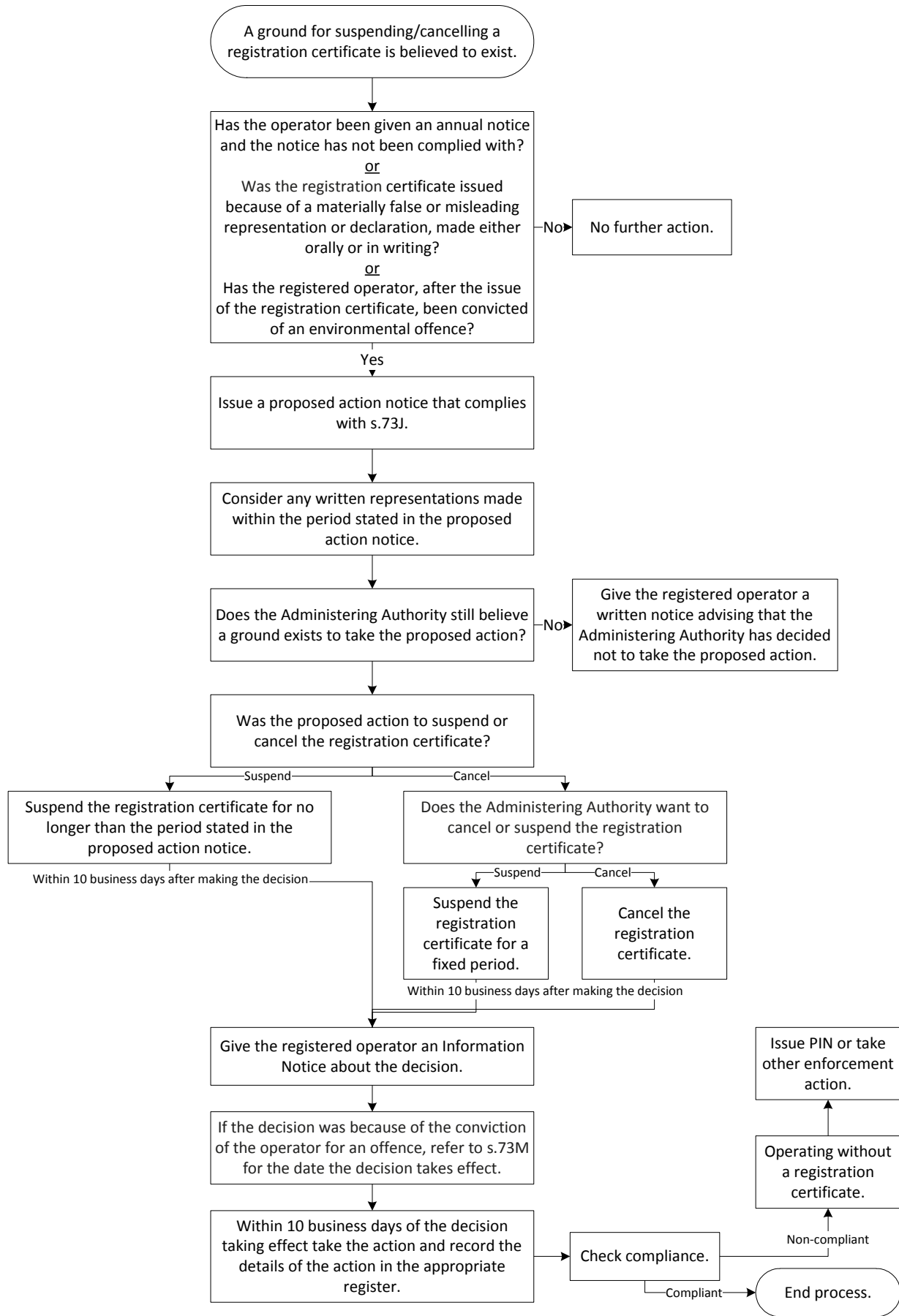
### 4.3. Tips

- ✓ Don't cancel a registration certificate for failing to comply with an annual notice if the site may be contaminated or development conditions haven't been complied with. Council can require a registered operator to comply with development conditions including those relating to cleaning up any pollution or removing infrastructure from a site. If there is no registered operator it may be difficult to resolve any outstanding issues.

Note: legal advice is pending regarding the best process to undertake for abandoned ERAs.

### 4.4. Flow Chart

Refer to next page.



## 5. Environmental Protection Orders

### 5.1. Overview

Environmental Protection Orders (EPOs) can be used:

- ✓ If a person/company has not complied with a requirement to:
  - Conduct or commission an environmental evaluation and submit it to the Administering Authority; or
  - Prepare a TEP and submit it to the Administering Authority.
- ✓ The Administering Authority is satisfied unlawful environmental harm is being, or is likely to be, caused based on the results of an environmental evaluation.
- ✓ To secure compliance with the general environmental duty (GED) which creates a 'catch-all' enforcement tool (i.e. an EPO can be issued when no other regulatory tool can be used).
- ✓ To secure compliance with an environmental protection policy (EPP) and/or a development conditions.
- ✓ To secure compliance with a Direction Notice.

EPOs should not be used to regulate:

- ✗ Less serious offences such as environmental nuisances. A Direction Notice is a more appropriate notice to use first.

### 5.2. Notes

EPOs are most commonly used when:

- the non-compliance is not trivial in nature;
- no other enforcement tool is able to be used to deal with a specific situation (e.g. to secure compliance with the general environmental duty);
- other enforcement tools have not had the desired effect; or
- when specific action is required to be taken to stop pollution continuing or to prevent environmental harm.

The Administering Authority is responsible for determining what action must/must not be taken and has to clearly specify this action in the EPO, along with the compliance timeframes. The Administering Authority must also monitor compliance with the EPO. Consequently, while EPOs are effective tools, they can be resource intensive.

### 5.3. Legislation

EPAct Section	Summary
s.358	<p>An Administering Authority may issue an Environmental Protection Order (EPO) to a person/company:</p> <ul style="list-style-type: none"> <li>▪ if the person does not comply with a requirement to conduct or commission an environmental evaluation and submit it to the authority;</li> <li>▪ if the person does not comply with a requirement to prepare a transitional environmental program and submit it to the authority;</li> <li>▪ if, because of an environmental evaluation, the authority is satisfied unlawful environmental harm is being, or is likely to be, caused by an activity carried out, or proposed to be carried out, by the person;</li> <li>▪ to secure compliance by the person with:</li> </ul>

EPAct Section	Summary
	<ul style="list-style-type: none"> <li>○ the general environmental duty;</li> <li>○ an environmental protection policy;</li> <li>○ a development condition of a development approval;</li> <li>○ a standard environmental condition of a code of environmental compliance for a chapter 4 activity; and</li> <li>○ a range of other activities regulated by DERM; or</li> <li>▪ if the person is, or has been, contravening any of the following provisions: <ul style="list-style-type: none"> <li>○ section 363E;</li> <li>○ section 440Q;</li> <li>○ section 440ZG; or</li> <li>○ a provision of chapter 8, part 3D, 3E or 3F.</li> </ul> </li> </ul>
s.359	Before deciding to issue an EPO the Administering Authority must consider the standard criteria as defined in Schedule 4 of the EPAct.
s.360	<p>An EPO:</p> <ul style="list-style-type: none"> <li>▪ must be in the form of a written notice;</li> <li>▪ must specify the person/company to whom it is issued;</li> <li>▪ may impose a reasonable requirement to prevent or minimise environmental harm;</li> <li>▪ must state the review or appeal details; and</li> <li>▪ must be served on the recipient.</li> </ul> <p>An EPO may:</p> <ul style="list-style-type: none"> <li>▪ require the recipient to not start, or stop, a stated activity indefinitely, for a stated period or until further notice from the Administering Authority;</li> <li>▪ require the recipient to carry out a stated activity only during stated times or subject to stated conditions; or</li> <li>▪ require the recipient to take stated action within a stated period.</li> </ul>
s.361	<p>It is an offence for the recipient of an EPO not to comply with the order.</p> <p>Maximum penalty: 2,000 penalty units or 2 years imprisonment (wilful contravention) or 1,665 penalty units.</p>
s.362	<p>If the recipient of an EPO proposes to dispose of the place or business that the EPO relates to, before agreeing to dispose of the place or business the recipient must give the buyer written notice of the existence of the EPO. Maximum penalty: 50 penalty units.</p> <p>If the recipient of the EPO does not give the buyer written notification of the EPO, the buyer may rescind the agreement subject to the requirements set out in s.362.</p> <p>Within 10 business days after agreeing to dispose of the place or business, the recipient must give written notice of the disposal to the Administering Authority. Maximum penalty: 50 penalty units.</p>
s.363	Within 10 business days after ceasing to carry out the activity that the EPO relates to, the recipient of the EPO must give written notice to the Administering Authority that they have ceased carrying out the activity. Maximum penalty: 50 penalty units.
s.493A	If an EPO authorises any of the following acts, they are not unlawful:

EPA Act Section	Summary
	<ul style="list-style-type: none"> <li>▪ an act that causes serious or material environmental harm or an environmental nuisance (refer to Chapter 8, Part 3 - Offences relating to environmental harm);</li> <li>▪ an act that contravenes a noise standard (refer to s.440Q - Offence of contravening a noise standard); or</li> <li>▪ a deposit of a contaminant, or release of stormwater run-off, mentioned in section 440ZG - Depositing prescribed water contaminants in waters and related matters.</li> </ul> <p>Complying with the general environmental duty (GED) while carrying out a lawful act is a defence.</p> <p>A reference in this section to an act includes an omission and a reference to doing an act includes making an omission.</p>
s.540	The Administering Authority must keep a number of registers, including a register of EPOs (refer to s.114 of the EReg for details).
Schedule 2, Part 2	<p>Original decisions</p> <p>The decision to issue an EPO under s.358 is an original decision.</p>

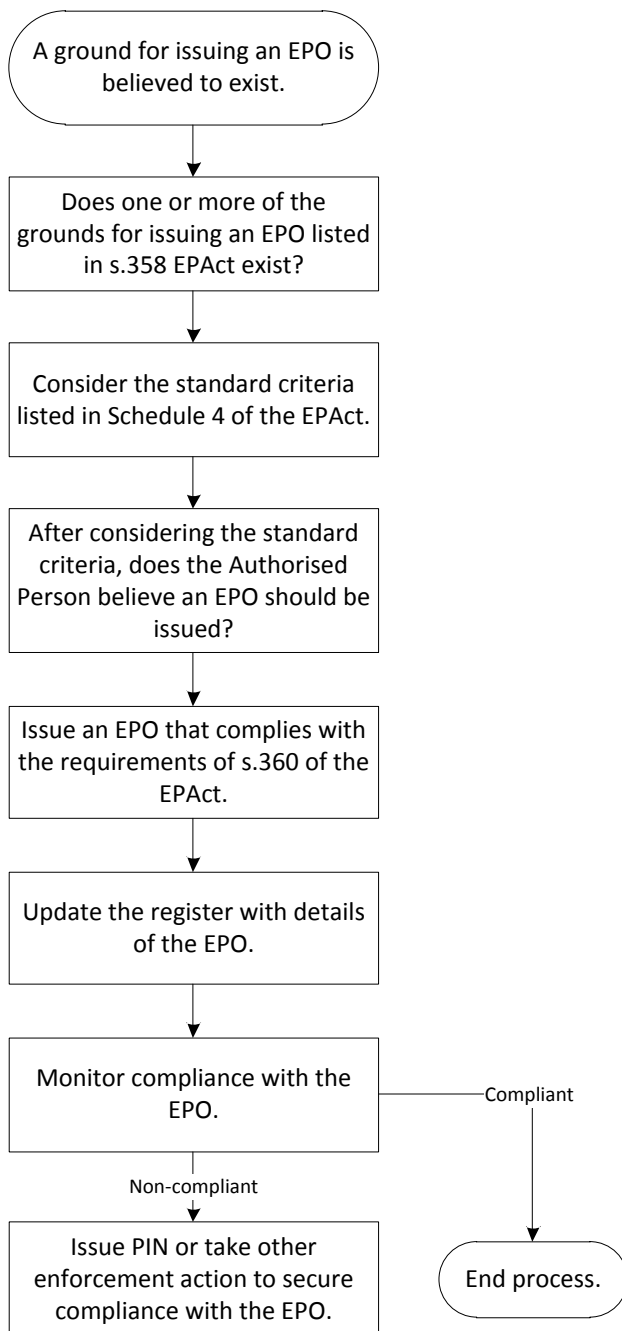
EReg Section	Summary
s.114	The Administering Authority must keep a register of EPOs that includes the information listed in s.114 of the EReg.

#### 5.4. Tips

- ✓ Include securing compliance with the general environmental duty (GED) in the grounds.
- ✓ Use an EPO if no other environmental protection regulatory tool can be used to address an issue.

#### 5.5. Flow Chart

Refer to next page.



## 6. Transitional Environmental Program

### 6.1. Overview

A Transitional Environmental Program (TEP) can be used:

- ✓ To work with a person/company to improve their environmental performance to a fully compliant standard.
- ✓ When a registered operator is not complying with their development conditions and a gradual improvement to achieve compliance is acceptable.

TEPs should not be used to regulate:

- ✗ Issues that require urgent action, e.g. immediate and significant harm to the environment is likely.

### 6.2. Notes

A Transitional Environmental Program (TEP) is known as an ‘environmental improvement program’ in some other jurisdictions, a title which better reflects the purpose of the program. A TEP is a specific program that documents how a person/company will reduce environmental harm or how they will transition to an improved environmental standard (e.g. transitioning from the current standard to being fully compliant).

The preparation of a draft TEP may be imposed as a mandatory requirement by an Administering Authority or a TEP can be submitted voluntarily.

A TEP is a positive compliance tool that enables the person/company to identify the best way for their business to work towards full compliance, rather than Council imposing requirements as occurs with other notices. This tool is often well received by industry and working relationships are often strengthened during the development, approval and implementation of a TEP as the Administering Authority is seen to be ‘working with’ the business. The business also has legal protection as long as they are fully compliant with the TEP. The process of planning and documenting the steps to be taken often makes the required transition less daunting to the people involved as they see each step as achievable and that each step will help them achieve full compliance.

The proactive structure and accountability associated with TEPs also means that registration holders are more likely to actually follow through with each step, rather than simply waiting for an officer from the Administering Authority to reinspect and possibly follow-up with some sort of enforcement action.

Note: in earlier versions of the EP Act, a TEP was called an Environmental Management Program (EMP). This term is no longer used as a similar term is used in planning legislation and caused confusion.

### 6.3. Legislation

EPAct Section	Summary
s.330	<p>A Transitional Environmental Program (TEP) is a program, that when complied with, achieves compliance with this Act for the activity to which it relates by:</p> <ul style="list-style-type: none"> <li>▪ reducing environmental harm caused by the activity;</li> <li>▪ detailing the transition of the activity to an environmental standard; and/or</li> <li>▪ detailing the transition of the activity to comply with: <ul style="list-style-type: none"> <li>○ a condition, including a standard environmental condition, of an environmental authority or code of environmental compliance; or</li> <li>○ a development condition.</li> </ul> </li> </ul>
s.331	A TEP must, for the activity that it relates to:

EPAct Section	Summary
	<ul style="list-style-type: none"> <li>▪ state the objectives to be achieved and maintained under the program for the activity;</li> <li>▪ state the particular actions required to achieve the objectives, and the day by which each action must be carried out, taking into account: <ul style="list-style-type: none"> <li>○ the best practice environmental management for the activity; and</li> <li>○ the risks of environmental harm being caused by the activity;</li> </ul> </li> <li>▪ state how any environmental harm that may be caused by the activity will be prevented or minimised, including any interim measures that are to be implemented;</li> <li>▪ if the activity is to transition to an environmental standard, state: <ul style="list-style-type: none"> <li>○ details of the standard; and</li> <li>○ how the activity is to transition to the standard before the program ends;</li> </ul> </li> <li>▪ if the activity is to transition to comply with a condition of an environmental authority or code of environmental compliance, or a development condition, state: <ul style="list-style-type: none"> <li>○ details of the condition and how the activity does not comply with it; and</li> <li>○ how compliance with the condition will be achieved before the program ends;</li> </ul> </li> <li>▪ state the period over which the program is to be carried out;</li> <li>▪ state appropriate performance indicators at intervals of not more than 6 months; and</li> <li>▪ provide for monitoring and reporting on compliance with the program.</li> </ul>
s.332	<p>An Administering Authority may require a person/company to prepare and submit to it for approval a draft TEP:</p> <ul style="list-style-type: none"> <li>▪ as a condition of an environmental authority (not devolved to local government); or</li> <li>▪ as a development condition of a development approval.</li> </ul> <p>The Administering Authority may also require a person/company to prepare and submit to it for approval a draft TEP if it is satisfied:</p> <ul style="list-style-type: none"> <li>▪ an activity carried out, or proposed to be carried out, by the person or authority is causing, or may cause, unlawful environmental harm; or</li> <li>▪ it is not practicable for the person or public authority to comply with an environmental protection policy or regulation on its commencement; or</li> <li>▪ that a condition of an environmental authority held by the person or public authority is, or has been, contravened; or</li> <li>▪ that a standard environmental condition of a code of environmental compliance for a chapter 4 activity is, or has been, contravened by the person or public authority; or</li> <li>▪ a development condition of a development approval is, or has been, contravened and the person or public authority is: <ul style="list-style-type: none"> <li>○ an owner of the land for which the approval is granted; or</li> <li>○ another person in whom the benefit of the approval vests.</li> </ul> </li> </ul> <p>A requirement to submit a draft TEP must be made by written notice given.</p> <p>The notice must state:</p> <ul style="list-style-type: none"> <li>▪ the grounds on which the requirement is made; and</li> <li>▪ the matters to be addressed by the program; and</li> <li>▪ the period over which the program is to be carried out; and</li> <li>▪ the day (at least a reasonable period after the notice is given) by which the program must be prepared and submitted to the administering authority; and</li> <li>▪ the review or appeal details.</li> </ul> <p>It is an offence not to comply with a notice requiring the submission of a draft TEP unless the person has a reasonable excuse. Maximum penalty: 100 penalty units.</p>

EPAct Section	Summary
s.333	<p>A person/company/authority may, at any time, submit for approval a draft TEP to the Administering Authority for an activity the person or public authority is carrying out or proposes to carry out.</p> <p>A person or public authority may submit a document if it contains or provides for the matters mentioned in section 331, even though the document was not originally prepared for this Act. The document is taken to be a draft TEP.</p>
s.334	<p>A person/company that submits a draft TEP to an Administering Authority for approval must pay the authority the fee prescribed by regulation.</p>
s.335	<p>If a draft TEP is proposed to be carried out for a period longer than 3 years, the person/company/authority must give public notice of the submission for approval of the draft TEP within 2 business days after the application date.</p> <p>s.335 details the requirements of the public notification (e.g. newspaper advertisement, placing a notice on the premises, etc.) and the requirements of the notice. Submissions can be made and the notice must state the day (at least 10 business days after the notice) nominated by the Administering Authority as the day by which submissions may be made.</p>
s.336	<p>The Administering Authority may invite the person/company/authority that has submitted a draft TEP and another person who has made a submission under section 335 about the program, to a conference to help it in deciding whether or not to approve the program.</p> <p>The Administering Authority must give written notice to all persons invited to attend the conference of when and where the conference is to be held.</p> <p>However, if the Administering Authority considers it is impracticable to give notice to all persons invited to attend the conference, the Authority may give notice of the conference by publishing a notice in the newspapers the Authority decides.</p> <p>The Administering Authority must endeavour to appoint an independent person to mediate the conference.</p>
s.337	<p>The Administering Authority must consider the draft TEP and decide whether to approve the submitted TEP within 20 business days of the application date or the date stated in the public notice as the day by which submissions may be made.</p> <p>If public notice is required to be given of the submission of the draft TEP, the Administering Authority must be satisfied public notice has been properly given before making a decision.</p>
s.338	<p>In deciding whether to approve or refuse to approve the draft TEP or the conditions (if any) of the approval, the Administering Authority:</p> <ul style="list-style-type: none"> <li>▪ must comply with any relevant regulatory requirement; and</li> <li>▪ subject to regulatory requirements, must also consider: <ul style="list-style-type: none"> <li>○ the standard criteria;</li> <li>○ additional information given in relation to the draft program;</li> <li>○ the views expressed at a conference held in relation to the draft program.</li> </ul> </li> </ul> <p>If the draft TEP is prepared because of a requirement of a development condition of a development approval, the Authority may approve the draft TEP only if it is not inconsistent with other conditions of the approval.</p>

EPAct Section	Summary
s.339	<p>The Administering Authority may:</p> <ul style="list-style-type: none"> <li>▪ approve a draft TEP as submitted;</li> <li>▪ approve a draft TEP as amended at the request, or with the agreement, of the Administering Authority; or</li> <li>▪ refuse to approve a draft TEP.</li> </ul> <p>The Administering Authority may impose on an approval of a draft TEP:</p> <ul style="list-style-type: none"> <li>▪ any conditions the Authority must impose under a regulatory requirement; and</li> <li>▪ any other conditions the Administering Authority considers appropriate.</li> </ul> <p>If the draft TEP is approved, the approval remains in force for the period stated in the notice of the approval given under s. 340.</p>
s.340	<p>The administering authority must, within 8 business days after making a decision under s. 339, give the person/company/authority that submitted the TEP a written notice about the decision.</p> <p>If the Administering Authority approves the program, the notice must:</p> <ul style="list-style-type: none"> <li>▪ identify the documents forming the approved TEP, including any amendments;</li> <li>▪ state any conditions imposed on the approval by the Administering Authority; and</li> <li>▪ state the day the approval ends.</li> </ul> <p>If the Administering Authority refuses to approve the TEP or approves the program with conditions, the notice must be an information notice.</p>
s.341	<p>An approved TEP consists of the following:</p> <ul style="list-style-type: none"> <li>▪ the draft of the program submitted, as amended at the request, or with the agreement, of the Administering Authority;</li> <li>▪ any conditions imposed on the program by the Administering Authority.</li> </ul>
s.342	<p>If a person or public authority is required to give public notice of the submission of a TEP and the Administering Authority is not satisfied public notice has been properly given, the Administering Authority may consider and decide whether to approve the draft TEP if it is satisfied there has been substantial compliance with this Act.</p>
s.343	<p>If the Administering Authority fails to decide whether to approve or refuse a TEP within the time it is required to make a decision, the failure is taken to be a decision by the Authority to refuse to approve the program at the end of the time.</p>
s.344	<p>If the holder of a TEP submits for approval an amendment of the TEP that extends the period over which the program is to be carried out to longer than 5 years, s.335(2) and (3) applies to the submission as if the submission were for the approval of a draft TEP.</p> <p>The Administering Authority may approve the amendment only if it is reasonably satisfied it will not result in increased environmental harm being caused by the carrying out of the activity under the amended approval than the environmental harm that would be caused by carrying out the activity if the approval were not granted.</p> <p>Without limiting the matters to be considered in deciding the application, the Administering Authority must have regard to:</p> <ul style="list-style-type: none"> <li>▪ the period under the original approval;</li> </ul>

EPAct Section	Summary
	<ul style="list-style-type: none"> <li>▪ the period that remains under the original approval;</li> <li>▪ any change to the period under the original approval; and</li> <li>▪ the nature of the risk of environmental harm being caused by the activity.</li> </ul>
s.345	<p>The holder of an approval of a TEP must, within 22 business days after each anniversary of the day of approval of the program, give the Administering Authority an annual return in the approved form. Maximum penalty: 100 penalty units.</p>
s.346	<p>If an approved TEP authorises the holder to do, or not to do, something under the program, the holder, or a person acting under the approval may do, or not do, the thing under the program despite anything in:</p> <ul style="list-style-type: none"> <li>▪ a regulation;</li> <li>▪ an EPP;</li> <li>▪ a development condition of a development approval;</li> <li>▪ a standard environmental condition of a code of environmental compliance for a chapter 4 activity; or</li> <li>▪ other documents regulated by DERM.</li> </ul> <p>Without limiting the above, the doing, or not doing, of the thing under the program is not a contravention of a regulation, EPP, development condition, etc.</p>
s.347	<p>If the holder of an approval of a TEP proposes to dispose of the place or business that the TEP relates to, they have to comply with the requirements of s.347.</p>
s.348	<p>Within 10 business days after ceasing to carry out the activity to which a TEP relates, the holder of the approval for the program must give written notice of the ceasing the activity to the Administering Authority. Maximum penalty: 50 penalty units.</p>
s.349	<p>The holder of an approval for a TEP must achieve full compliance with this Act for the matters dealt with by the program at the end of the period over which the program is carried out.</p>
s.350	<p>A person may give the Administering Authority a notice (the <i>program notice</i>) about an act or omission (the <i>relevant event</i>) that:</p> <ul style="list-style-type: none"> <li>▪ has caused or threatened environmental harm in the carrying out of an activity by the person; and</li> <li>▪ is lawful apart from the EPAct.</li> </ul> <p>The program notice must:</p> <ul style="list-style-type: none"> <li>▪ be in the approved form;</li> <li>▪ give full details of the relevant event;</li> <li>▪ declare the person's intention to prepare, and submit to the Authority a TEP for the activity; and</li> <li>▪ state the other information prescribed by regulation.</li> </ul> <p>The person may submit with the notice any report, or the results of any analysis, monitoring program, test or examination, carried out by or for the person for the relevant event.</p>
s.351	<p>If the relevant event stated in the program notice constitutes an offence against this Act (the <i>original offence</i>), the giving of the program notice, the program notice and any documents submitted with it are not admissible in evidence against the person in a prosecution for the</p>

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	<p>original offence.</p> <p>However, the submission of a program notice does not prevent other evidence obtained because of the giving of the program notice, the program notice or any documents submitted with it being admitted in any legal proceeding against the person.</p>
s.352	<p>Within 10 business days after receiving the program notice, the Administering Authority must give written notice to the person of:</p> <ul style="list-style-type: none"> <li>▪ its receiving the notice; and</li> <li>▪ the day by which a draft transitional environmental program dealing with the activity must be submitted to it for approval (must not be more than 3 months after the Administering Authority receives the program notice).</li> </ul> <p>This section has effect subject to section 355.</p>
s.353	<p>On receipt of the program notice by the Administering Authority, the person giving the notice must not be prosecuted for a continuation of the original offence that happens after the authority receives the notice.</p> <p>However, the above only has effect until whichever of the following happens first:</p> <ul style="list-style-type: none"> <li>▪ the person receives from the administering authority an approval of a TEP for the activity;</li> <li>▪ the person receives from the administering authority a notice of refusal to approve a draft TEP for the activity;</li> <li>▪ if the person does not submit a draft TEP for the activity to the administering authority by the day stated in the notice given to the person under section 352(1) - the end of the stated day.</li> </ul> <p>Refer to s.353 for more information regarding the effect of the submission of a program notice.</p>
s.354	<p>If the holder of an approval for a TEP for an activity under a program notice does not comply with the program, section 353(1) ceases to apply to the person.</p>
s.355	<p>The Administering Authority may apply to Court for an order setting aside immunity from prosecution for the original offence.</p>
s.356	<p>The Court is to decide an application made under s.355 subject to the provisions of s.356.</p>
s.357	<p>The Court has the power to make an order pending the decision on an application made under s.355.</p>
s.364	<p>An Administering Authority may require a financial assurance subject to s.364, including by a condition of an approval of a TEP.</p>
s.365	<p>Before approving a TEP subject to the condition that financial assurance be given, the Administering Authority must give the applicant for the approval or person who submitted the program or plan a written notice under this section.</p> <p>The notice must:</p> <ul style="list-style-type: none"> <li>▪ state the grounds for the condition;</li> <li>▪ state the form and extent of the financial assurance;</li> </ul>

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	<ul style="list-style-type: none"> <li>▪ invite the applicant or person to make representations to the administering authority to show why the certificate should not be subject to the condition; and</li> <li>▪ state the period (at least 22 business days after the notice is given to the applicant or person) within which the representations may be made.</li> </ul> <p>The representations must be made in writing.</p> <p>Within 20 business days after the end of the period stated in the notice, the administering authority must:</p> <ul style="list-style-type: none"> <li>▪ consider the representations properly made by the applicant or person; and</li> <li>▪ if the administering authority gives the approval subject to the condition that the holder of the approval give financial assurance - the authority must give written notice to the holder giving reasons for imposing the condition.</li> </ul>
s.366	<p>An application for an amendment or discharge of financial assurance can be submitted.</p> <p>Refer to s.366 for details and the correct process.</p>
s.367	<p>Refer to s.367 for details of how an Administering Authority can make claims on financial assurances.</p>
s.432	<p>It is an offence to contravene a requirement of a TEP.</p> <p>The holder of an approval of a TEP, or a person acting under a TEP, must not wilfully contravene a requirement of the program. Maximum penalty: 1665 penalty units or 2 years imprisonment.</p> <p>The holder of an approval of a TEP, or a person acting under a TEP, must not contravene a requirement of the program. Maximum penalty: 835 penalty units.</p>
s.432A	<p>A person must not, without reasonable excuse, contravene a condition of an approval of a TEP. Maximum penalty: 835 penalty units.</p>
s.433	<p>The holder of an approval of a TEP must ensure everyone acting under the program complies with the program. Maximum penalty: the penalty under section 432(1) or (2) for the contravention of the program.</p> <p>Evidence that the other person has been convicted of an offence against section 432 while acting under the program is evidence that the holder committed the offence of failing to ensure the other person complies with the program.</p> <p>However, it is a defence for the holder to prove:</p> <ul style="list-style-type: none"> <li>▪ the holder issued appropriate instructions and used all reasonable precautions to ensure compliance with the TEP;</li> <li>▪ the offence was committed without the holder's knowledge; and</li> <li>▪ the holder could not by the exercise of reasonable diligence have stopped the commission of the offence.</li> </ul>
s.458	<p>An authorised person may apply to a magistrate for an order to enter land to carry out work on the land to:</p> <ul style="list-style-type: none"> <li>▪ prevent or minimise environmental harm or rehabilitate or restore the land because of an activity carried out under a transitional environmental program or other approvals/documents; or</li> </ul>

EPAct Section	Summary
	<ul style="list-style-type: none"> <li>▪ to secure compliance with a TEP or other approvals/documents;</li> </ul> <p>The Administering Authority must give written notice of the application to:</p> <ul style="list-style-type: none"> <li>▪ the owner of the land;</li> <li>▪ if the owner is not the occupier of the land - the occupier; and</li> <li>▪ if applicable, the TEP approval holder, registered operator, etc.</li> </ul> <p>The application for the order must be sworn and state the grounds on which it is made.</p> <p>The magistrate may refuse to consider the application until the person gives the magistrate all information the magistrate requires about the application in the way the magistrate requires.</p> <p>The magistrate may make an order under this section only if the magistrate is satisfied the entry sought is reasonable and necessary to carry out the work.</p> <p>The order must state:</p> <ul style="list-style-type: none"> <li>▪ that an authorised person may, with necessary and reasonable help and force, enter the land and conduct the actions, investigation or work to remediate the land;</li> <li>▪ the hours of the day when the entry may be made; and</li> <li>▪ the day when the order ends.</li> </ul> <p>The magistrate must record the reasons for making the order.</p>
s.493A	<p>An act that causes serious or material environmental harm or an environmental nuisance (refer to Chapter 8, Part 3 - Offences relating to environmental harm), contravenes a noise standard (refer to s.440Q - Offence of contravening a noise standard), or a deposit of a contaminant, or release of stormwater run-off, mentioned in s.440ZG (refer to s.440ZG - Depositing prescribed water contaminants in waters and related matters) is unlawful unless it is authorised under a TEP, EPP, EPO, development condition, a standard environmental condition of a code of environmental compliance for a chapter 4 activity, or an emergency direction.</p>
s.520	<p>A 'dissatisfied person' for an original or review decision includes:</p> <ul style="list-style-type: none"> <li>▪ if the decision is about a TEP - the holder of an approval for the program or person or public authority that is required to or submits the program;</li> <li>▪ a submitter for an application is also a <i>dissatisfied person</i> if the decision is about the submission of a TEP to which section 335 applies.</li> </ul>
s.540	<p>The Administering Authority must keep a number of registers, including a register of TEPs.</p> <p>Refer to s.113 EPRReg for more information.</p>
s.551	<p>Definitions for Chapter 12, Part 2 include:</p> <ul style="list-style-type: none"> <li>▪ <i>applicant</i>, for a TEP submission, means the person or public authority that made the submission;</li> <li>▪ <i>deciding</i>, for an application or submission, includes the following: <ul style="list-style-type: none"> <li>○ a step required for considering or deciding the application or submission;</li> <li>○ imposing a condition;</li> <li>○ etc.</li> </ul> </li> <li>▪ <i>TEP submission</i> means a submission for approval of, or an approval of an amendment to, a transitional environmental program.</li> </ul>

EPAct Section	Summary
s.552	<p>The <i>application date</i> for a TEP submission is the day that is 10 business days after the day it is made to the Administering Authority.</p> <p>However, if, within 8 business days after the day the application or submission is made, the Authority requires additional information relating to the application or submission, the <i>application date</i> is the day the Authority states as the application date in a written notice given by it to the person.</p> <p>For a TEP submission if, within 8 business days after the day the submission is made, the authority:</p> <ul style="list-style-type: none"> <li>▪ advises the person who made the submission that the TEP or proposed amended TEP to which the submission relates does not contain or provide for a matter mentioned in section 331; and</li> <li>▪ requires the person to: <ul style="list-style-type: none"> <li>○ amend the submission so the TEP or proposed amended TEP complies with section 331; and</li> <li>○ resubmit the submission to the Authority;</li> </ul> </li> </ul> <p>the <i>application date</i> is:</p> <ul style="list-style-type: none"> <li>▪ the day that is 10 business days after the day the amended TEP submission is submitted to the authority; or</li> <li>▪ if, within 8 business days after the day the amended TEP submission is submitted to the authority, the authority requires additional information relating to the amended TEP submission - the day the authority states as the application date in a written notice given by it to the person.</li> </ul> <p>The application date stated in a notice given to the person under this section must not be a day earlier than 2 business days after the person's receipt of the notice.</p>
s.553	Refer to s.553 for information regarding electronic applications and submissions.
s.554	Refer to s.554 for information regarding electronic notices about applications and submissions.
s.555	If the Administering Authority is deciding, or is required to decide a TEP submission, the Authority may extend the required period to make the decision if, before the extension starts, it gives the applicant and any submitters for the application an information notice about the decision to extend.
s.556	<p>If the Administering Authority is deciding, or is required to decide, an application or TEP submission, it may require:</p> <ul style="list-style-type: none"> <li>▪ the applicant to give the Authority stated additional information about the application or TEP submission; or</li> <li>▪ any information given in the application or TEP submission, or any additional information required above, to be verified by statutory declaration.</li> </ul> <p>The authority must, within 10 business days after deciding to make a requirement for additional information give the applicant an information notice about the decision.</p> <p>The Authority may seek relevant advice, comment or information from another person and the request may be by public notice.</p> <p>Asking for and receiving, or giving, a document or advice, comment or information under this</p>

EPA Act Section	Summary
	<p>section does not:</p> <ul style="list-style-type: none"> <li>▪ replace any public notice or other step required to decide the application or TEP submission; or</li> <li>▪ extend or reduce the period required for deciding the application or TEP submission or taking a step in deciding the application or submission (but this does not limit s.555).</li> </ul>
s.557	<p>If an entity is deciding, or is required to decide, an application or TEP submission under this Act and a provision of this Act requires the entity, in making the decision, to consider stated criteria or matters, the stated criteria or matters do not limit the criteria or matters the entity may consider in making the decision; i.e. the decision criteria is not exhaustive.</p>
s.558	<p>If a provision of this Act requires the administering authority to publish a decision or document, the publication may be made by placing a link to a record or register of the decision or to the document on the Authority's website on the internet.</p> <p>However, if a regulation requires the decision or document to be published in another way, it must be published in that way.</p> <p>The decision or document may also be published in any other way decided by the chief executive.</p> <p>In this section <i>publish</i> includes make available for public inspection, including, for example, insert or record particulars of in an appropriate register.</p>
Schedule 2	<p>The following are original decisions:</p> <ul style="list-style-type: none"> <li>▪ a requirement for draft TEP in accordance with s.332(1) or (2);</li> <li>▪ a decision on whether to approve, or to approve an amendment of an approval of, a draft TEP in accordance with ss.337(1) or 344;</li> <li>▪ the imposition of conditions on a TEP approval in accordance with s.339(3);</li> <li>▪ the refusal to approve draft TEP in accordance with s.340; and</li> <li>▪ the removal of immunity from prosecution for a person under a refusal to approve a draft TEP as detailed in s.353(3)(a).</li> </ul>

EReg Section	Summary
s.113	<p>The Administering Authority must keep a register of TEP that includes the information listed in s.113 of the EReg.</p>
s.140	<p>The Administering Authority can charge fees for TEPs.</p> <p>The fee for an Administering Authority's consideration of a draft TEP, or an amendment of an approval for a TEP, is the amount that:</p> <ul style="list-style-type: none"> <li>▪ the authority considers to be reasonable; and</li> <li>▪ is not more than the reasonable cost of deciding the application for approval of the program or the amendment of the approval.</li> </ul> <p>The holder of an approval of a TEP must pay the Administering Authority a fee for its</p>

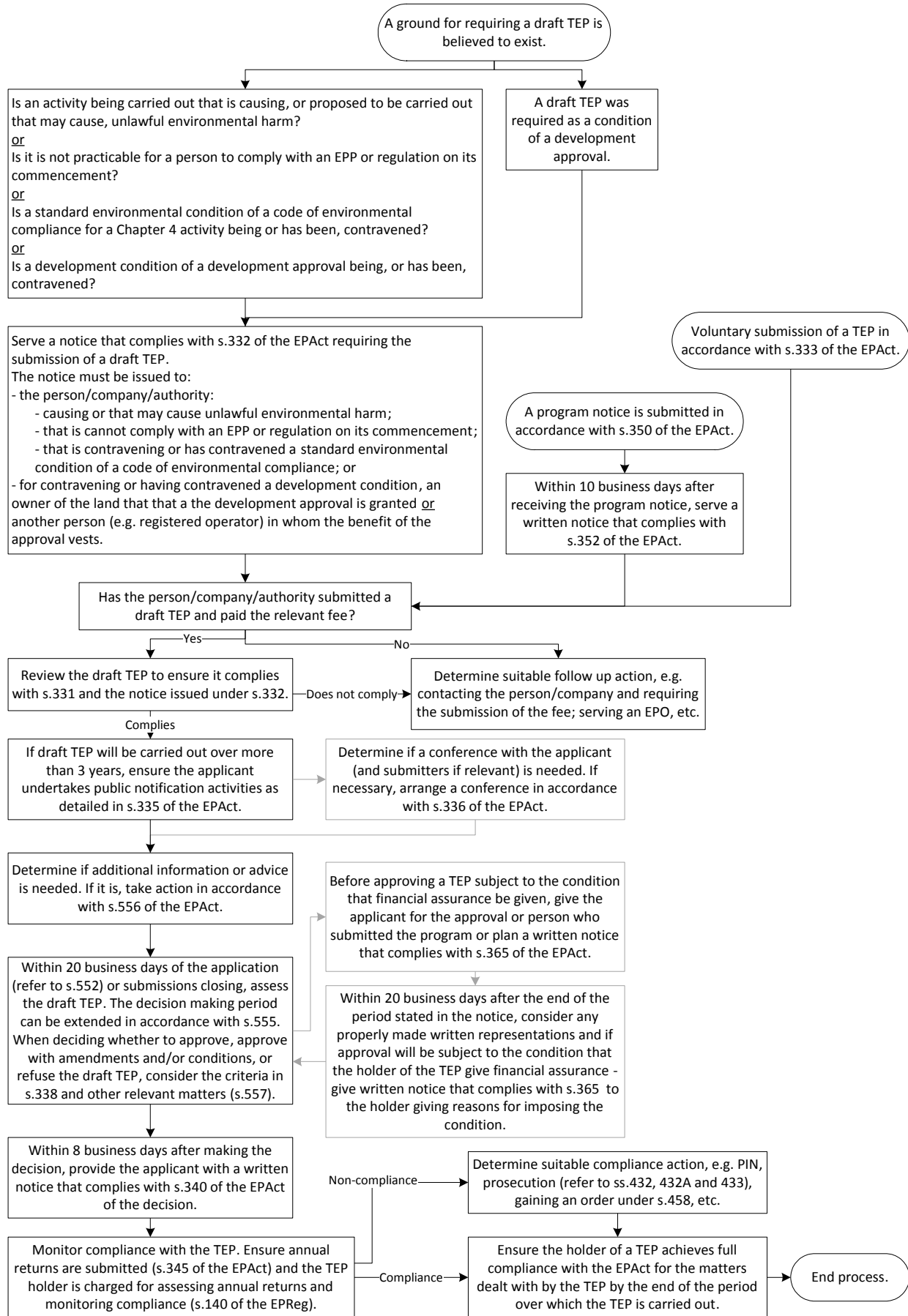
assessment of the holder's annual returns and monitoring compliance with the program.

The fee is the amount that:

- the authority considers to be reasonable; and
- is not more than the reasonable cost of the assessment and monitoring.

#### 6.4. Flow Chart

Refer to the next page.



## 6.5. Tips

- ✓ Use lesser known parts of the TEP process to your advantage, e.g. use s.556 to require more information or seek advice and s.555 to extend the decision making period if you know you will need more time to assess the draft TEP.
- ✓ Promote the benefits of a TEP to industry, e.g. provides legal protection while they improve to achieve full compliance with the Act. This legal protection has benefits in relation to insurance as a condition of insurance policies is compliance with all federal, state and local government laws.

## 7. Environmental Evaluations

### 7.1. Overview

Environmental Evaluations can be used to:

- ✓ Determine the source, cause or extent of environmental harm being caused or likely to be caused by an activity or event.
- ✓ Determine the need for a TEP for the activity.

Environmental Evaluations should not be used when:

- ✗ Urgent action is needed, e.g. immediate and significant harm to the environment is likely.

### 7.2. Notes

There are two types of environmental evaluations:

- Environmental audit (used when development condition/s have been contravened); and
- Environmental investigation (used when an activity/event has caused environmental harm or is likely to cause environmental harm).

Note: an environmental audit for devolved ERAs is different to an environmental audit for mining activities detailed in Chapter 5, Part 11 of the EPAct.

### 7.3. Legislation

EPAct Section	Summary
s.321	<p>An environmental evaluation is an evaluation of an activity or event to decide:</p> <ul style="list-style-type: none"> <li>▪ the source, cause or extent of environmental harm being caused, or the extent of environmental harm likely to be caused, by the activity or event; and</li> <li>▪ the need for a transitional environmental program for the activity or event.</li> </ul>
s.322	<p>The Administering Authority may require a person to conduct or commission an audit (an <i>environmental audit</i>) of the matter and submit a report on the audit if it is satisfied on reasonable grounds that:</p> <ul style="list-style-type: none"> <li>▪ the holder of, or a person acting under, an environmental authority (not devolved to local government) is or has been, contravening a condition of the authority;</li> <li>▪ a person is, or has been, contravening a development condition of a development approval (e.g. Chapter 4 activities devolved to local government);</li> <li>▪ a person is, or has been, contravening a regulation, an EPP or a TEP; or</li> <li>▪ a person is, or has been, contravening any of the following provisions: <ul style="list-style-type: none"> <li>○ section 363E (Offence not to comply with Direction Notice);</li> <li>○ section 440Q (Offence of contravening a noise standard);</li> <li>○ section 440ZG (Depositing prescribed water contaminants in waters and related matters);</li> <li>○ a provision of Chapter 8, Part 3D, 3E or 3F (not devolved to local government);</li> </ul> </li> </ul> <p>The Authority must, within 8 business days after deciding to make the requirement, give the person an information notice about the decision.</p> <p>The person must comply with the requirement. Maximum penalty: 100 penalty units.</p>

EPAct Section	Summary
s.323	<p>The Authority may require the person who has carried out, is carrying out or is proposing to carry out the activity to conduct or commission an investigation (an <i>environmental investigation</i>) and submit a report on the investigation to it if the Administering Authority is satisfied on reasonable grounds:</p> <ul style="list-style-type: none"> <li>▪ an event has happened causing environmental harm while an activity was being carried out; or</li> <li>▪ an activity or proposed activity is causing, or is likely to cause environmental harm.</li> </ul> <p>The authority must, within 8 business days after deciding to make the requirement, give the person an information notice about the decision.</p> <p>The person must comply with the requirement. Maximum penalty: 100 penalty units.</p> <p>This section does <u>not</u> apply if the Administering Authority requires an environmental audit for the event or activity.</p> <p>In this section <i>activity</i> includes rehabilitation or remediation work.</p>
s.324	<p>A requirement to conduct or commission an environmental evaluation must be made by written notice.</p> <p>The notice must:</p> <ul style="list-style-type: none"> <li>▪ state the grounds on which the requirement is made;</li> <li>▪ outline the facts and circumstances forming the basis for the grounds;</li> <li>▪ state the relevant matters for the evaluation; and</li> <li>▪ state the day (at least a reasonable period after the notice is given) by which an environmental report must be submitted to the administering authority.</li> </ul>
s.325	<p>An environmental report submitted to the administering authority must be accompanied by a statutory declaration by the recipient and the person who carried out the environmental evaluation.</p> <p>The recipient's declaration must be made:</p> <ul style="list-style-type: none"> <li>▪ if the recipient is an individual - by the recipient; or</li> <li>▪ if the recipient is a corporation - by an executive officer of the corporation.</li> </ul> <p>The recipient's declaration must state that the recipient:</p> <ul style="list-style-type: none"> <li>▪ has not knowingly given any false or misleading information to the person who carried out the environmental evaluation; and</li> <li>▪ has given all relevant information to the person who carried out the environmental evaluation.</li> </ul> <p>A declaration by the person who carried out the environmental evaluation must:</p> <ul style="list-style-type: none"> <li>▪ state his or her qualifications and experience relevant to the evaluation; and</li> <li>▪ state that he or she has not knowingly included any false, misleading or incomplete information in the report; and</li> <li>▪ state that he or she has not knowingly failed to reveal any relevant information or document to the administering authority; and</li> <li>▪ certify that: <ul style="list-style-type: none"> <li>○ the report addresses the relevant matters for the evaluation and is factually correct; and</li> </ul> </li> </ul>

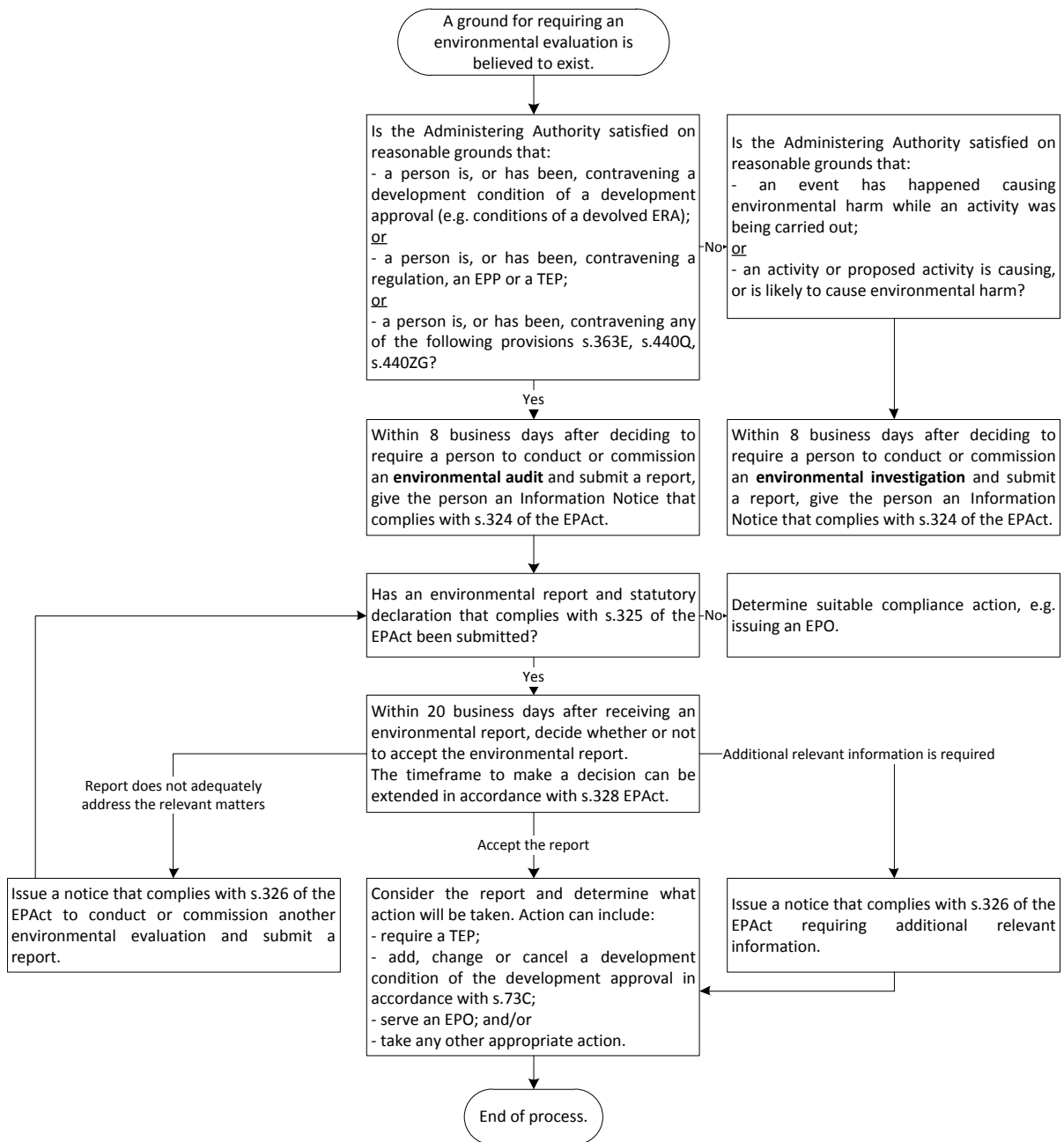
EPA Act Section	Summary
	<ul style="list-style-type: none"> <li>○ the opinions expressed in it are honestly and reasonably held.</li> </ul>
s.326	<p>The administering authority must decide whether or not to accept the environmental report within 20 business days after receiving it.</p> <p>If the administering authority accepts the report, it may do 1 or more of the following:</p> <ul style="list-style-type: none"> <li>▪ require the recipient to prepare and submit a transitional environmental program to it;</li> <li>▪ if the recipient is the holder of an environmental authority (not devolved to local government) - amend the conditions of the authority;</li> <li>▪ if the recipient is a registered operator for a development approval - under section 73C, add, change or cancel a development condition of the development approval;</li> <li>▪ serve an EPO on the recipient;</li> <li>▪ take any other action it considers appropriate.</li> </ul> <p>If the administering authority is satisfied the report does not adequately address the relevant matters for the environmental evaluation to which the report relates, it may require by written notice the recipient to conduct or commission another environmental evaluation and submit a report on the evaluation to it.</p> <p>If the administering authority is satisfied additional relevant information is required, it may require by written notice the recipient to give it the information.</p> <p>The notice must:</p> <ul style="list-style-type: none"> <li>▪ state the grounds on which the requirement is made;</li> <li>▪ outline the facts and circumstances forming the basis for the grounds;</li> <li>▪ state the relevant matters for the evaluation or the information required;</li> <li>▪ state the day (at least a reasonable period after the notice is given) by which the report or information must be given to the administering authority; and</li> <li>▪ state the review or appeal details.</li> </ul>
s.327	<p>The recipient must meet the following costs:</p> <ul style="list-style-type: none"> <li>▪ the costs of conducting or commissioning an environmental evaluation and report; and</li> <li>▪ the costs of giving additional relevant information about the report required by the administering authority.</li> </ul>
s.328	<p>The administering authority may decide to extend the time it is required to decide whether or not to accept an environmental report if:</p> <ul style="list-style-type: none"> <li>▪ it has required additional relevant information about the report; or</li> <li>▪ it is satisfied there are special circumstances for extending the time.</li> </ul> <p>The authority must, before the extension starts, give the applicant an information notice about the decision to make the extension.</p>
s.329	<p>If the administering authority fails to decide whether or not to accept an environmental report within the time it is required to make a decision on the report, the failure is taken to be a decision by the authority to refuse to accept the report at the end of the time.</p>
s.358	<p>The administering authority may issue an EPO to a person for a variety of reasons including if the person does not comply with a requirement to conduct or commission an environmental evaluation and submit it to the Authority.</p>

EPA Act Section	Summary
s.520	<p>A 'dissatisfied person' for an original or review decision includes:</p> <ul style="list-style-type: none"> <li>▪ if the decision is about an environmental evaluation - the recipient.</li> </ul>
s.540	<p>The Administering Authority must keep a number of registers, including a register of environmental reports.</p> <p>Refer to s.111 of the EPRegs for more information.</p>
Schedule 2, Part 2	<p>Original decisions for court appeals includes:</p> <ul style="list-style-type: none"> <li>▪ requirement for environmental audit (s.322(1));</li> <li>▪ requirement for environmental investigation (s.323(1));</li> <li>▪ requirement for additional information about an environmental evaluation s.326(4); and</li> <li>▪ extension of time for decision on submission of environmental report (s.328(1)).</li> </ul>
Schedule 4	<p>Dictionary</p> <p><i>environmental evaluation</i> means an environmental audit or investigation.</p> <p><i>environmental report</i> means a report on an environmental evaluation.</p> <p><i>recipient</i> for an environmental evaluation means the person on whom the requirement for the evaluation is made, etc.</p> <p><i>relevant matters</i>, for an environmental evaluation, means the matters to be addressed by the evaluation.</p>

EPReg Section	Summary
s.111	<p>The Administering Authority must keep a register of environmental reports that includes the information listed in s.111 of the EPReg.</p>

## 7.4. Flow Chart

Refer to the next page.



### 7.5. Tips

- ✓ Ensure you require the person to conduct or commission the correct type of environmental evaluation.
- ✓ Ensure you require a comprehensive study that includes all aspects of the activity that you believe are relevant.
- ✓ Remember to attach the declaration forms that the person/company has to submit.
- ✓ Be realistic about timeframes, especially if a consultant will need to be engaged.

## 8. Enforcement and Restraint Orders

### 8.1. Overview

**Enforcement Orders** can be used to deal with:

- ✓ Non-compliance with development conditions of a development approval that require prompt action to prevent significant harm to the environment (e.g. non-compliance with conditions by a devolved ERA).

**Restraint Orders** can be used to deal with:

- ✓ Serious issues that require prompt action to prevent significant harm to the environment and that do not relate to development offences.

Restraint and Enforcement Orders should not be used to regulate:

- ✗ Less serious issues.
- ✗ Issues that can be dealt with using a less powerful tool.

Restraint orders cannot be used to deal with:

- ✗ Development offences, e.g. non-compliance with development conditions.

### 8.2. Notes

Enforcement Orders and Restraint Orders are types of court orders and are therefore a particularly powerful tool with significant punishments for non-compliance.

### 8.3. Legislation for Restraint Orders

EPAct Section	Summary
s.504	This part does not apply to a development offence; i.e. a restraint order cannot be used to secure compliance with development conditions.
s.505	<p>A proceeding may be brought in the Court for an order to remedy or restrain an offence against this Act, or a threatened or anticipated offence against this Act, by:</p> <ul style="list-style-type: none"> <li>▪ the Minister;</li> <li>▪ the administering authority;</li> <li>▪ someone whose interests are affected by the subject matter of the proceeding; or</li> <li>▪ someone else with the leave of the Court (even though the person does not have a proprietary, material, financial or special interest in the subject matter of the proceeding).</li> </ul> <p>If the Court is satisfied:</p> <ul style="list-style-type: none"> <li>▪ an offence against this Act has been committed (whether or not it has been prosecuted);</li> <li>▪ an offence against this Act will be committed unless restrained;</li> </ul> <p>the Court may make the orders it considers appropriate to remedy or restrain the offence.</p> <p>An order:</p> <ul style="list-style-type: none"> <li>▪ may direct the defendant: <ul style="list-style-type: none"> <li>○ to stop an activity that is or will be a contravention of this Act; or</li> <li>○ to do anything required to comply with, or to cease a contravention of, this</li> </ul> </li> </ul>

EPA Act Section	Summary
	<p>Act; and</p> <ul style="list-style-type: none"> <li>▪ may be in the terms the Court considers appropriate to secure compliance with this Act;</li> <li>▪ must specify the time by which the order is to be complied with; and</li> <li>▪ may include an order for the defendant to pay the costs reasonably incurred by the administering authority in monitoring the defendant's actions in relation to the offence.</li> </ul> <p>The Court's power to make an order to stop an activity may be exercised whether or not:</p> <ul style="list-style-type: none"> <li>▪ it appears to the Court the person against whom the order is made intends to engage, or to continue to engage, in the activity;</li> <li>▪ the person has previously engaged in an activity of that kind; or</li> <li>▪ there is danger of substantial damage to the environment if the person engages, or continues to engage, in the activity.</li> </ul> <p>The Court's power to make an order to do anything may be exercised whether or not:</p> <ul style="list-style-type: none"> <li>▪ it appears to the Court the person against whom the order is made intends to fail, or to continue to fail, to do the thing;</li> <li>▪ the person has previously failed to do a thing of that kind; or</li> <li>▪ there is danger of substantial damage to the environment if the person fails, or continues to fail, to do the thing.</li> </ul> <p>Without limiting the powers of the Court, the Court may make an order:</p> <ul style="list-style-type: none"> <li>▪ restraining the use of plant or equipment or a place;</li> <li>▪ requiring the demolition or removal of plant or equipment, a structure or another thing; or</li> <li>▪ requiring the rehabilitation or restoration of the environment.</li> </ul> <p>The Court must order a plaintiff to pay costs if the Court is satisfied the proceeding was brought for obstruction or delay.</p> <p>The Court's power under this section is in addition to its other powers.</p> <p>A person who contravenes an order commits an offence against this Act. Maximum penalty: 3000 penalty units or 2 years imprisonment.</p>
s.506	<p>The Court can make a pending determination if a proceeding has been brought by a person in the Court under section 505 and the Court has not determined the proceeding.</p> <p>On the person's application, the Court may make an order of a kind mentioned in section 505 pending determination of the proceeding if it is satisfied it would be proper to make the order.</p> <p>The Court's power to make an order to stop an activity may be exercised whether or not:</p> <ul style="list-style-type: none"> <li>▪ it appears to the Court the person against whom the order is made intends to engage, or to continue to engage, in the activity;</li> <li>▪ the person has previously engaged in an activity of that kind; or</li> <li>▪ there is an imminent danger of substantial damage to the environment if the person engages, or continues to engage, in the activity.</li> </ul> <p>The Court's power to make an order to do anything may be exercised whether or not:</p> <ul style="list-style-type: none"> <li>▪ it appears to the Court the person against whom the order is made intends to fail, or to continue to fail, to do the thing;</li> </ul>

EPAct Section	Summary
	<ul style="list-style-type: none"> <li>▪ the person has previously failed to do a thing of that kind; or</li> <li>▪ there is an imminent danger of substantial damage to the environment if the person fails, or continues to fail, to do the thing.</li> </ul> <p>The Court's power under this section is in addition to its other powers.</p> <p>A person who contravenes an order commits an offence against this Act. Maximum penalty: 3000 penalty units or 2 years imprisonment.</p>

#### 8.4. Legislation for Enforcement Orders

EPAct Section	Summary
s.507	<p>A person may bring a proceeding in the Court:</p> <ul style="list-style-type: none"> <li>▪ for an order to remedy or restrain the commission of a development offence (an <i>enforcement order</i>);</li> <li>▪ if the person has brought a proceeding for an order to remedy or restrain the commission of a development offence and the Court has not decided the proceeding - for an order under section 509 (an <i>interim enforcement order</i>); or</li> <li>▪ to cancel or change an enforcement order or interim enforcement order.</li> </ul> <p>The person may bring a proceeding for an order to remedy or restrain the commission of a development offence whether or not any right of the person has been, or may be, infringed by, or because of, the commission of the offence.</p>
s.508	<p>The proceeding may be brought by the person on their own behalf or in a representative capacity. However, if the proceeding is brought in a representative capacity, 1 of the following consents must be obtained:</p> <ul style="list-style-type: none"> <li>▪ if the proceeding is brought on behalf of a body of persons or a corporation - the members of the governing body;</li> <li>▪ if the proceeding is brought on behalf of an individual - the individual.</li> </ul>
s.509	<p>In accordance with s.509 of the EP Act, the Court may make an interim enforcement order if the Court is satisfied it would be appropriate to make that order, pending the decision of the proceeding for an enforcement order. The Court may make the interim enforcement order subject to conditions, including a condition requiring Council to give an undertaking to pay costs resulting from damage suffered by the person/company the order is served on if the subsequent proceeding for the enforcement order is unsuccessful.</p>
s.510	<p>In accordance with s.510 of the EP Act the Court may make an enforcement order if it is satisfied a development offence has been committed or will be committed unless restrained. If the Court is satisfied the offence has been committed, the Court may make an enforcement order regardless of whether or not there has been a prosecution for the offence.</p>
s.511	<p>An enforcement order or an interim enforcement order may direct the respondent:</p> <ul style="list-style-type: none"> <li>▪ to stop an activity that constitutes, or will constitute, a development offence;</li> <li>▪ not to start an activity that will constitute a development offence; or</li> </ul>

EPAct Section	Summary
	<ul style="list-style-type: none"> <li>▪ to do anything required to stop committing a development offence.</li> </ul> <p>Without limiting the Court's powers, the Court may make an order:</p> <ul style="list-style-type: none"> <li>▪ restraining the use of plant or equipment or a place;</li> <li>▪ requiring the repairing, demolition or removal of plant or equipment, a structure or other thing; or</li> <li>▪ requiring the rehabilitation or restoration of the environment.</li> </ul> <p>An enforcement order or interim enforcement order:</p> <ul style="list-style-type: none"> <li>▪ may be in terms the Court considers appropriate to secure compliance with this Act; and</li> <li>▪ must state the time by which the order is to be complied with.</li> </ul> <p>A person who contravenes an enforcement order or interim enforcement commits an offence against this Act. Maximum penalty: 3000 penalty units or 2 years imprisonment.</p>
s.512	<p>The Court's power to make an enforcement order or interim enforcement order to stop, or not to start, an activity may be exercised whether or not:</p> <ul style="list-style-type: none"> <li>▪ it appears to the Court the person against whom the order is made intends to engage, or to continue to engage, in the activity;</li> <li>▪ the person has previously engaged in an activity of the kind; or</li> <li>▪ there is danger of substantial damage to the environment if the person engages, or continues to engage, in the activity.</li> </ul> <p>The Court's power to make an enforcement order or interim enforcement order to do anything may be exercised whether or not:</p> <ul style="list-style-type: none"> <li>▪ it appears to the Court the person against whom the order is made intends to fail, or to continue to fail, to do the thing;</li> <li>▪ the person has previously failed to do a thing of the kind; or</li> <li>▪ there is danger of substantial damage to the environment if the person fails, or continues to fail, to do the thing.</li> </ul> <p>The Court may cancel or change an enforcement order or interim enforcement order.</p> <p>The Court's power under this section is in addition to its other powers.</p>
s.513	<p>If the proceeding is brought in a representative capacity, the person on whose behalf the proceeding is brought may contribute to, or pay, the legal costs and expenses incurred by the person bringing the proceeding.</p>

## 8.5. Tips

- ✓ Make sure you know which court to attend.
- ✓ Make sure you have all the evidence and documentation you need.
- ✓ Generally a local government would apply for an enforcement order related to a development offence (e.g. non-compliance with development conditions). Other activities that are serious enough to seek a court order for will generally not be devolved to local government, therefore it is unlikely a local government would ever apply for a restraint order.

## 9. Notice Requiring Relevant Information

### 9.1. Overview

A notice requiring relevant information (issued under s.451 EPAct) can be used to:

- ✓ Obtain information that is relevant to the administration and enforcement of the Act (e.g. a copy of underground tank integrity test results).

A notice requiring relevant information (issued under s.451 EPAct) cannot be used to:

- ✗ Gain information that may lead to self-incrimination.
- ✗ Go on a 'fishing' expedition looking for anything that may discredit an organisation.

### 9.2. Legislation

EPAct Section	Summary
s.451	<p>Administering authority may require relevant information:</p> <p>The administering authority may give a notice under this section to a person requiring the person to give it information relevant to the administration or enforcement of this Act.</p> <p>The notice may only be given to a person the authority suspects on reasonable grounds has knowledge of a matter, or has possession or control of a document dealing with a matter, for which the information is required.</p> <p>The notice must:</p> <ul style="list-style-type: none"> <li>▪ be in the approved form; and</li> <li>▪ state the person to whom it is issued; and</li> <li>▪ state the information required; and</li> <li>▪ state the time within which the information is to be given to the authority; and</li> <li>▪ state why the information is required; and</li> <li>▪ state the review or appeal details; and</li> <li>▪ be given to the person.</li> </ul>
s.470	<p>If a person is given a notice under section 451, the person must comply with the notice unless the person has a reasonable excuse for not complying with it. Maximum penalty: 50 penalty units.</p> <p>It is a reasonable excuse for the individual to fail to comply with the notice if complying with it might tend to incriminate the individual.</p> <p>The person does not commit an offence against this section if the information sought by the administering authority is not in fact relevant to the administration or enforcement of this Act.</p>
Schedule 2	<p>Original decisions - Part 2 Original decisions for court appeals:</p> <p>A requirement for information relevant to the administration or enforcement of this Act issued under s.451(1) is an original decision.</p>

### 9.3. Tips

- ✓ Ensure the required information is specific and relevant.

## 10. Other Tools/Options

### 10.1. Environmental Impact Statements

Environmental Impact Statements (EIS) seek to identify the potential impact/consequence of activities before they commence. An EIS will generally include a description of proposed works, impacts, safeguards, alternatives, etc.

The EIS process contained in Chapter 3 of the EPAct and Chapter 2 of the EPReg applies to the assessment of non-devolved activities (e.g. level 1 mining activity).

The environmental impacts of some other activities and developments are assessed under the *Sustainable Planning Act 2009* (SPA), the Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999* and other legislation for State development projects.

### 10.2. Clean-Up Notices

Clean-up notices are not devolved to local government.

A clean-up notice may be issued if DERM reasonably believes an incident involving the contamination of the environment has caused or is likely to cause serious or material environmental harm (e.g. if the clean-up costs are likely to exceed \$5000). A clean-up notice can require a person/company to:

- prevent or minimise contamination;
- rehabilitate or restore the environment because of the 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; or
- keep the administering authority informed about the incident or the actions taken under the notice, including by giving to the administering authority stated reports, plans, drawings or other documents.

Refer to ss.363F-363L EP Act for more information regarding clean-up notices.

### 10.3. Cost-Recovery Notices

Cost-recovery notices are not devolved to local government.

A cost-recovery notice may be issued if DERM incurs expenses associated with cleaning up a contamination incident after issuing a clean-up notice or if DERM incurs expenses dealing with an incident using their emergency powers.

Refer to ss.363M-363O EP Act for information regarding cost-recovery notices.

Note: As serious and material environmental harm are not devolved to local government, it is unlikely that a local government would need to ask DERM to issue a clean-up or cost-recovery notice.

### 10.4. Financial Assurances

A financial assurance is similar to a bond whereby the operator of an activity has to provide the administering authority financial assurance to ensure any rehabilitation or restoration work required after the activity can be paid for. This prevents the situation whereby a company can, for example, undertake mining activities for several years, then become insolvent and leave significant environmental issues that the State government would then have to resolve using public funds.

The administering authority may require a financial assurance by:

- a condition of an environmental authority (mining activities) (not devolved);
- approval of a TEP;
- approval of a site management plan (not devolved);
- a development condition for a Chapter 4 Activity prescribed under a regulation (i.e. a Chapter 4 Activity for which there is an aggregate environmental score prescribed).

The financial assurance provides security for:

- compliance with the environmental authority (not devolved);
- compliance with the TEP;
- compliance with the site management plan (not devolved);
- compliance with the development approval and any development conditions; and
- costs or expenses, or likely costs or expenses, mentioned in section 367.

However, the administering authority may only impose a condition for a development approval for a Chapter 4 Activity requiring a financial assurance to be given if it is satisfied the condition is justified having regard to:

- the degree of risk of environmental harm being caused, or that might reasonably be expected to be caused, by the activity carried out, or to be carried out, under the approval;
- the likelihood of action being required to rehabilitate or restore and protect the environment because of environmental harm being caused by the activity; and
- the environmental record of the registered operator.

Refer to s.364 of the EPA Act for more information regarding financial assurances.

An administering authority can also add, change or cancel a development condition regarding a financial assurance because a particular person/company has applied to be the registered operator of the activity (refer to s.73C EP Act).

Note: DERM regulate activities most likely to require a financial assurance.

## 10.5. Incentive Fees

Many Councils offer discounted fees for ERA operators with a history of compliance. This can act as a strong incentive for businesses to comply.

Each Council needs to adopt its own policy regarding incentive fees and adopt the fees in accordance with the *Local Government Act 2009*.

## 10.6. Waste Management Works Approvals

Businesses performing 'waste management works' require an approval from the local government under s.369A of the EPA Act unless:

- the work is performed by or for the local government;
- the person holds, or is acting under a development approval;
- the person is acting under a code of environmental compliance; or
- the works are an environmentally relevant activity other than waste transport.

### Tips

- ✓ From 1 January 2009 regulated waste transporters regulated by DERM have been operating under a code of environmental compliance and therefore do not need a s.369A Approval.
- ✓ It is likely that s.369A Approvals will be removed from future environmental protection legislation. Therefore Councils that use s.369A Approvals to regulate specific issues (e.g. noise associated with early collections) should consider implementing alternatives (e.g. a local law).

## 10.7. Penalty Infringement Notices

Penalty Infringement Notices (PINs) can be issued for offences listed in the *State Penalties Enforcement Regulation 2000*. Schedule 2 of the Regulation lists the offences under the Environmental Protection legislation that PINs can be issued for and Schedule 5 lists relevant SPA offences.

The following table lists relevant offences that local government may issue PINs for.

Section	Offence	PIN fine (penalty units)	
		Individual	Corporation
s.361(2) EPAct	Offence not to comply with an Environmental Protection Order	5	20
s.363E EPAct	Offence not to comply with a Direction Notice	10	20
s.369 EPAct	Unlawful performance of waste management works	25	40
s.369C EPAct	Offence of contravening an approval to perform waste management works	25	40
s.427(1) EPAct	Carrying out a Chapter 4 activity without a registration certificate	5	20
s.432(2) EPAct	Contravention of a requirement of a Transitional Environmental Program	5	20
s.435(2) EPAct	Offence to contravene a development condition	5	20
s.440D(1) EPAct	Depositing litter:		
	If the offence involves depositing 200L or more of litter	16	64
	If the offence involves dangerous littering	4	16
	If the offence involves depositing more than 20L but less than 200L of litter	4	16
	If the offence involves depositing litter from a vehicle	4	16
	Otherwise	3	12
s.440Q EPAct	Offence of contravening a noise standard	10	20
s.440ZG EPAct	Depositing prescribed water contaminants in waters and related matters	10	20

Section	Offence	PIN fine (penalty units)	
		Individual	Corporation
s.444A EPAAct	Offence not to notify Chapter 4 Activity has stopped	5	20
s.12(1) WMRegs	Unlawful disposal of waste at a waste facility	2	2
s.13 WMRegs	Burning waste at a waste facility	2	2
s.14 WMRegs	Use of waste facility without consent	1	1
s.15(2) WMRegs	Waste transporter to comply with directions and give information	1	1
s.67(2) WMRegs	Prohibition on use of non-complying waste equipment (applies to specific ERAs and persons performing waste management works under s.369 of the EPAAct)	4	4
s.68 WMRegs	Failing to ensure waste is loaded in a way that prevents its release from the vehicle to the environment (i.e. unsecure load)	2	2
s.578(1) SPA	Carrying out assessable development without an effective development permit for the development	10	50

The DERM enforcement guidelines (2010, pp.9-10) notes that PINs are generally appropriate in the following circumstances:

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

Once a PIN has been issued and paid, a person cannot be prosecuted for the same offence. So it is important that a PIN is not issued for a serious offence. DERM also notes that PINs should not be issued:

- 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 DERM to do specified work within a time limit and the limit has not expired;
- where multiple breaches have occurred, unless all are minor;
- where the offence took place under a proposal approved by DERM/Administering Authority.

## 10.8. Prosecution

The decision to prosecute may be influenced by a number of factors including a history of non-compliance, the seriousness of the offence, the wilful nature involved, etc.

For guidance regarding factors that should be considered when deciding whether or not to prosecute, refer to the DERM enforcement guidelines and the Brisbane City Council prosecution policy.

## 10.9. Tools in the *Environmental Protection (Waste Management) Regulation 2000*

The following tools are available in the *Environmental Protection (Waste Management) Regulation 2000*.

EP(WM) Reg Section	Summary
s.10H	<p><b>Local government may give notice about removal of general waste</b></p> <p>This section applies to a local government that has arranged for the removal of general waste produced at a premises.</p> <p>The local government may give the occupier of the premises a notice stating:</p> <ul style="list-style-type: none"> <li>▪ the days on which the waste is to be collected;</li> <li>▪ where the waste container is to be placed for collection of the waste (the <b><i>designated location</i></b>); and</li> <li>▪ the time by which the waste container is to be placed in the designated location for collection of the waste.</li> </ul>
s.10M	<p><b>Cesspits etc. not to be constructed or used at particular premises</b></p> <p>This section applies to the owner or occupier of:</p> <ul style="list-style-type: none"> <li>▪ serviced sanitary premises; or</li> <li>▪ premises in which a sanitary convenience is connected, or is required under a law of the State to be connected, to a sewer or septic tank.</li> </ul> <p>The owner or occupier of the premises must not:</p> <ul style="list-style-type: none"> <li>▪ construct or use a cesspit or cesspool at the premises; or</li> <li>▪ allow a cesspit or cesspool to be constructed or used at the premises.</li> </ul> <p>Maximum penalty: 20 penalty units.</p> <p>If the owner or occupier contravenes subsection (2), the local government may give the owner or occupier a written notice requiring the owner or occupier to fill the cesspit or cesspool with earth and remove any structure on or near the cesspit or cesspool within the period stated in the notice.</p>
s.10P	<p><b>Authorised person may give notice to comply</b></p> <p>If an authorised person believes on reasonable grounds that a person (an <i>affected person</i>) has contravened this part (i.e. Part 2A – waste management in local government areas), the authorised person may give the affected person a written notice.</p> <p>The notice must state—</p>

EP(WM) Reg Section	Summary
	<ul style="list-style-type: none"><li>▪ the act or omission comprising the contravention;</li><li>▪ the action the affected person must take to rectify the alleged contravention; and</li><li>▪ the day by which the affected person must take the action (i.e. at least 28 days after the notice is given).</li></ul> <p>The person must comply with the notice unless the person has a reasonable excuse for not complying with it. Maximum penalty: 10 penalty units.</p> <p>If a person is given a notice in relation to an alleged contravention of this part, the person can be prosecuted for the contravention only if the person does not comply with the notice.</p> <p>However, this section does not require an authorised person to give a person a notice before the person may be prosecuted for a contravention of this part.</p>

### 10.10. Executive Officer Liability

Section 493 of the EPAct places the responsibility for compliance with the environmental protection legislation on a corporation's executive officers. This is known as executive officer liability and a number of executives have received significant penalties including prison terms for serious breaches of the EPAct and the associated subordinate legislation. This requirement attempts to prevent executive officers of corporations, who have ultimate control of that corporation and its operations, from avoiding their responsibilities.

## 11. Sustainable Planning Act Tools

Chapter 4 Activities (ERAs) must operate under a relevant development approval (DA). The DA relates to the activity and contains all relevant conditions, e.g. requiring the prevention of pollution, etc. The operator of an ERA is also required to obtain a registration certificate.

	Development Approval	Registration Certificate
Relevant legislation	<i>Sustainable Planning Act 2009</i>	<i>Environmental Protection Act 1994</i>
Primary consideration	Is it appropriate to conduct this ERA on this land?	Is it appropriate for this person/company to conduct this ERA on this land?
Conditions relate to	Conditions restrict the activity, control pollution, etc.	n/a
Change of ownership	DA conditions remain with the parcel of land unless the activity changes.	The new operators are required to apply for a new registration certificate.

If an ERA is operating without a development approval a regulatory tool (e.g. Show Cause Notice, Enforcement Order) can be used under the *Sustainable Planning Act 2009* (SPA).

SPA Section	Summary
s.588	<p>Giving show cause notice:</p> <p>This section applies if the assessing authority reasonably believes a person has committed, or is committing, a development offence.</p> <p><u>Before</u> giving an enforcement notice about the development offence, the assessing authority must give the person a notice (a <i>show cause notice</i>) inviting the person to show cause why the enforcement notice should not be given.</p> <p>However, the assessing authority need not give a show cause notice if it reasonably considers it is not appropriate in the circumstances to give the notice; e.g. an assessing authority might not give a show cause notice if it considers urgent action is necessary to address a danger to public health or safety or giving the notice would be likely to adversely affect the effectiveness of the enforcement notice.</p>
s.589	<p>General requirements of show cause notice:</p> <p>A show cause notice must:</p> <ul style="list-style-type: none"> <li>▪ be in writing;</li> <li>▪ outline the facts and circumstances forming the basis for the assessing authority's belief that an enforcement notice should be given to the person;</li> <li>▪ state that representations may be made about the show cause notice;</li> <li>▪ state how the representations may be made;</li> <li>▪ state where the representations may be made or sent;</li> </ul>

SPA Section	Summary
	<ul style="list-style-type: none"> <li>▪ state:               <ul style="list-style-type: none"> <li>○ a day and time for making the representations; or</li> <li>○ a period within which the representations must be made.</li> </ul> </li> </ul> <p>The day or period stated in the notice must be, or must end, at least 20 business days after the notice is given.</p>
s.590	<p>Giving enforcement notice:</p> <p>If an assessing authority reasonably believes a person has committed, or is committing, a development offence, the authority may give a notice (an <i>enforcement notice</i>) to the person requiring the person to do either or both of the following:</p> <ul style="list-style-type: none"> <li>▪ to refrain from committing the offence;</li> <li>▪ to remedy the commission of the offence in the way stated in the notice.</li> </ul> <p><i>Note:</i> A person who receives an enforcement notice may appeal against the notice under section 473 or 533 (Appeals against enforcement notices).</p> <p>If the assessing authority giving the notice reasonably believes the person has committed, or is committing, the development offence in a local government area and the assessing authority is not the local government, the assessing authority must also give the local government a copy of the notice.</p> <p>An enforcement notice requiring any person carrying out development to stop carrying out the development may be given by fixing the notice to the premises, or the building or structure on the premises, in a way that a person entering the premises would normally see the notice.</p> <p>If, in relation to a development offence involving premises, the person who committed the offence is not the owner of the premises, the assessing authority may also give an enforcement notice to the owner requiring the owner to remedy the commission of the offence in the way stated in the notice.</p> <p>Refer to s.590 for more information.</p>
s.591	<p>Restriction on giving enforcement notice:</p> <p>This section applies if the assessing authority has given a person a show cause notice about a development offence.</p> <p>The assessing authority may give the person an enforcement notice about the development offence only if the assessing authority:</p> <ul style="list-style-type: none"> <li>▪ has considered all representations made by the person about the show cause notice within the period stated in the notice; and</li> <li>▪ still believes it is appropriate to give the enforcement notice.</li> </ul>
s.592	<p>Specific requirements of enforcement notice:</p> <p>Without limiting specific requirements an enforcement notice may impose, a notice may require a person to do any of the following:</p> <ul style="list-style-type: none"> <li>▪ to stop carrying out development;</li> <li>▪ to stop a stated use of a premises;</li> <li>▪ to demolish or remove a work;</li> <li>▪ to restore, as far as practicable, premises to the condition the premises were in immediately before development was started;</li> <li>▪ to do, or not to do, another act to ensure development complies with a development</li> </ul>

SPA Section	Summary
	<p>approval, a compliance permit, a code or a master plan;</p> <ul style="list-style-type: none"> <li>▪ to apply for a development permit or make a master plan application;</li> <li>▪ to make a request under section 401 for compliance assessment of development, a document or work requiring compliance assessment;</li> <li>▪ if the assessing authority reasonably believes a work is dangerous: <ul style="list-style-type: none"> <li>○ to repair or rectify the work; or</li> <li>○ to secure the work, whether by a system of supports or in another way; or</li> <li>○ to fence off the work to protect persons;</li> <li>○ to prepare and submit to the assessing authority a compliance program demonstrating how compliance with the enforcement notice will be achieved.</li> </ul> </li> </ul> <p>However, a person may be required to demolish or remove a work only if the assessing authority reasonably believes it is not possible and practical to take steps:</p> <ul style="list-style-type: none"> <li>▪ to make the work comply with a development approval, a compliance permit, a code or a master plan; or</li> <li>▪ if the work is dangerous - to remove the danger.</li> </ul>
s.593	<p>General requirements of enforcement notices:</p> <p>An enforcement notice must:</p> <ul style="list-style-type: none"> <li>▪ be in writing; and</li> <li>▪ describe the nature of the alleged offence; and</li> <li>▪ inform the person to whom the notice is given of the person's right to appeal against the giving of the notice.</li> </ul> <p>If an enforcement notice requires a person to do an act involving the carrying out of work, it also must give details of the work involved.</p> <p>If an enforcement notice requires a person to refrain from doing an act, it also must state either:</p> <ul style="list-style-type: none"> <li>▪ a period for which the requirement applies; or</li> <li>▪ that the requirement applies until further notice.</li> </ul> <p>If an enforcement notice requires a person to do an act, it also must state a period within which the act is required to be done.</p> <p>If an enforcement notice requires a person to do more than 1 act, it may state different periods within which the acts are required to be done.</p>
s.594	<p>Offences relating to enforcement notices</p> <p>A person who is given an enforcement notice must comply with the notice. Maximum penalty: 1665 penalty units.</p> <p>A person must not damage, deface or remove an enforcement notice given under section 590(8). Maximum penalty: 1665 penalty units.</p>
s.595	<p>Processing application or request required by enforcement notice or show cause notice:</p> <p>If a person applies for a preliminary approval or development permit or makes a master plan application or a request for compliance assessment of development under section 401 as required by an enforcement notice or in response to a show cause notice, the person:</p> <ul style="list-style-type: none"> <li>▪ must not discontinue the application or request, unless the person has a reasonable excuse;</li> </ul>

SPA Section	Summary
	<ul style="list-style-type: none"> <li>▪ must take all necessary and reasonable steps to enable the application or request to be decided as quickly as possible, unless the person discontinues the application or request with a reasonable excuse; and</li> <li>▪ if the person appeals against the decision on the application or request—must take all necessary and reasonable steps to enable the appeal to be decided by the court as quickly as possible, unless the person has a reasonable excuse.</li> </ul> <p>Maximum penalty: 1665 penalty units.</p>
s.596	<p>Assessing authority may take action:</p> <p>If a person to whom an enforcement notice is given contravenes the notice by not doing something, the assessing authority, if it is not a local government, may do the thing.</p> <p><i>Note—</i></p> <p>If the assessing authority is a local government, it has similar powers and may recover its costs under the Local Government Act, section 142.</p> <p>Any reasonable costs or expenses incurred by an assessing authority in doing anything under subsection (1) may be recovered by the authority as a debt owing to it by the person to whom the notice was given.</p>

### 11.1. Tips

- ✓ It is unlikely an ERA operating without a development approval will need to be issued an enforcement order first. The usual sequence will be to issue a Show Cause Notice, and then if the person fails to respond an Enforcement Order should be issued.
- ✓ Ensure the operator of an ERA understands that they need a development approval and registration certificate.

### 11.2. Amending Development Conditions

Development conditions can only be added, changed or cancelled in specific circumstances.

- The Administering Authority considers it necessary or desirable because of:
  - A contravention of the EPA Act or an environmental offence committed by the registered operator;
  - The development approval was issued because of a materially false or misleading representation or declaration;
  - A change in the way in which, or the place where, contaminants are, or are likely to be, released into the environment;
  - The approval of an EPP or the approval of the amendment of an EPP;
  - An environmental report; and
  - The approval or approved amendment of a TEP.
- The Administering Authority considers it necessary or desirable to change a condition about financial assurance, monitoring or reporting because a person has applied to be the registered operator for the development approval.
- The registered operator for the development approval has agreed in writing to the addition, change or cancellation of the development condition/s.

The process detailed in s.378 of SPA must be followed when adding, changing or cancelling a development condition under s.73C of the EPAAct.

SPA Section	Summary
s.345	Conditions must be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or be reasonably required in relation to the development or use of premises as a consequence of the development.
s.346	<p>A condition may:</p> <ul style="list-style-type: none"> <li>▪ place a limit on how long a lawful use may continue or works may remain in place;</li> <li>▪ state a development may not start until other development permits or compliance permits, for development on the same premises, have been given or other development on the same premises, including development not covered by the development application, has been substantially started or completed;</li> <li>▪ require compliance with an infrastructure agreement relating to the land;</li> <li>▪ require a document or work to be subject to compliance assessment;</li> <li>▪ require development, or an aspect of development, to be completed within a particular time; or</li> <li>▪ require the payment of security under an agreement under section 348 of SPA.</li> </ul>
s.347	<p>Conditions that <u>can not</u> be imposed.</p> <p>A condition must not:</p> <ul style="list-style-type: none"> <li>▪ be inconsistent with a condition of an earlier development approval or compliance permit still in effect for the development;</li> <li>▪ state that works required to be carried out for a development must be undertaken by an entity other than the applicant; and</li> <li>▪ other situations that do not apply to devolved ERAs.</li> </ul>
s.367	<p>What is a <i>permissible change</i> for a development approval?</p> <p>A <i>permissible change</i>, for a development approval, is a change to the approval that would not:</p> <ul style="list-style-type: none"> <li>▪ result in a substantially different development;</li> <li>▪ if the application for the approval were remade including the change: <ul style="list-style-type: none"> <li>▪ require referral to additional concurrence agencies;</li> <li>▪ for an approval for assessable development that previously did not require impact assessment—require impact assessment; or (c) for an approval for assessable development that previously required impact assessment—be likely, in the responsible entity’s opinion, to cause a person to make a properly made submission objecting to the proposed change, if the circumstances allowed; or</li> <li>▪ cause development to which the approval relates to include any prohibited development.</li> </ul> </li> </ul>
s.368	368 Notice about proposed change before request is made.

SPA Section	Summary
s.369	Request to change development approval.
s.370	Notice of request.
s.371	When owner's consent required for request.
s.372	Copy of request to be given to particular entities.
s.373	Particular entities to assess request for change.
s.374	Responsible entity to assess request.
s.375	Responsible entity to decide request.
s.376	Notice of decision.
s.377	When decision has effect.
s.378	When condition may be changed or cancelled by assessment manager or concurrence agency.
s.467	Appeals about changing or cancelling conditions imposed by assessment manager or concurrence agency.
s.522	Appeal by applicant—condition of particular development approval.
s.531	Appeals about changing or cancelling conditions imposed by assessment manager or concurrence agency.
s.812	Particular condition of development approvals.

EPAct / EReg Section	Summary
s.73B EPAct	<p>Conditions of development approval that may and must be imposed:</p> <p>Subject to s.345 of SPA, the Administering Authority may impose the conditions on the development approval it considers are necessary or desirable.</p> <p>The conditions must include any condition the authority is required to impose under a regulatory requirement.</p> <p>Without limiting the above, the conditions may:</p> <ul style="list-style-type: none"> <li>▪ require all or any of the following: <ul style="list-style-type: none"> <li>▪ stated plant or equipment to be installed and operated in a stated way within a stated period;</li> <li>▪ stated measures be taken to minimise the likelihood of environmental harm being</li> </ul> </li> </ul>

EPAct / EPRreg Section	Summary
	<p>caused;</p> <ul style="list-style-type: none"> <li>▪ carrying out and reporting on a stated monitoring program;</li> <li>▪ the preparation and carrying out of a transitional environmental program;</li> <li>▪ the giving of relevant information reasonably required by the administering authority for the</li> <li>▪ administration or enforcement of this Act;</li> <li>▪ the carrying out or reporting about stated rehabilitation or remediation work relating to the</li> <li>▪ chapter 4 activity the subject of the development approval; or</li> <li>▪ prohibit the changing, replacing or operating of any plant or equipment associated with the activity if the change, replacement or operation increases, or is likely to substantially increase, the risk of environmental harm; or</li> <li>▪ include a condition under section 364 requiring the giving of financial assurance.</li> </ul> <p>A condition may be imposed even if it imposes an obligation that continues to apply after the activity stops. For example, a condition may be about rehabilitation of the land to which the development approval relates after the activity has ended.</p>
s.73C EPAct	<p>The administering authority may add, change or cancel a development condition of a development approval if it considers the addition, change or cancellation is necessary or desirable because of:</p> <ul style="list-style-type: none"> <li>▪ a contravention of this Act or an environmental offence committed by the registered operator;</li> <li>▪ the development approval or registration certificate was issued because of a materially false or misleading representation or declaration, made either orally or in writing;</li> <li>▪ the development approval was issued on the basis of a miscalculation of: <ul style="list-style-type: none"> <li>▪ the quantity or quality of contaminant authorised to be released into the environment;</li> <li>▪ the effects of the release of a quantity or quality of contaminant authorised to be released into the environment; or</li> </ul> </li> <li>▪ a change in the way in which, or the place where, contaminants are, or are likely to be, released into the environment;</li> <li>▪ the approval of an environmental protection policy or the approval of the amendment of an environmental protection policy;</li> <li>▪ an environmental report;</li> <li>▪ a report made by or for, or approved by, a recognised entity if the report: <ul style="list-style-type: none"> <li>▪ is relevant to the development approval or an activity carried out under it; and</li> <li>▪ if the administering authority is not the chief executive—has been accepted by the chief executive; or</li> </ul> </li> </ul>

EPAct / EPRreg Section	Summary
	<ul style="list-style-type: none"> <li>▪ the approval by the administering authority of:               <ul style="list-style-type: none"> <li>▪ a transitional environmental program; or</li> <li>▪ an amendment of the approval of a transitional environmental program; or</li> </ul> </li> <li>▪ another circumstance prescribed under a regulation.</li> </ul> <p>The administering authority may also add, change or cancel a development condition of a development approval about financial assurance, monitoring or reporting if it considers the addition, change or cancellation is necessary or desirable because a person has applied to be the registered operator for the development approval.</p> <p>The administering authority may also add, change or cancel a development condition of a development approval if the registered operator for the development approval has agreed in writing to the addition, change or cancellation.</p> <p>The process stated in s.378 of SPA for changing or cancelling a condition applies for adding, changing or cancelling a condition under this section.</p> <p>If the administering authority adds, changes or cancels a condition, it must:</p> <ul style="list-style-type: none"> <li>▪ within 10 business days, record the particulars of the addition, change or cancellation in the appropriate register; and</li> <li>▪ if the condition relates to a mobile and temporary environmentally relevant activity—give notice of the addition, change or cancellation to the registered operator for the development approval.</li> </ul> <p>A notice stating the administering authority has decided to add, change or cancel a condition is taken to be a notice to which the Planning Act, section 467(1) applies. This does not apply if the condition has been added, changed, or cancelled with agreement.</p>
s.22A EPRreg	Prescribed circumstances for adding, changing or cancelling a development condition of particular approvals apply for specific ERAs that were amended or are no longer ERAs.

## 12.A Brief History of ERAs

Since the introduction of ERAs there have been a variety of different approval/licence/registration types. This causes a lot of confusion for local government staff who are not familiar with the history of ERAs. The following table provides a brief overview of ERA types.

Years	Types of ERA Approvals
1995-1998	Integrated authority; Level 1 licence; Provisional licence; Level 2 approval; Deemed approval (level 2 ERAs).
1998-2004	Integrated authority; Level 1 approval (without DA); Level 1 approval (with DA); Level 1 licence (without DA); Level 1 licence (with DA); Provisional licence; Level 2 approval (without DA); Development approval for level 2 ERA. Deemed approval (level 2 ERAs) *Note: Several ERA levels and definitions changed with the introduction of the 1998 Regulation. *Note: Chapter 4 Activities were introduced in 2001 (i.e. renaming of ERA type).
2004-2010	DA or equivalent of DA (e.g. former licence/approval) and Registration Certificate. Deemed approval. *Note: From 1 January 2009 some ERAs were no longer regulated, thresholds and definitions for several ERAs changed, etc.
2011-current	DA or equivalent of DA (e.g. former licence/approval) and Registration Certificate.
Proposed for commencement in 2012	** Greentape reforms pending **

Prior to ERAs being incorporated into the Integrated Planning Act (replaced by SPA), ERAs were approved as a type of licence, approval or authority. All of these licence, approval and authority types were generically known as 'Environmental Authorities'.

It is important to note, all devolved ERAs now operate under development conditions. From 4 October 2004<sup>1</sup> any environmental authority (including a licence or approval for an ERA) became legally equivalent to a development permit and environmental authority/licence/approval conditions became legally equivalent to a development condition (s.619 EP Act). The only environmental authorities that continue to exist are for mining and other DERM regulated activities. Therefore no notices or PINs should ever be issued by Council EHOs for non-compliance with a condition of an environmental authority.

### 12.1. Deemed Approvals

Any 'level 2' ERA that existed prior to the 1995 regulation being introduced was 'deemed' to be approved, i.e. the owner of the ERA did not have to lodge an application with Council to continue the ERA operation. ERAs operating under this process were known as 'deemed approvals'. These 'deemed approvals' remained in effect as long as the operator from 1995 continued the ERA and there was no increase in the intensity or scale of the operations.

A 'deemed approval' could not be transferred, so if there was a change in operator the new operator had to lodge an application with the Council to continue the ERA. An application was also required if there was an increase in the intensity or scale of the ERA operations. Council would then issue the operator with a set of conditions that they had to comply with.

In 2006 the environmental protection legislation was amended and all ERA operators had to apply for a 'registration certificate'. By this stage many ERAs had changed operator or increased in scale/intensity and therefore had detailed conditions they had to comply with. However, 'deemed approval' operators were in an unusual position of having to be registered, having to comply with their 'general environmental duty' (i.e. the requirement to take all reasonable and practicable measures to prevent or minimise environmental harm that will or is likely result from an activity) and being regulated by Council; but they had no detailed conditions that enabled them to proactively manage their farm to ensure they complied with Council's expectations.

Amendments to the *Environmental Protection Act 1994* which took effect from 1 January 2009 helped fix this anomaly. The amendment required the operators of all ERAs, including 'deemed approvals', to have a development permit that specifically authorises the relevant ERA operation. Consequently, all ERA operators previously operating under a 'deemed approval' had to apply for a new development approval for the activity. The operator should have submitted their application and received the development permit by 31 December 2010.

### 12.2. Expired Approvals

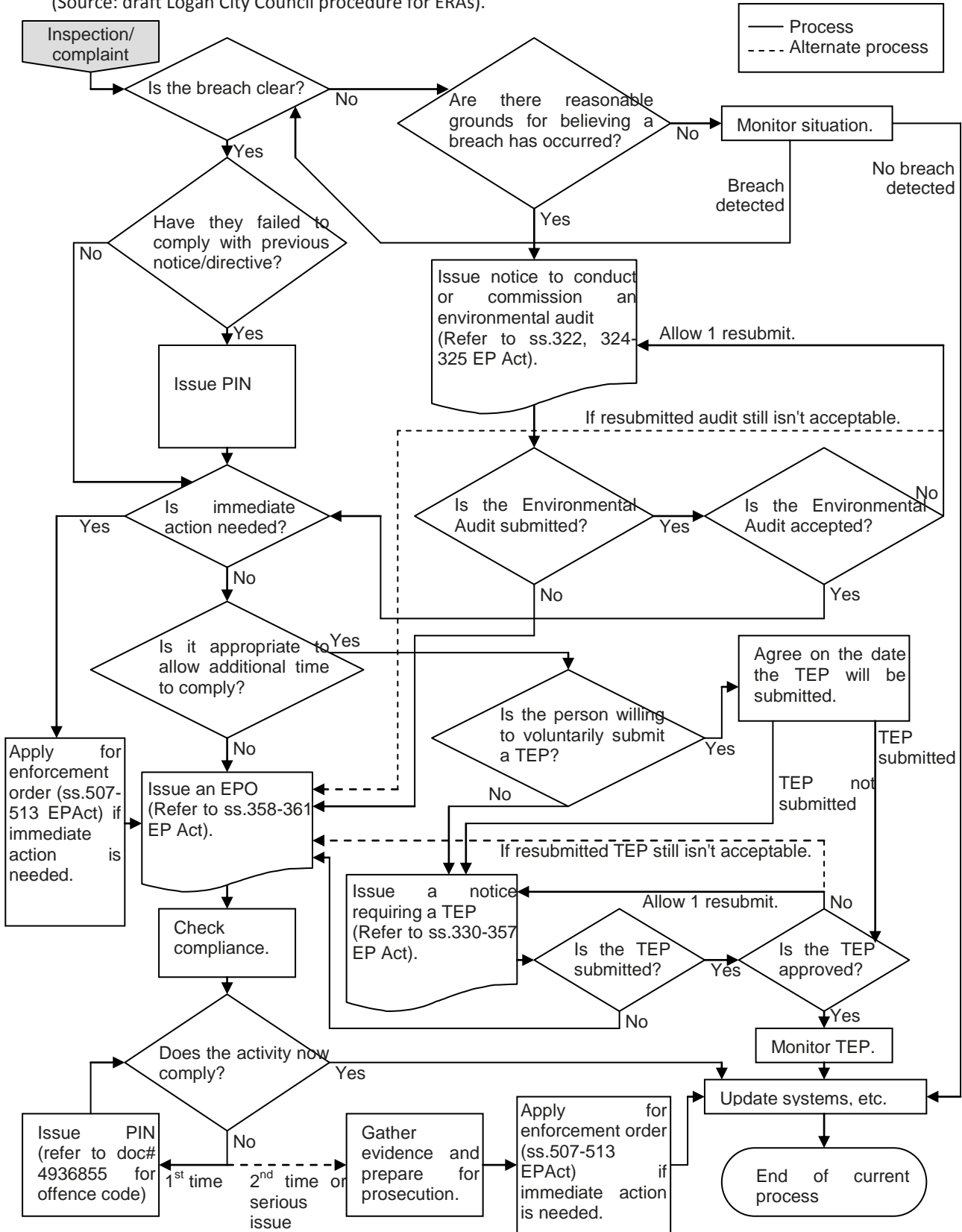
In some cases the licence/authority/approval issued to an ERA had an expiration date. The operator had to apply for a new development approval to be able to lawfully continue the ERA after the expiry date of the initial licence/authority/approval.

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<sup>1</sup> Refer to the Proclamation Subordinate Legislation 2004 No. 207 made under the *Environmental Protection Legislation Amendment Act 2003* [Act No. 95 of 2003].

### 13. Choosing a Tool (ERAs)

(Source: draft Logan City Council procedure for ERAs).



## 14. Case studies

Quarterly Newsletter of Environmental Health Australia (Queensland Branch) Number 4, 2009

### Company Directors Held Accountable for Pollution

*By: Scott Oertel, Stuart Brown and Belinda Davies.  
Brisbane City Council*

A development approval application was submitted to Brisbane City Council in March 2003 to build a tile manufacturing business in an industrial area. The application was granted in May of that year, with appropriate conditions set for conducting an Environmentally Relevant Activity (ERA 62 – Concrete Batching). A notice was sent advising the applicant of the outcome and stating that, as building work had not been completed, no licence for the ERA had been approved, and the applicant had to contact Council prior to the activity commencing.

In May 2004, a Council inspection revealed that the Concrete Batching activity had commenced without a licence application being submitted. The business owner was ordered to lodge the appropriate application form, which was received later that month.

During the May 2004 inspection several non-compliances with the development conditions were identified, including that there was no bunding around potential contaminants. The Company Director was advised to address the issues within one month, which he did.

In May 2005 a complaint was received alleging contamination of a waterway located along the rear boundary of the property which was downhill from the building where the ERA was being conducted. The customer advised that the “waterway had changed from a dark green to a light milky-blue”. An investigation revealed that the tile manufacturer was releasing solid and liquid waste from the processing area to the space between the natural ground level and the underside of the building slab floor. The waste was then travelling downhill and into the waterway, causing the discoloration. The discoloured water was tested for pH and was found to be very alkaline, with the pH as high as 14. The operators were verbally directed to cease discharging any waste waters with a pH of greater

than 9 and required to clean up the remaining waste water and sludge. This information was passed on to the Directors of the company who quickly responded to Council advising of their understanding of the issues. This resulted in the installation of a waste water treatment system and the removal of the alkaline sediment as well as treatment of the underlying soil with approximately 200L of concentrated hydrochloric acid (HCl).

A routine inspection was conducted in December 2006 which again revealed several non-compliances. Many of the issues identified were similar to those identified in May 2005, and again, the business was ordered to clean up the site and develop documented procedures to deal with these recurring issues. One of the greatest concerns involved the storage and treatment of waste water. Waste water was diverted into a large tank underneath the building to allow the sediment to settle out, and then the “cleaner” water was pumped back into a water treatment system where it was dosed with carbon dioxide (CO<sub>2</sub>) to correct the pH. Unfortunately, with no regular maintenance of this system sediment had been allowed to completely fill the settlement tank resulting in all the sediment laden waste water being deposited on the ground underneath the building. By February 2007 the site had been cleaned and procedures developed and once again Council believed that the issues had been addressed and the business owners understood the requirements of the environmental protection laws.

In October 2008 the site was again inspected, this time as part of a joint audit program undertaken by Brisbane City Council and the former Environmental Protection Agency of a State Industrial Park. It was found that the business had vacated the premises and left behind a large amount of waste material on the forecourt and under the building. The area under the building was heavily contaminated and in a flood prone area near a mangrove lined creek.

The site owner was present and advised Council that the business had gone into liquidation and had left the premises. The land owner provided consent for entry to the property including the buildings to enable Environmental Health Officers to undertake a thorough investigation, including gathering evidence for potential prosecution.

A CITEC search confirmed that the organisation holding the registration certificate had gone into administration.

The investigation findings were discussed with senior Environmental Health staff. Consideration was given to the various tools provided in the Environmental Protection legislation. But given the risk the contamination posed to the waterway and the fact that the company was in the hands of Administrators, it was decided that the best course of action was to issue an Environmental Protection Order (EPO). With the company in under the control of Administrators it was unlikely that an acceptable outcome would be reached if the EPO was issued to the company. The solution was to issue an EPO to each of the company Directors requiring them to remediate the site.

Within Brisbane City Council there are teams, known as Regional Enforcement Teams, which assist environmental health and other staff with enforcement action, gathering evidence, and related work. Once it was decided which course of action to take, the Regional Enforcement Team were informed of the issues and their assistance sought in relation to the enforcement action and potential future prosecution.

When drafting an EPO Council officers have to be very careful to ensure that the requirements are sufficiently detailed, will achieve the desired outcomes and cannot be misinterpreted. This needs to be balanced so that requirements are not unnecessarily onerous on either the recipient of the EPO or on Council to monitor compliance.

The EPO required the Directors to:

1. Remove all accumulated waste products and contaminated sediment from underneath the buildings and dispose of all waste at an appropriate regulated waste facility. Any items moved or removed to facilitate the clean up must be reinstated to their original condition upon completion.
2. Engage the services of an appropriately qualified person to conduct a sampling program to ascertain the extent of any contamination on the site. The sampling program must include sampling and analysis of soil from underneath the building as well

as from the grassed area around the building. Appropriately qualified person includes those defined in Schedule 8A of the *Environmental Protection Regulations 1998*.

3. Provide Council with a copy of the report developed by the appropriately qualified person including the person's qualifications, details of their expertise, the sampling plan, sampling methods and any remediation plan necessary, having regard to the sampling results. The remediation plan must include any required revegetation or rehabilitation works required to re-establish any vegetation that may be disturbed or damaged during the waste removal and remediation process. The report must also include references to any guidelines or standards used to develop the sampling plan, sampling methods or to assess the suitability of the sampling results.
4. Undertake any remediation work identified by the abovementioned report. Measures, such as sediment fences, must be installed during any works to ensure that any sediment generated during the works is not able to pollute the surrounding environment.
5. Provide Council with certification that all required works have been completed in accordance with the approved report.

A lawyer representing the company Directors contacted Council after they received the EPO. The lawyer asked how Council could issue an EPO on the Directors of a company that was in the hands of Administrators. A Council officer assisted the lawyer to locate and understand the Executive Officer liability provisions in the Environmental Protection Act, the sections that enabled Council to issue an EPO to 'a person responsible' for the environmental harm and other relevant sections of the legislation. The lawyer agreed that Council had acted within the provisions of the legislation and that the Directors did have to comply with the EPO.

The company Directors engaged a consultant to undertake the remediation work which involved the removal of approximately 80m<sup>3</sup> of contaminated sediment and the dosing of the underlying soil. The soil was initially treated with 225kg of gypsum, which had little effect in correcting the pH. Treatment with 240L of vinegar and 200L of

concentrated Hydrochloric acid (HCl) occurred in several stages over a two month period in order to return the soil pH to an acceptable level.

The Directors, through their consultant, fully complied with all requirements in the EPO. After compliance was achieved the Directors applied to surrender the ERA registration certificate which was later approved.

Even though the Directors had arranged for the site to be remediated as required by the EPO, Council decided to prosecute after considering relevant criteria in Council's prosecution policy including the history of non-compliance. The fact that the Directors had abandoned the site with no intention of removing the remaining contaminants also influenced the decision to prosecute.

The Directors of the company were each prosecuted for:

- 4 offences of non-compliance with development conditions;
- 4 offences of a registered operator failing to ensure compliance with development conditions; and
- 4 offences of an executive officer failing to ensure compliance with development conditions.

Both Directors pled guilty to all charges. However, due to the suggested penalties submitted by both parties being considerably different the hearing took several hours. Several issues were debated and at one stage the defence unexpectedly (i.e. no prior notice was given) tendered a report to show how the Directors had complied with the EPO and the extent of the work they were required to do. Fortunately the Council staff involved in the case were in the court room and during a break were able to highlight to Council's solicitor how the report confirmed the extent of the pollution. The solicitor then used the report to explain the seriousness of the situation to the Magistrate who later used this information in her summation.

During the hearing it became evident that, due to an oversight in the brief of prosecution, only limited facts regarding the history of non-compliance were included in the agreed statement of facts, which resulted in it appearing that there had only been one incident spanning three and a half years, rather than

three separate incidents over that time. This had a large bearing on the outcome of the case as the magistrate stated that Council could not have been too concerned with this pollution or they would have issued an enforcement notice sooner. With this in mind, and the fact that there haven't been any similar prosecutions by Council, it was encouraging to hear the severity with which the magistrate addressed the potential outcomes of the contamination and handed each of the Directors a fine of \$18,000 plus court and legal costs.

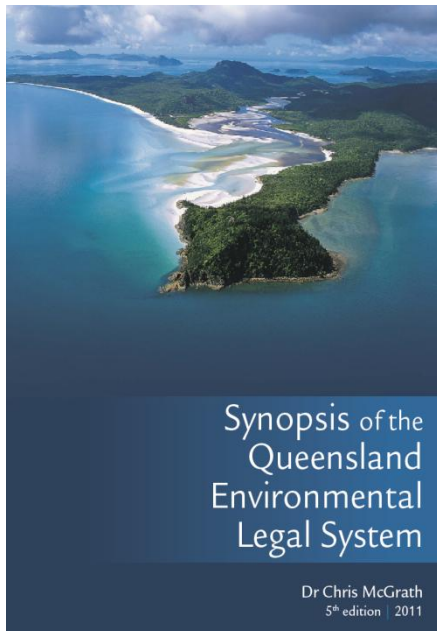
Some of the significant lessons we have learnt from this case are:

- There is a clear expectation that a serious issue will evoke a swift and serious response from Council;
- If we fail to take serious action there is the potential for a magistrate to consider the matter to be less serious and consequently impose a more lenient penalty;
- If there is a history of non-compliance, this information should be provided to Council's solicitors in a concise, but sufficiently detailed manner so that it is clear what action has occurred to manage the issue at all stages; and
- It is very beneficial for staff involved in the case to be present, even if the people/corporation pleads guilty, so that technical issues can be clarified and other information provided to Council's solicitor as needed.

Whilst the prosecution result in itself was a great outcome and many lessons were learnt from that process, the greatest reward has been to see a challenging situation resolved. In 2008 Council staff were faced with a heavily contaminated site adjacent to a waterway that had been abandoned and the company responsible was in the hands of Administrators. Council staff used regulatory tools wisely to achieve the desired outcome and now the site has been remediated, the Directors of the company responsible paid for the remediation, and the Directors were held accountable for not complying with the environmental protection legislation.

## 15. Useful Resources

Synopsis of the Queensland Environmental Legal System: <http://www.envlaw.com.au/sqels5.pdf>



DERM enforcement guidelines: [http://www.derm.qld.gov.au/environmental\\_management/pdf/enforcement-guidelines.pdf](http://www.derm.qld.gov.au/environmental_management/pdf/enforcement-guidelines.pdf)

DERM Compliance Updates (a newsletter that can be subscribed to).

Brisbane City Council prosecution policy:

<http://www.brisbane.qld.gov.au/prdc/groups/corpwebcontent/documents/documents/038094.pdf>

## 16. References

Department of Environment and Resource Management 2010, *Enforcement guidelines*, available via: [http://www.derm.qld.gov.au/environmental\\_management/pdf/enforcement-guidelines.pdf](http://www.derm.qld.gov.au/environmental_management/pdf/enforcement-guidelines.pdf).

Queensland Government 2011, *Environmental Protection Act 1994*, reprint 9M, available via <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/EnvProtA94.pdf>.

Queensland Government 2011, *Environmental Protection Regulation 2008*, reprint 2, available via <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/EnvProtR08.pdf>.

Queensland Government 2011, *Environmental Protection (Waste Management) Regulation 2000*, reprint 4E, available via <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/EnvProtWaMR00.pdf>.

Queensland Government 2011, *Sustainable Planning Act 2009*, reprint 1J, available via <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SustPlanA09.pdf>.