

Environment Protection (General) Environment Protection Policy 2012 (No 1)

Notifiable instrument NI2012–325

made under the

Environment Protection Act 1997, section 28 (Notification of environment protection policies), section 29 (Inspection)

1 Name of instrument

This instrument is the *Environment Protection (General) Environment Protection Policy (No1)*.

2 Commencement

This instrument commences on the day after notification.

3 Notification

Notice is hereby given that the Environment Protection Authority has made an Environment Protection Policy in Annexure A:

Title of Policy

General Environment Protection Policy

Brief Description of the Policy

The General Environment Protection Policy is designed to help people understand the *Environment Protection Act 1997* and the Environment Protection Regulation 2005.

4 Inspection

In accordance with s 29 of the *Environment Protection Act 1997*, copies of the General Environment Protection Policy are available for public inspection at the following locations:

during business hours, at Environment Protection Unit, Level 3 South Wing, Macarthur House, 12 Wattle Street, Lyneham ACT 2602; and

electronic copies are available from the Environment and Sustainable Development Directorate website at <http://www.environment.act.gov.au>.

5 Revocation

This instrument revokes the Environment Protection (Environment Protection Policy) Notice 2010 (No 3) – NI 2010-134

Daniel Walters
Environment Protection Authority
18 June 2012

ENVIRONMENT PROTECTION AUTHORITY



GENERAL ENVIRONMENT PROTECTION POLICY

Environment Protection Authority, ACT

August 2007

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Published by Department of Territory and Municipal Services

Enquiries: Phone Canberra Connect on 13 22 81

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1 BACKGROUND

1.1 Role of EPPs

This General **Environment Protection Policy (EPP)** is designed to help people understand the *Environment Protection Act 1997* (the Act) and the Environment Protection Regulation 2005 (the Regulation). This **EPP** contains information and policies common to several areas of environment protection. Information particular to only one area (such as Water) is contained in the relevant specific **EPP** (such as the Water Quality **EPP**).

Overall, **EPPs**, along with the Act, the Regulation and the Magistrates Court (Environment Protection Infringement Notices) Regulation 2005 are designed to provide a framework for environment protection which:

- is outcome-focused and able to be tailored to a variety of specific outcomes;
- provides appropriate opportunity for self-regulation (particularly through **Environmental Protection Agreements** and codes of practice);
- gives incentives for compliance (for example through reduced fees for holders of **accredited authorisations**);
- promotes business certainty, by allowing **Environmental Authorisations** to be granted for an indefinite period in many cases (subject to annual review) and also by requiring that the policies and procedures used to make decisions be publicly available;
- is based on the principles of “polluter-pays” and “user-pays” charging for fees, consistent with the ACT’s commitment to the *Inter-Governmental Agreement on the Environment* (May 1992);
- makes the administration of environment protection transparent;
- provides a better and more appropriate range of “tools” to regulate activities (for example, on-the-spot fines for minor infringements); and
- implements what would generally be acknowledged by stakeholders to be national best practice in environment protection.

This **EPP** has been prepared by the **Environment Protection Authority (EPA)** in accordance with Part 4 of the Act.

1.2 Administration Consistent with Objects of the Act

Section 2 of the Act requires that the Act be construed and administered consistently with the Objects of the Act. This **EPP** should be read and applied to best give effect to the Objects of the Act.

1.3 What about other Legislation?

EPPs are complemented by other environmental programs and legislation aimed at protecting the environment. Readers are encouraged to consider whether other legislation and policies may be relevant to an issue dealt within

an **EPP**. For example, the *Land (Planning and Environment) Act 1991* and the Territory Plan made under that Act are often relevant to environmental issues (e.g. the plan sets environmental values for water bodies and noise zones).

Further examples are shown below, however this is not an exhaustive list.

Activity	Act	Contact
General environmental duty	<i>Environment Protection Act 1997</i>	EPA by calling Canberra Connect on 132281
Handling and storage of dangerous substances	<i>Dangerous Substances Act 2004</i>	ACT WorkCover on 6205 0200
Littering	<i>Litter Act 2004</i>	City Rangers by calling Canberra Connect on 13 22 81
Disposal of hazardous waste material	<i>Environment Protection Act 1997</i>	EPA by calling Canberra Connect on 13 22 81
Dams/ponds construction, waterway works and water abstraction licences	<i>Water Resources Act 2007</i>	Water Resources by calling Canberra Connect on 13 22 81

1.4 Notes on Reading this EPP

- Where the **EPP** refers to a legal requirement, it will give the source of this requirement for reference. References to 'the Act' refer to the *Environment Protection Act 1997* (as amended) while 'the Regulation' refers to the Environment Protection Regulation 2005 (as amended).
- Wherever a term is used that is defined in the Act or Regulation, it appears in **bold**.
- Copies of the documents cited in this **EPP**, including this **EPP** may be inspected at the following locations:
 - Department of Territory and Municipal Services
Macarthur House
12 Wattle St
LYNEHAM, ACT 2602
 - ACT Public Libraries
 - Department of Territory and Municipal Services Website:
www.tams.act.gov.au

2 POLICY OBJECTIVE

The objective of the General EPP is to provide a simplified explanation of the Act, the Regulation, and their administration.

3 COMPLIANCE WITH THIS EPP

EPPs are not legally binding in themselves; they are statements of policy, guidelines and explanations of legal requirements. If something is legally required, this **EPP** refers to the source legal document (usually the Act or Regulation). **EPPs** have been developed to help people comply with the legal requirements of the Act and Regulation and the **general environmental duty**, which requires people to take practicable and reasonable steps to minimise **environmental harm** or **environmental nuisance**.

4 ENFORCEMENT POLICY

The **EPA's** general approach to enforcement, consistent with the duty in Section 2 to administer the Act to give effect to its objects, will be:

- first, to seek to work in partnership with business and the community as “co-regulators” and educators;
- secondly, to warn;
- thirdly, to take non-criminal statutory action such as authorisation variations and issuing **environment protection orders**, together with on-the-spot fines as appropriate and requiring compulsory **environmental audits**; and
- finally, to consider suspension or cancellation of an agreement or authorisation, or referral to the Director of Public Prosecutions (DPP) for a decision on prosecution, or both, as appropriate.

Note: This approach is adopted for guidance only and serious cases may justify immediate application of a strict approach to enforcement.

Consistent with the **EPA's** approach to enforcement above, the **EPA** produces a range of education information, including industry specific information and codes of practice to educate and inform the public of their responsibilities under the Act.

5 REVIEW OF EPA DECISIONS

Certain decisions made by the **EPA** are reviewable by the Administrative Appeals Tribunal (AAT). Under Section 135 of the Act, which specifies the reviewable decisions, an eligible person can make an application to the AAT for review of an **EPA** decision.

6 WHAT ARE ENVIRONMENT PROTECTION POLICIES (EPPs)

The **EPPs** are policies and guidelines, issued to coincide with the Act, which help to explain and apply the Act and the Regulation made under that Act.

To explain the context for policy, **EPPs** often summarise or explain the Act. Of course, the Act, Regulation and other legislation remain the authoritative statement of the law and readers are encouraged to refer to the actual text of the legislation whenever necessary.

This **EPP** is one of several issued to coincide with the Act. The **EPA** intends to update **EPPs** regularly, to ensure they are relevant, useful and reflect both experience and current best environmental practice.

6.1 What is the difference between EPPs and the Act and Regulation?

The Act and Regulation are legislation passed by the Legislative Assembly and are legally binding. As policies and guidelines, the **EPPs** are not legally binding. They support the operation of the legislation by providing certainty and transparency in its administration.

6.2 How do all three components (Act, Regulation and EPPs) fit together?

The Act, Regulation and **EPPs** all work together to provide an integrated framework for environment protection as follows:

- the Act is a general legislative framework, which establishes the machinery necessary for environment protection. For example, it establishes the **EPA** and provides for instruments like **environmental authorisations**;
- the Regulation contains rules and standards about specific aspects of the environment. Examples of matters dealt with in the Regulation are setting water quality standards and noise levels for particular areas of Canberra;

- the **EPPs** contain guidance on meeting the requirements of the Act and the Regulation; and
- Section 2 of the Act sets out the Objects of the Act, and requires that the Act shall be construed and administered so as to be consistent with the objectives. Because the Regulation and the **EPPs** are made under the Act, this principle applies with equal force to those instruments.

6.3 How are EPPs produced and who has input?

The **EPA** develops draft **EPPs**, but before these are finalised, the **EPA** must advertise the release of drafts and give members of the public 40 working days (8 weeks) to comment on them.

The **EPA** must consider these comments and may incorporate them into the **EPP** if appropriate. An **EPP** can only be made with the consent of the Minister responsible for the Act.

6.3.1 How will people know about changes to policies?

The **EPA** must publish a notice in the Legislation Register and a newspaper when an **EPP** is finalised, changed or revoked, except when changes are only editorial. For example, if the name of a government agency has changed, the name can be changed in the **EPPs** without public consultation or notification in the Legislation Register.

The **EPA** cannot vary or revoke an **EPP** without the Minister's consent.

6.4 How many EPPs are there?

Currently, there are nine **EPPs**:

- General (this **EPP**);
- Water Quality;
- Air;
- Noise;
- Contaminated Sites;
- Hazardous Materials;
- Waste Water Reuse;
- Motor Sport Noise; and
- Outdoor Concert Noise.

The **EPA** may develop other **EPPs** over time as required.

6.5 How are the EPPs structured?

The **EPPs** are generally structured on the following lines:

- Background - this part sets out the context and underlying policy objectives of the **EPP**;

- Policies and Guidelines - this part explains how relevant provisions of the Act and Regulation work and contains the substantive policies and guidelines of the **EPP**;
- Appendix - this part contains detailed or technical information separated from policies and guidelines for easy reference; and
- Glossary - this part contains explanations of words and abbreviations, particularly those specific to the particular **EPP**. Terms used in more than one **EPP** are included in the Glossary for this General **EPP**.

6.6 To whom and where do the EPPs apply?

The **EPPs** apply to all persons and things for activities on all land within the ACT including land owned by the Commonwealth, to which the Act applies. This includes the ACT Government and its agencies and government-owned companies. At present the Act does not bind the Commonwealth Government, however, generally Commonwealth agencies have committed to comply with the Act.

6.7 How are EPPs kept up to date?

EPPs can be amended at any time, to keep them up to date. All amendments other than those of an editorial nature only must go through the public consultation process above.

7 ENVIRONMENTAL DUTIES

The Act creates environmental duties: a **general environmental duty** and the duty to notify the **EPA** of actual or threatened **environmental harm** (Sections 22 and 23 of the Act).

7.1 What is the general environmental duty?

The **general environmental duty** requires all people to take practicable and reasonable steps to prevent or minimise any **environmental harm** or **environmental nuisance** their actions may cause.

This section is intended to encourage everyone in the community to take personal responsibility for protecting the environment. Failing to comply with this provision is not, by itself, an offence under the Act. Nor does it give rise to a civil liability. However, if necessary, compliance with this duty can be enforced by an Environment Protection Officer issuing an **Environment Protection Order**. Failing to comply with such an order is an offence (s126).

7.1.1 Can you give me an example?

For example, spraying several fruit trees in your backyard on a windy day can result in spray being blown onto neighbouring properties. To do so would be a breach of the environmental duty because of the **environmental harm** this might cause. While this very localised action is unlikely of itself to constitute an offence, if an Environment Protection Officer, acting on a complaint, issued an order to cease spraying, it would be an offence (with a penalty for an individual of up to \$20,000) not to comply.

7.1.2 What are the benefits of complying with the duty?

Obviously, people complying with the **general environmental duty** are doing the right thing by the environment as well as meeting a legal obligation. But there is an extra benefit, particularly for a business conducting an activity with the potential to cause significant **environmental harm**. Under Section 143 of the Act, a number of the major offences under Part 15 of the Act are taken not to have been committed by a person who is complying with the **general environmental duty**. In other words, if you are complying with the **general environmental duty** and otherwise acting lawfully, it is very unlikely that you are committing an offence involving **environmental harm**.

7.2 Duty to notify actual or threatened environmental harm

The second environmental duty arises where a person realises that their actions have caused or might cause serious or material **environmental harm** from pollution. Section 23 of the Act requires a person in this situation (an “activity manager”) to report the matter to the **EPA** as soon as possible. This requirement would apply even if reporting an incident might involve admitting to something unlawful. To encourage compliance with this provision, Section 140 provides that this information is not admissible in evidence against the person in a prosecution under the Act.

8 THE CONCEPT OF ENVIRONMENTAL HARM

The concept of **environmental harm** is central to the Act, underpinning both environmental management measures such as improvement plans and the major offence provisions. The definitions of **environmental harm**, **material environmental harm** and **serious environmental harm** are set out in Section 3 of the Act. The definitions operate to create a form of “sliding-scale” of harm, ranging from **environmental harm**, through material harm to **serious environmental harm**. A number of the environmental management instruments outlined below can only be invoked if the level of **environmental harm** involved is material or serious. A notable exception is **environment**

protection orders, which can be made on the basis of any breach of the Act or breach of an authorisation (s125 and s126).

9 ENVIRONMENTAL MANAGEMENT INSTRUMENTS

The Act creates a number of environmental management instruments such as **environmental improvement plans** and **environmental audits**. In many cases these instruments will be prepared at the instigation of an activity manager, but the Act also allows the **EPA** to require the use of an instrument where necessary. These instruments are:

- **environmental protection agreements** (Part 7 of the Act);
- **environmental authorisations** (Part 8 of the Act);
- **environmental improvement plans** (Division 1 of Part 9 of the Act);
- **environmental audits** (Division 2 of Part 9 of the Act);
- an **emergency plan** (Division 3 of Part 9 of the Act);
- **financial assurances** (Division 4 of Part 9 of the Act); and
- **environment protection orders** (Division 2 of Part 13 of the Act).

9.1 Environmental protection agreements

9.1.1 What are environmental protection agreements?

Environmental protection agreements are formal, but non-contractual, agreements between the **EPA** and businesses (see Sections 39 and 40 of the Act). They are intended to allow businesses to manage their environmental performance in partnership with the **EPA**.

9.1.2 When are environmental protection agreements used?

Section 38 of the Act provides that the **EPA** can enter into **environmental protection agreements** for Schedule 1 Class B activities in lieu of an **environmental authorisation** (Subsection 42(2) of the Act) and generally for giving effect to the objects of the Act.

The **EPA** encourages the maximum use of **environmental protection agreements** as a means of formalising partnerships for environment protection. Although they have a specific role for Class B activities, **environmental protection agreements** can apply to any activity where this would assist in protecting the environment.

Further, although a business or activity manager will typically propose agreements, the **EPA** welcomes proposals from industry associations, government agencies or community groups to enter agreements that will advance the objects of the Act. For example, an agreement with an industry association might be based around a commitment to pursue higher environmental standards for the industry over time and to

work with the **EPA** to develop an environmental code of practice for the industry.

9.1.3 What does an environmental protection agreement say?

An outline of a typical agreement is at Appendix 12.1 to this **EPP**. This outline shows the general framework of an agreement with the **EPA**. Bear in mind however that the agreements are intended to be very flexible instruments, subject only to the minimal requirements of Part 7 of the Act.

It should be noted that an environmental protection agreement can be revoked, refer to Appendix 12.1.

9.2 Environmental authorisations

9.2.1 What is an environmental authorisation?

Environmental authorisations are a form of licence to conduct an activity which has a significant potential to cause **environmental harm**. An authorisation sets out the conditions under which the activity may be conducted.

9.2.2 Grant of authorisation - exemption from public consultation

Under Section 48 of the Act, applications for **environmental authorisations** must be notified in a newspaper and the public given the opportunity to make submissions. However, that section allows the Minister to make a determination listing activities which will be exempt from the requirement for public notification before a decision is made on whether to grant the application and what conditions to impose. (Note however that these exempt applications are still subject to appeal). A determination under Section 48 by the Minister for Environment, Water and Climate Change is at Appendix 12.2.

9.2.3 Kinds of authorisations

Section 46 of the Act provides for three kinds of authorisation: standard, accredited and special.

9.2.3.1 What is a standard authorisation?

Standard authorisations are the main category of authorisation. Under Section 52 of the Act they can be issued for an unlimited period or for a specified period of up to 3 years. They are subject to annual review under Section 57. Both the decision to grant the authorisation and decisions flowing from the annual review are notified publicly and are appealable.

9.2.3.2 *What is an accredited authorisation?*

An **accredited authorisation** can be given to a person who is applying an “**environmental improvement initiative**” to an activity (see Section 46 of the Act.) “**Environmental improvement initiative**” is defined in Section 3 of the Act to mean taking any of the following action:

- entering an **environmental protection agreement** that includes a requirement to comply with an accredited code of practice (see Section 31 of the Act)
- applying an environmental improvement plan accredited under Section 72 of the Act
- complying with a prescribed standard of the International Organization for Standardization in conducting the activity; or
- any other prescribed initiative endorsed by the **EPA**.

The primary benefits of an **accredited authorisation** are lower fees (see Subsection 53(3)) and three-yearly review in lieu of annual review (Section 58 of the Act).

9.2.3.3 *What is a special authorisation?*

Under Section 46 of the Act, a **special authorisation** is an authorisation issued for up to 3 years (s52(1)) for research and development, including trialing special equipment.

Policies about **special authorisations** are set out below.

9.2.4 **When is an environmental authorisation required?**

Sections 42 & 43 of the Act provide that **environmental authorisations** are required if:

- the activity is listed as a Class A activity in Schedule 1 to the Act;
- the activity is listed as a Class B activity in Schedule 1 to the Act and an **environmental protection agreement** is not in place; or
- the **EPA** requires an **environmental authorisation** on the grounds that in conducting an activity (i.e. any activity) the activity manager has, is or is likely to, contravene a provision of the Act, and as a result, serious or material **environmental harm** has, is or is likely to occur.

The **EPA** will not lightly use the last of these powers to require an authorisation on a one-off basis and will generally seek to cooperate with a person who may be in breach of the Act to prevent the problem recurring. The **EPA** will however be prepared to invoke the power if satisfied that the conditions for its use are met and that it is, in the circumstances, the decision that will best advance the objects of the Act. An example might be an activity that, while not covered by Schedule 1 of the Act, is being managed so poorly with such frequent breaches of the Act that the activity manager should be required to operate under an authorisation that sets strict conditions.

9.2.5 When will the EPA grant authorisations for an unlimited period?

Generally the **EPA** will grant authorisations for an unlimited period, because the requirement for annual review under Section 57 (three-yearly for **accredited authorisations**) ensures regular review of performance and the relevance of current conditions of authorisation. Examples of situations where the **EPA** may set an authorisation period of 3 years or less are:

- where the activity has a limited life-span; and
- where the Regulation or other laws and policies applying to an activity are under review and there can be no assumption of the activity being authorised to continue, such as an activity involving superseded and polluting technology.

9.2.6 What conditions will apply to an environmental authorisation?

9.2.6.1 *General approach to conditions*

Section 49 of the Act provides that the **EPA** can grant an **environmental authorisation** subject to specified conditions.

The general approach of the **EPA** will be:

- to include only those conditions that are necessary to achieve the objects of the Act
- to tailor the conditions to the specific circumstances.

There may be some conditions that are relevant to whole classes of activity. The more important of these are explained in subject-specific **EPPs** such as the Water Quality **EPP**.

Some conditions will relate to the nature of the particular activity conducted, such as the amount of a substance that can be discharged into the air. Other conditions will relate to the way in which the activity is or has been conducted, such as a requirement to conduct an **environmental audit**, prepare an environmental improvement plan or an **emergency plan**. The condition may even relate to the person conducting the activity, such as requiring a **financial assurance** from a person with a poor environmental record.

The **EPA** wishes to work in partnership with business and the community and encourages activity managers to be proactive in proposing **environmental protection agreements**, voluntary **environmental audits** and the like. Except where an activity manager has a poor environmental record, it would be rare for the **EPA** to set conditions of authorisation at the outset that include compulsory audits, improvement plans or the like. It will however be common for conditions to include a requirement for monitoring by the activity manager - see below.

9.2.6.2 *Conditions relating to monitoring*

In many cases regular scientific monitoring is the only way to measure the extent of **environmental harm** resulting from an activity and the effectiveness of measures aimed at minimising **environmental harm**. Authorisations will therefore often include a condition that the activity manager conduct or commission monitoring and supply results to the **EPA**. This data is publicly available from the **EPA**, as required by Section 19 of the Act. The **EPA** will usually undertake monitoring directly only in circumstances of last resort, such as to obtain evidence for a prosecution or in an emergency.

9.2.7 **When will the EPA grant an accredited authorisation?**

While the Act sets preconditions to the grant of an **accredited authorisation**, the decision to confer this beneficial status is a discretionary one for the **EPA**. One precondition apparent from Section 46 of the Act is that an **environmental improvement initiative** (Section 3) must already have been implemented or being implemented; a proposal to take a relevant initiative is not sufficient.

The Act confers significant benefits on holders of accredited authorisations. The holders of **accredited authorisations** are also likely to obtain considerable marketing advantage from this status. At the same time, **accredited authorisations** are intended to act as an incentive to environmental best practice. Bearing these factors in mind, the **EPA** intends to adopt a cautious approach to agreeing to applications for **accredited authorisations**. The **EPA** will look for demonstrated action of a type that clearly meets the requirements of the Act and significantly advances its objects, as relevant to the activity concerned. The **EPA** will however be conscious of the need to give encouragement to those who strive for environmental best practice and will not administer this provision so as to make **accredited authorisations** almost unobtainable. Over time, the **EPA** regards **accredited authorisations** as within the reach of all activity managers who seriously pursue the requirements and objects of the Act.

9.2.8 **When will the EPA issue a special authorisation?**

Until policy can be developed in the light of experience, the **EPA** regards it as undesirable to develop detailed policies on **special authorisations**. Two broad points can be made at this stage:

- **special authorisations** are intended to cater for those who wish to pursue new technologies or techniques in the quest for better environmental outcomes; and
- the **EPA** would welcome discussions with any activity manager pursuing such a course and would be prepared to contemplate conditions of authorisation that make allowance for the nature of the research and development proposed in the interests of beneficial medium and long-term outcomes.

9.2.9 When will the EPA vary, suspend or cancel an authorisation?

Given that authorisations are subject to annual review (three-yearly for **accredited authorisations**), and given also the need to keep pace with developments in environmental technology and standards, the **EPA** expects that variation of conditions after review of an authorisation will be a relatively frequent occurrence. If the **EPA** proposes to vary an authorisation, Sections 60-62 of the Act contain a procedure and grounds that ensure that activity managers are treated fairly and protected from capricious action. Decisions to vary are appealable.

A decision to suspend or cancel an authorisation is much more likely to be a rare occurrence and will usually be regarded by the **EPA** as being close to a last resort, especially given the likely impact on the income of the activity manager. Again, Sections 63-65 of the Act contain a procedure and grounds that ensure that activity managers are treated fairly and protected from capricious action. Decisions to suspend or cancel are appealable.

9.3 Environmental improvement plan

9.3.1 What is an environmental improvement plan?

An environmental improvement plan is a formal plan under Part 9.1 of the Act to improve the environmental performance of an activity and achieve best environmental practice over time. Voluntary plans can be accredited by the **EPA**, who can also require a person to submit a plan.

9.3.2 Content of an environmental improvement plan

Under Section 68 of the Act an environmental improvement plan must say how the activity will be conducted differently to minimise or reduce environmental impacts and ensure compliance with the Act. It must include a timetable for implementation and may also provide for monitoring.

9.3.3 How is a voluntary environmental improvement plan accredited?

Any person may submit a draft environmental improvement plan to the **EPA** for accreditation. To be approved, the plan obviously has to meet the requirements of Section 68, above. Under Sub-Section 72(3), the **EPA** can accredit the plan if satisfied that implementing the plan over the specified time will reduce **environmental harm** to the maximum extent reasonably possible.

This section sets a high standard. In assessing what is reasonably possible, the **EPA** will have regard to cost-effectiveness, and in particular whether the plan entails the use of the best available technology not entailing excessive cost.

9.3.4 When can the EPA require an environmental improvement plan?

Section 69 of the Act provides that the **EPA** can require a person conducting an activity to submit an environmental improvement plan on having reasonable grounds for believing:

- the person has contravened, or is likely to contravene, an **environmental authorisation**, an environment protection order or a provision of the Act so as to cause serious or material **environmental harm**; and
- that changes in the way the activity is run would reduce this likelihood of harm.

9.3.5 How is a compulsory environmental improvement plan approved?

When issuing a notice requiring a plan, the **EPA** can specify matters to be addressed. Section 71 of the Act is not explicit as to the basis on which the **EPA** should approve a draft plan. Applying the general directive of Section 2 of the Act to administer it according to its objects, the **EPA** takes the view that approval cannot be given unless the **EPA** is satisfied that the plan addresses any matters specified in the notice, meets the content requirements above of Section 68 and is consistent with the objects of the Act.

9.4 Environmental audits

9.4.1 What is an environmental audit?

Environmental audits are defined in Section 74 of the Act as an assessment of an activity to:

- identify source, cause or extent of **environmental harm** or breaches of the Act resulting from the activity;
- determine the need for any change in management practices to reduce environmental impact; and
- identify the extent and nature of any contravention or likely contravention.

9.4.2 Voluntary environmental audits

To encourage activity managers to take a proactive approach to improving environmental performance, and to encourage voluntary disclosure of breaches of the Act **environmental audits** may be undertaken on a voluntary basis.

Under Section 78 of the Act, a person proposing to commission a voluntary audit may apply to the **EPA** for legal protection for the findings of the audit. If granted, the findings of the protected audit are not admissible in evidence to support the prosecution of the activity manager for breach of the Act.

The **EPA** may grant protection to the findings of the voluntary audit under Section 78 of the Act or may grant protection subject to certain

conditions, including:

- that the audit report must address, and may only address, certain matters; and
- that the report be prepared in a specified manner.

The **EPA** wishes to encourage activity managers to use this provision and takes the view that full disclosure and cooperation in addressing deficiencies is much more likely to advance the objects of the Act, than prosecution or other penalising approach. The **EPA** notes however that on occasion a grant of protection will not advance the objects of the Act and that in such cases enforcement proceedings will be pursued.

9.4.3 When can the EPA require an environmental audit?

To cover situations where activity managers do not take advantage of the protection given to voluntary audits, or where it is not appropriate to give that protection, Section 76 of the Act provides that the **EPA** can require people conducting or proposing to conduct an activity to submit an **environmental audit** if:

- the person has contravened, is contravening or is likely to contravene an **environmental authorisation**, an **environment protection order**; or a provision of the Act; or has breached, is breaching or is likely to breach an **environmental protection agreement**; and
- serious or material **environmental harm** has or may result.

The **EPA** can specify particular matters to be addressed in the **environmental audit**.

In addition, under Section 51, the **EPA** can require an **environmental audit** as a condition of an **environmental authorisation**. The Act does not set any explicit preconditions to the exercise of this latter power, but given the likely cost of an audit the **EPA** will generally only require an audit as a licence condition if satisfied that it is likely to identify ways of achieving significant reductions in **environmental harm** (or risk of harm) without excessive cost.

9.4.4 Who can conduct an environmental audit?

An **environmental audit** may only be conducted by a qualified **auditor** who is approved by the **EPA** under Section 75 of the Act. A list of **auditors** approved by the **EPA** is held at the **EPA's** main office at the Department of Territory and Municipal Services, Macarthur House, 12 Wattle St Lyneham ACT, phone Canberra Connect on 132281.

9.4.5 What are the requirements for an environmental auditor

Under Section 75 of the Act, the **EPA** must not approve a person to conduct a proposed **environmental audit** unless satisfied that the person:

- has appropriate qualifications and experience; and
- is on a list of persons who meet prescribed criteria.

As yet there are no criteria prescribed under the Regulation. However, Section 75 provides that persons registered under corresponding laws in other States as environmental **auditors** are taken to be on the list of persons who meet the criteria.

For both a voluntary and compulsory **environmental audit**, the **EPA** would expect the environmental **auditor** engaged to be approved by the authority.

In considering whether an eligible environmental **auditor** has appropriate qualifications and experience to conduct the proposed audit, the **EPA** will have regard to the person's:

- knowledge of and experience in relation to the relevant industry or activity; and
- understanding of an experience in dealing with the relevant regulatory requirements and technical or other relevant standards.

9.5 Emergency plans

9.5.1 What is an emergency plan and what does it contain?

Emergency plans are defined in Section 80 as plans for dealing with the foreseeable but unplanned entry into the environment of unauthorised pollutants, where they may cause serious or material harm.

Section 81 of the Act deals with the content of an emergency plan: an **emergency plan** specifies what an activity-manager will do in the event of specified environmental emergencies. The plan may also specify a course of action for possible future emergencies and may specify a timetable for the implementation of any preparation requirements.

9.5.2 When are emergency plans required?

Under Section 82, **emergency plans** can also be required if the **EPA** has reasonable grounds for believing that environmental emergencies could occur during the conduct of the activity.

Under Section 81 of the Act the **EPA** may specify certain matters to be addressed by the plan, how the plan is to be prepared and by whom including:

- specifying the environmental emergencies to be addressed;
- specifying certain preparation requirements to be included; or
- requiring that the draft plan be prepared on the person's behalf by a person who holds specialist qualifications.

The **EPA** can also require the preparation of an **emergency plan** as a condition of an **environmental authorisation** (see Section 51 of the Act). Typically the **EPA** would set such a condition on similar grounds to those required for a separate decision under Section 82 to require an **emergency plan**.

9.6 Financial assurances

9.6.1 What is a financial assurance?

A **financial assurance** is a type of bond or security and acts as a financial guarantee that certain **environmental harm** will not result from anything done by the activity manager. An assurance can take several forms, including a bank guarantee, bond, or insurance policy (see Section 85 of the Act). **Financial assurances** are held by the **EPA** and are only claimed in circumstances where the **EPA** has incurred certain costs in remedying serious or material environmental harm caused by the activities concerned (see Section 88).

9.6.2 When can the EPA require a financial assurance?

Under Section 85 of the Act, the **EPA** can require a **financial assurance** as a condition of an **environmental authorisation** if, after considering:

- the likelihood of the activity causing serious or material **environmental harm**
- the likelihood of action being needed to remedy such harm; and
- the activity manager's environmental record.

9.6.3 What is the EPA's approach to financial assurances?

The **EPA** takes the view that **financial assurances** will be required in relatively unusual situations, involving a fine balancing of risks, benefits, rights and interests. One example would be where the activity manager had a poor environmental record, but not so poor as to justify rejecting the application for authorisation. Another example would be where a proposed activity offered significant public benefits, but also entailed atypically high risks of serious or material harm. Note that the Act provides the usual procedural protections such as a requirement for "show cause" notice, together with appeal rights.

9.7 Environment protection orders

9.7.1 What are environment protection orders and what do they do?

Environment protection orders are instruments issued by the **EPA** under Section 125 of the Act where the **EPA** is satisfied that the person has breached the Act or an authorisation condition. The order requires the person to do, or not do, specified things to remedy the breach of the Act or authorisation.

In this context, contravening the Act includes failing to comply with the **general environmental duty**.

Environment protection orders can impose a variety of requirements on people, as long as they are reasonably necessary for the purposes for which the order is served. For example, orders can require people to:

- stop or not commence certain action;

- provide information; or
- undertake environmental restoration of a public place.

9.7.2 When will the EPA issue an environment protection order?

Environment protection orders are flexible instruments suitable for use in a variety of circumstances, from minor domestic breaches of the **general environmental duty** such as tipping paint-wash down the drain to major breaches of an authorisation by industry. In this latter context penalties of up to \$100,000 are possible.

The **EPA** anticipates using **environment protection orders** as a second or third resort - if approaches based on cooperation, education, and in appropriate cases, formal warning, have failed.

10 ENFORCEMENT

10.1 When will a prosecution be commenced?

Prosecutions in the ACT are the responsibility of the DPP under the *Director of Public Prosecutions Act 1990*, and offences under the *Environment Protection Act 1997* are no exception to this.

Although a decision on whether to prosecute is always one for the DPP, in routine matters under the *Environment Protection Act 1997* the decision on whether to refer a matter to the DPP for consideration is one for the **EPA**.

The **EPA** has developed an Investigations Procedures Manual to assist Environment Protection Officers perform their duties, including procedures to be followed by investigative staff. This manual should be referred to by Environment Protection Officers when investigating an incident, particularly in regards to collecting evidence for prosecution.

Refer to Section 4 of this EPP for the EPA's general approach to enforcement.

10.2 Infringement notices

Infringement notices are imposed under the Magistrates Court (Environment Protection Infringement Notices) Regulation 2005. The offences against the Act and the Regulation for which **infringement notices** can be issued are found at Schedule 1 of the Magistrate Court (Environment Protection Infringement Notices) Regulation 2005.

Infringement notices do not fit easily into the traditional divisions of the law. An **infringement notice** is issued because an offence has apparently been committed, but payment of the fine does not lead to a criminal conviction being recorded. On the other hand, if a person elects to have the matter heard, criminal proceedings are commenced in respect of the relevant minor environmental offence.

The approach of the **EPA** will generally be to use **infringement notices** only after education and warnings have not been successful. However, in cases of blatant disregard for the environment an on-the-spot fine will be used immediately if it is the appropriate enforcement instrument in the circumstances. An example would be when a person is caught tipping used engine oil from their car into a stormwater drain.

A decision to issue an **infringement notice** is a discretionary one and environment protection officers will exercise care to ensure that the issuing of a fine is the appropriate action in the circumstances. For example, it may be more appropriate to issue an **environment protection order** requiring the clean up of a site or to address an ongoing compliance problem by negotiating a change in practice, possibly reflected in a variation of authorisation conditions. An **infringement notice** would not be issued in addition to the taking of other such action. Alternatively, if the facts are complex or unclear, or if it appears that significant criminality is involved, it will be more appropriate to refer the matter to the DPP to consider the laying of charges.

Generally an **infringement notice** is issued within 14 days of the **EPA** becoming aware of the alleged breach.

11 ECONOMIC MEASURES

Part 6 of the Act gives the **EPA** power to develop and implement “Economic Measures”, particularly **bubble licences** and **tradeable permits**. **Bubble licences** are licences covering a number of related activities or establishments, such as all the sewerage plants in a river catchment. **Tradeable permit** schemes permit trade in emissions. For example, a scheme may set the total emissions from the ACT for sulfur dioxide (usually the total reduces each year) while allowing trading between emitters, so that emitters who reduce emissions can sell emission rights to those who do not.

12 APPENDIX

Appendix 12.1 Outline of Possible Environmental Protection Agreement

1. The agreement will identify the parties. A party could include an individual activity manager, an industry association, a community group or a government agency.
2. It may be appropriate to include a statement of shared objectives of the agreement.
3. The parties will commit themselves to certain actions. In the case of a “Class B” activity this could include the steps the activity manager will take to minimise emissions or other causes of **environmental harm**. It may also include provisions about monitoring the activity manager will undertake. There might also be a commitment to comply with a particular code of practice or to prepare a **draft environment improvement plan** by a specified date. In agreements with an industry group, there might be a commitment to develop a code of practice or to work otherwise on industry environmental standards and practices over time.
4. The agreement will provide for termination, usually on 28 days’ notice but on shorter notice if the **EPA** has received notice of a major breach of the agreement that is for example, likely to cause imminent serious or material environmental harm.
5. There will be provision for service of notices and other formalities.

Appendix 12.2 Extract from Ministerial Determination Exempting Certain Activities from Public Consultation Requirements

Australian Capital Territory

Environment Protection (Consultation for Environmental Authorisation Application) Exemption 2007 (No 1)*

Disallowable instrument DI2007—195

made under the

Environment Protection Act 1997, s48 (Consultation on application for environmental authorisation)

1 Name of instrument

This instrument is the *Environment Protection (Consultation for Environmental Authorisation Application) Exemption 2007 (No 1)*.

2 Commencement

This instrument commences on the day after notification.

3 Notification

Notice is hereby given that under section 48 of the *Environment Protection Act 1997* the attached *Environment Protection (Consultation for Environmental Authorisation Application) Exemption 2007 (No 1)* is approved.

4 Exemptions from consultation for environmental authorisation applications

I declare that under section 48(6) of the *Environment Protection Act 1997* the requirement as to consultation does not apply to the following prescribed activities:

- (a) lighting, using or maintaining a fire in the open air, or causing or permitting a fire to be lit, used or maintained in the open air, for the purpose of burning plant matter-
 - (i) to reduce a fire hazard;
 - (ii) to clear the land; or
 - (iii) to conserve biological diversity or ecological integrity.
- (b) the commercial use of chemical products registered under the Agricultural and Veterinary Chemicals Code as in force for the time being under the *Agricultural and Veterinary Chemicals Code Act 1994* of the Commonwealth for pest control or turf management.
- (c) the sale or supply in the ACT of firewood to the person who uses it, unless-
 - (i) the quantity of firewood sold or supplied is less than 100kg; or
 - (ii) the firewood is sold under a scheme in which an annual fee is paid for the right to collect waste softwood in pine plantations.

5 Revocation

This instrument revokes Disallowable Instrument Number **DI 1998-77**.

Jon Stanhope
Minister for the Environment, Water and Climate Change
23 July 2007

13 GLOSSARY

List of Terms

Activity manager a person managing or otherwise responsible for an activity to which the Act applies

Environment protection officer the informal name for an authorised officer under Section 14 of the Act - these officers exercise powers of the EPA under delegation

List of Abbreviations

AAT Administrative Appeals Tribunal

the Act the Environment Protection Act 1997

DPP Director of Public Prosecutions

EPP Environment Protection Policy made under Part 4 of the Act

EPA the Environment Protection Authority established under Section 11 of the Act

the Regulation Environment Protection Regulation 2005 made under the *Environment Protection Act 1997*

14 REFERENCES

- Waste Water Reuse Environment Protection Policy, ACT EPA
- Contaminated Sites Environment Protection Policy, ACT EPA
- Hazardous Materials Environment Protection Policy, ACT EPA
- General Noise Environment Protection Policy, ACT EPA
- Motor Sport Noise Environment Protection Policy, ACT EPA
- Outdoor Concert Noise Environment Protection Policy, ACT EPA
- Air Environment Protection Policy, ACT EPA
- Water Quality Environment Protection Policy, ACT EPA
- Investigations Procedures Manual, ACT EPA
- ACT EPA Information Sheets