

Module 2:

Legislative and policy framework for air quality management

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1 Introduction

1.1 NSW Action for Air

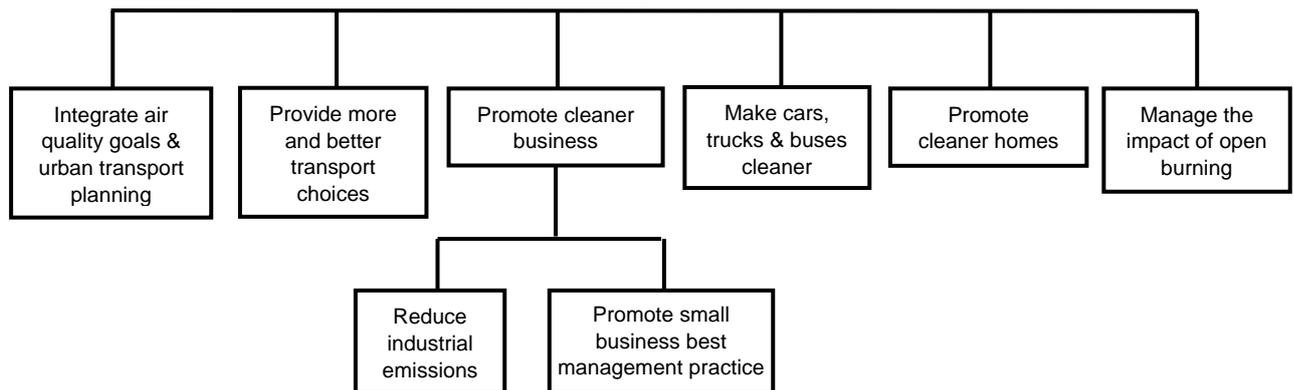
In March 1998 the Environment Protection Authority (EPA) released the NSW Government's 25-year air quality management plan *Action for Air*. Through this document the NSW Government has developed a comprehensive long-term approach to the management of air quality in the Sydney Greater Metropolitan Region which includes Sydney, the Illawarra and the Lower Hunter.

Action for Air focuses on the **regional air pollution issues** of photochemical smog and fine particle pollution. The **global air pollution issues** of greenhouse gas emissions and stratospheric ozone depletion are being addressed in other programs in which all levels of government play a part.

Local government is most immediately involved in the management of **local air quality issues** that arise from the impacts of activities and premises on their near neighbours.

Of the seven key objectives that are identified in *Action for Air*¹, several have associated actions that fall within the responsibility and capability of local government. Each of these associated actions is important for local government management of local air quality issues:

Action for Air actions in which local government in NSW has a role



At all levels of government, and in particular at the local government level, the actions that are needed to achieve the objectives set out in *Action for Air* involve integrating three fundamental areas:

- planning and development assessment
- regulation and enforcement
- environmental education.

The Department of Environment and Climate Change (DECC) has developed this *Local Government Air Quality Training Toolkit* to provide information to help local government officers better understand and manage the air quality issues under local government planning and regulatory control.

¹ See Figure 12 on p18 of *Action for Air*.

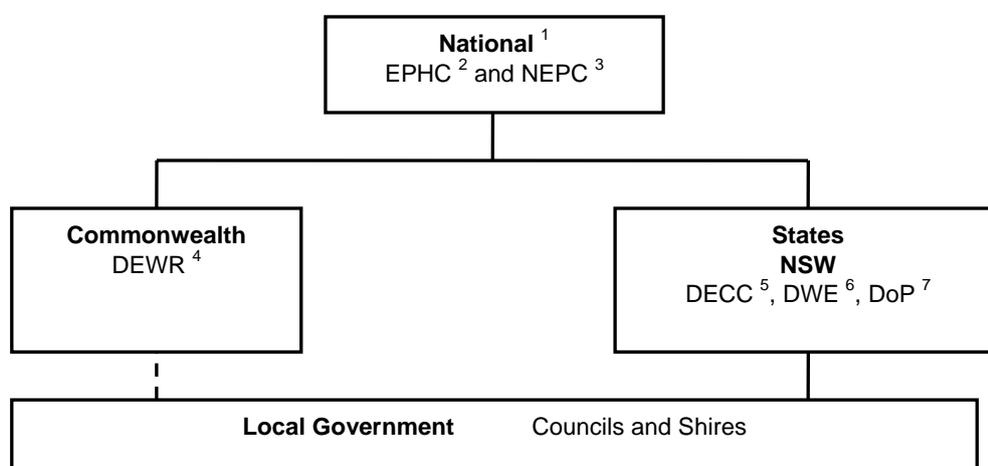
1.2 Government and air quality management

The main **regional air pollution problems** in NSW are photochemical smog and particle pollution in the Greater Sydney Metropolitan Region, and fine particles from solid fuel heaters in regional areas.

In addition there are **local air pollution problems** associated with particular premises and activities that cause nuisance or offence to neighbours in their immediate vicinity. Examples frequently brought to the attention of local government officers include odour from spray painting and food shops and dust from building sites.

Environmental management roles of different levels of government

Each level of government—Commonwealth, State and local—plays a role in preventing or minimising the impacts of air pollution. This Module briefly outlines the environmental policy and legislative framework relevant to air quality at each government level and the relationships between each level. The regulatory instruments and programs for managing air quality available to local government are then described in more detail in the following sections.



- 1 The Commonwealth, State and Territory Governments acting through the Inter-governmental Agreement on the Environment (IGAE)
- 2 Environment Protection and Heritage Council
- 3 National Environment Protection Council
- 4 Department of the Environment and Water Resources
- 5 Department of Environment and Climate Change
- 6 Department of Water and Energy
- 7 Department of Planning

Greenhouse gas emissions and global climate change are important environmental issues. They are being addressed at the local government level through Cities for Climate Protection (CCP®) and energy and greenhouse programs sponsored by the NSW Department of Water and Energy—see section 6.6 of this Module for references.

However, the focus of this Toolkit is on the emissions of particles and air pollutants, rather than on greenhouse gas emissions and global climate change.

2 Policy framework

Environmental protection responsibilities are shared between the Commonwealth, the States and local government authorities (councils).

2.1 Commonwealth Government

The Commonwealth Government takes a leading role in a number of air quality issues, including:

- ozone protection
- standards for new motor vehicles
- motor vehicle fuel standards, including the accelerated phase-out of leaded petrol
- coordination of the national response to global climate change
- facilitating the development of NEPMs.

In cooperation with the States and Territories, the Commonwealth contributes to the development of air quality policies and standards through the National Environment Protection Council (NEPC) under the ‘umbrella’ of the Environment Protection and Heritage Council (EPHC). These joint Commonwealth-State Ministerial Councils initiate and oversee the development of National Environment Protection Measures (NEPMs) which set national objectives for protecting or managing particular aspects of the environment.

The **Ambient Air Quality NEPM** sets air quality standards and goals to ensure adequate protection of health and wellbeing. For further information on NEPMs go to the EPHC website at: www.ephc.gov.au/nepms/nepms.html.

The Commonwealth is responsible for motor vehicle fuel quality and it establishes limits for fuel parameters as Determinations under the *Fuel Quality Standards Act 2000*. The Commonwealth also regulates motor vehicle emission standards as Australian Design Rules under the *Motor Vehicle Standards Act 1989*. There is also a Diesel Vehicle Emissions NEPM.

National Greenhouse Strategy

The Commonwealth and the States have jointly developed the **National Greenhouse Strategy**. The Commonwealth Government represents Australia in international discussions on greenhouse and climate change. The Commonwealth funds greenhouse gas abatement projects across Australia via the Australian Greenhouse Office (AGO).

For further information on the Commonwealth’s response to climate change go to the AGO website at: www.greenhouse.gov.au/ and access the National Greenhouse Strategy at: www.greenhouse.gov.au/government/ngs/index.html.

2.2 The States

State governments are responsible for taking action to implement programs, NEPMs and greenhouse initiatives with appropriate legislation, policies, strategies and programs. In the case of NEPMs, States must report on progress made in achieving NEPM goals.

Action for Air

Action for Air is the NSW Government's 25-year strategy for tackling photochemical smog and particle pollution. Launched in 1998, and subsequently reviewed and updated in 2002, it aims to bring NSW air quality in line with the national air quality standards established under the Ambient Air Quality NEPM.

Action for Air provides the framework for DECC's air-related activities. It covers the Sydney, Illawarra and lower Hunter regions, and the urban areas of the State needing a regional (as distinct from a local) strategy for air quality. The strategy addresses all major sources of air pollutants in the urban environment:

- motor vehicles
- major industrial sources
- smaller commercial sources
- domestic sources
- open burning

For an outline of the *Action for Air* strategy, visit the DECC website at:
www.environment.nsw.gov.au/air/actionforair/index.htm.

Department of Environment and Climate Change NSW

In April 2007, the name of the Department of Environment and Conservation NSW (DEC) changed to the Department of Environment and Climate Change NSW (DECC). In this Toolkit there are several references to the EPA. This is because the EPA is nominated in various laws and regulations as having specified regulatory powers and responsibilities. **The EPA is part of DECC.**

2.3 Regulatory instruments

Regulatory instruments for environmental protection in Australia sit within the normal statute law framework and provisions for its implementation.

Bills and Acts

Bills are drafted and brought to the Parliament by the executive arm of government.

Bills enacted by Parliament become **Acts**. These acts establish the objectives, principles and legal mechanisms for the legislation.

Subordinate legislation

Acts usually contain provision for **subordinate or delegated legislation** in the form of **regulations, by-laws** and **orders** which are drafted by public officials and experts. It is the subordinate legislation

which usually contains the detailed technical and administrative provisions that give the legislation practical effect.

Subordinate legislation provides the working structure of the law. This is where environmental discharge limits and procedures for licensing and monitoring are specified. Scientific and technical experts, including those in government agencies, help to draft subordinate legislation which is made by the Governor on advice from the Executive Council. Parliament can disallow any regulation.

When a regulation under an act is proposed it must lay on the table of the NSW Upper House for a specified period for parliamentary review.

The regulation becomes effective from the date of publication or other date specified in the NSW Government Gazette.

A period of public consultation on draft legislation is commonly practised by governments in the process of developing legislation. A skilled workforce with relevant scientific and technical training is usually needed to implement and administer environmental legislation.

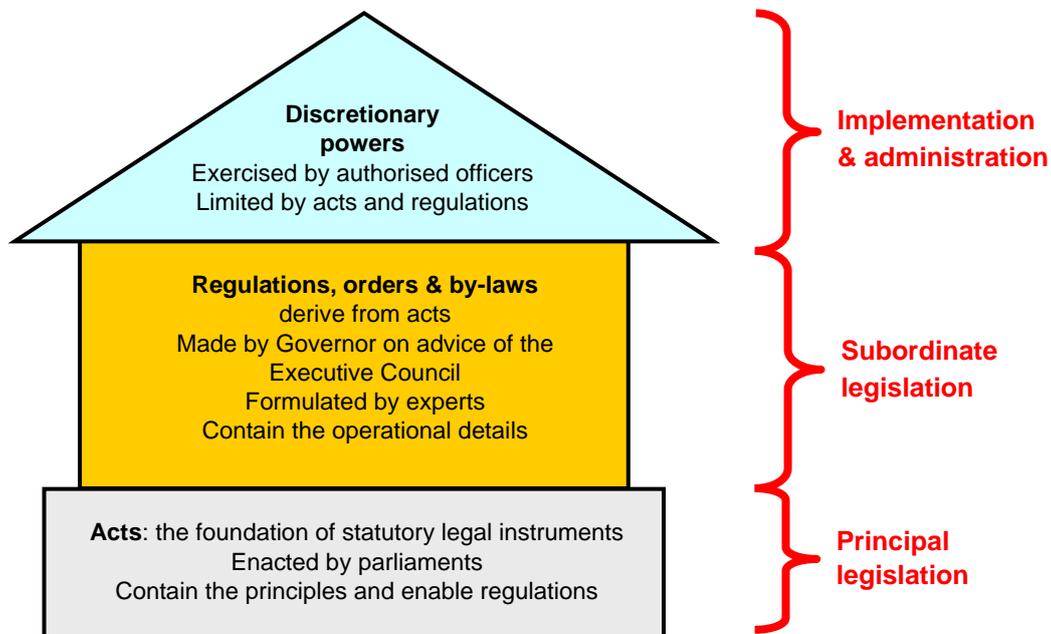
Discretionary powers granted to Authorised Officers

Under an act, **discretionary powers** may be granted to **authorised officers** to administer sections of the legislation. However these discretionary powers must be exercised within the strict limitations set by the principal and subordinate legislation and the agency.

Examples of relevant discretionary powers are the issuing of Clean-up Notices, Prevention Notices or Penalty Notices under the *Protection of the Environment Operations Act 1997* (POEO Act).

The overall structure of environmental administration is represented in the following diagram:

Acts, regulations, orders, by-laws and discretionary powers



Regulatory instruments in NSW

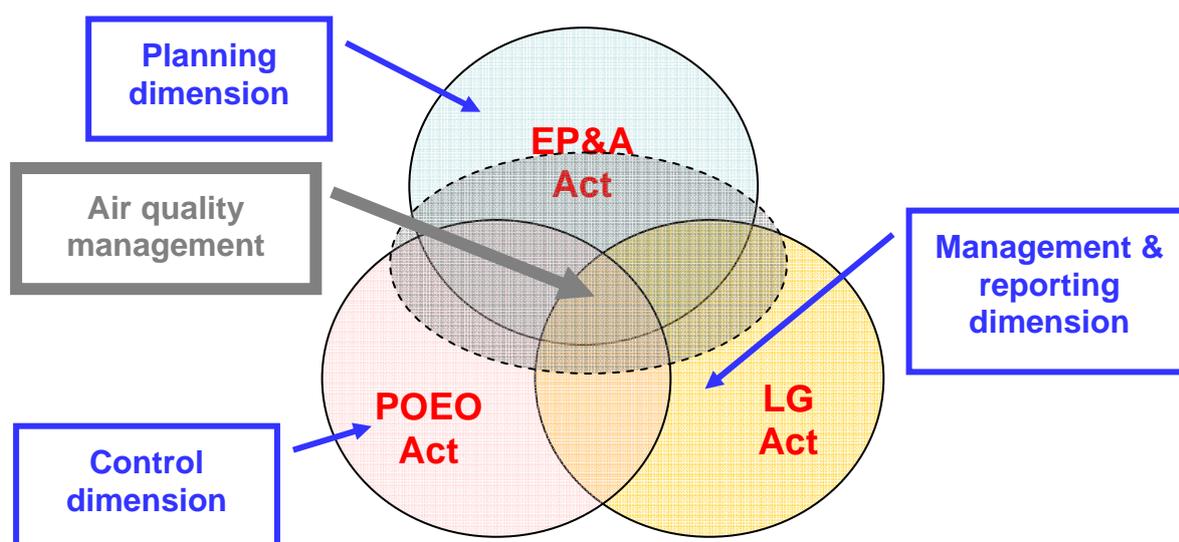
The key statutory provisions within the NSW regulatory framework for air quality relevant to local government are listed in Table 1.

Table 1: Key statutory provisions in NSW relevant to local government

Act	Major provisions
<i>Protection of the Environment Operations Act 1997 (POEO Act)</i>	Regulations Clean-Up Notices Prevention Notices Penalty Notices No Burn Orders Directions concerning fires Public registers
<i>Environmental Planning and Assessment Act 1979 (EP&A Act)</i>	Environmental planning instruments Development consents
<i>Local Government Act 1993 (LG Act)</i>	Approvals Orders Inspections

The three acts provide the regulatory framework for the management of air quality in NSW in terms of both local and regional impacts. The acts have distinct general purposes which contribute to effective air quality management, although there is necessarily some interaction between their separate roles and their implementation by the different tiers of government.

The role of legislation in air quality management by local government



2.4 Standards

The term ‘standard’ is used in two ways in the context of air quality management. One refers to a characteristic of the environment (e.g. 9.0 ppm carbon monoxide), the other to the procedures for performance or measurement (e.g. the Australian standard for odour measurement method AS/NZS 4323.3:2001).

Standards in NEPMs

NEPMs are similar to environmental protection policies. NEPMs may consist of any combination of goals, standards, protocols, and guidelines. Typically a NEPM may contain:

- a **goal**
- one or more **standards**
- one or more **monitoring and reporting** protocols
- some **guidelines**.

The NEPM definition of ‘standard’

A ‘standard’ is a quantifiable characteristic of the environment against which environmental quality can be assessed. It is an indicator of the desired environmental outcome, namely, air quality that adequately protects human health and wellbeing. It is a necessary, but not always sufficient, indicator of environmental quality and provides a reference point against which measured environmental quality can be assessed.

Standards Australia

Standards Australia is a non-government organisation recognized by the Commonwealth Government as the peak standards body in Australia. The primary role of Standards Australia is to prepare standards through an open process of consultation and consensus in which all interested parties from a variety of industries are invited to participate.

Standards Australia has a policy of adopting International Standards wherever possible. And approximately one third of current Australian Standards are fully or substantially aligned with International Standards.

Australian Standards are not legal documents. However, many Australian Standards have been referred to in Commonwealth or State legislation and have mandatory force to that extent. There are currently more than 6,400 Australian Standards, of which around 2,400 are mandatory.

The Standards Australia definition of ‘standard’

A ‘standard’ is a published document which sets out specifications and procedures designed to ensure that a material, product, method or service is fit for its purpose and consistently performs in the way it was intended.

Standards establish a common language which defines quality and establishes safety criteria. Standards and conformance are the keys to ensuring the quality and consistency of physical, chemical and biological measurement throughout Australian society and the economy.

Regulation monitoring and test methods

In specifying methods of monitoring and testing air pollution the Protection of the Environment (Clean Air) Regulation 2002 (POEOCAR) refers to the DEC publication *Approved Methods for Sampling and Analysis of Air Pollutants in NSW*. These methods in turn commonly specify Australian Standard testing methods or specified methods of other recognised bodies, such as the United States Environment Protection Agency (US EPA). These secondary methods are not regulations, but are introduced into the implementation of a regulation by legal reference².

2.5 Local government

Local government authorities play an important role in implementing Commonwealth and State initiatives for managing air quality. In NSW, this role is defined through the *Protection of the Environment Operations Act 1997* (POEO Act), the *Environmental Planning and Assessment Act 1979* (EP&A Act) and the *Local Government Act 1993* (LG Act) as set out in Table 1 above.

Local councils' main air quality responsibilities are in respect of small businesses, domestic premises and urban planning.

Local government's management of the many sources of air pollution from small businesses and domestic premises, together with its role in urban planning, contribute significantly to regional as well as local impacts on air quality.

Thus local government plays a role in the broader framework of air quality management.

A brief overview of the POEO Act and EP&A Act follows in sections 3 and 4 of this Module, focusing on the respective roles of local councils and DECC in administering these acts.

Legislative and regulatory mechanisms and other programs for dealing with air pollution from sources relevant to local councils are discussed in the following sections of this Module:

- Section 5—small businesses
- Section 6—planning, avoidance and mitigation strategies
- Section 7—domestic premises
- Section 8—motor vehicles.

² Approved methods and other derived requirements are 'made bureaucratically' and are therefore open to legal challenge in a way that does not apply to regulations.

3 Protection of the Environment Operations Act 1997

3.1 Overview

The *Protection of the Environment Operations Act 1997* (POEO Act) is the key piece of environment protection legislation in NSW. In regards to air pollution, the POEO Act regulates commercial, industrial and domestic activities. The POEO Act also contains provisions concerning air pollution arising from motor vehicles and open burning.

In relation to air quality management by local government **the POEO Act:**

- defines ‘air pollution’
- enables the Government to make protection of the environment policies to prevent or minimise air pollution
- allocates responsibility for environment protection between the State Government and local councils for particular environment protection functions
- provides a range of tools to address air pollution, including orders and directions concerning fires, Clean-up Notices and Prevention Notices.
- enables local government to issue notices or directions to maintain and operate equipment in a proper and efficient manner
- makes it an offence to do various things that cause the emission of air pollution and to breach the conditions of an order, direction or notice.

Regulations supporting the POEO Act

The following regulations support the POEO Act in managing air pollution:

- Protection of the Environment Operations (Clean Air) Regulation 2002
- Protection of the Environment Operations (General) Regulation 1998.

The POEO (Clean Air) Regulation 2002 (POEOCAR)

Sets emission concentration standards and rates for certain activities.

Sets certain requirements in respect of domestic solid fuel heaters and motor vehicles.

Part 2A of the Regulation establishes a framework for controlling where and what types of substances may be burnt.

The Regulations describe offences for breaching relevant standards and POEO Act provisions, and outline penalties for these offences.

Approved Methods for the Sampling and Analysis of Air Pollutants in NSW

Lists the methods to be used for the sampling and analysis of air pollutants in NSW for statutory purposes.

Prescribes methods for the sampling and analysis of air pollutants from stationary sources and mobile sources, motor vehicle fuels and pollutants in ambient air.

This is referred to in the POEO (Clean Air) Regulation 2002 for testing.

Approved Methods for the Modelling and Assessment of Air Pollutants in NSW

Lists the statutory methods for modelling and assessing air pollutants from stationary sources in NSW.

Specifies assessment criteria which reflect the environmental outcomes adopted by DECC.

This is referred to in the POEO (Clean Air) Regulation 2002 for assessment of impacts of air pollutants.

Both of the above documents may also be referred to in statutory instruments such as notices issued under the POEO Act.

Further information on the POEO legislation is available on the DECC website at:
www.environment.nsw.gov.au/legal_and_licensing.htm

3.2 Air pollution

The POEO Act defines 'air pollution' as:

'the emission into the air of any impurity'

'Air impurity' is defined to include:

'smoke, dust (including fly ash), cinders, solid particles of any kind, gases, fumes, mists, odours and radioactive substances'

Air pollution is subsequently defined as a component of 'pollution', the other components being water, noise and land pollution.

This establishes that the general provisions of the POEO Act that apply to 'pollution' also apply to air pollution.

3.3 Roles and responsibilities in air pollution control

Appropriate regulatory authority

The POEO Act differentiates between activities and premises regulated by DECC (EPA) and those that are the responsibility of councils by designating only one of these organisations as the **appropriate regulatory authority (ARA)**.

If an ARA has responsibility for an activity, the ARA can regulate any form of pollution resulting from that activity, including air pollution.

When the local council is the ARA

The local council is the ARA if:

- the activity is NOT listed in Schedule 1 of the POEO Act (i.e. it is NOT a scheduled activity)

- there is NOT a licence to control water pollution from the activity
- the activity is NOT carried out by a public authority (including a local council—i.e. a local council is NOT the ARA for its own activities).

Authorised officers

Authorised officers are people who are appointed by the ARA under s. 187 of the POEO Act. They act on behalf of the ARA in investigating alleged environmental problems relating to activities regulated by the ARA under the POEO Act.

Local councils must appoint their own authorised officers.

Authorised officers have a range of investigation powers and can issue directions concerning fires and other notices provided for by the POEO Act or regulations.

For further information on the appointment of authorised officers, see the DEC publication *Authorisation of Council Officers* at: www.environment.nsw.gov.au/mao/authofcouncil.htm.

Powers of authorised officers

The POEO Act provides authorised officers with powers to:

- require information or records (POEO Act Part 7.3)
- enter and search premises (POEO Act Part 7.4)
- question and identify persons (POEO Act Part 7.5).

Section 187 of the POEO Act enables a local council to appoint officers and employees of **other local councils** (as well as its own officers and employees) as authorised persons for the purposes of the Act, in relation to its area. This is to facilitate activities under the Act that require action across local government boundaries.

For further information on the powers of authorised officers see the DEC publication *Powers of Authorised Officers* at: www.environment.nsw.gov.au/mao/powersao.htm.

Enforcement officers

Enforcement officers are people who are appointed under s. 226 of the POEO Act to issue Penalty Notices for specific offences listed in Schedule 1 of the POEO (Penalty Notices) Regulation 1999. Councils could, for example, appoint enforcement officers for littering offences without conferring on them the full powers of authorised officer for pollution investigations and preventions.

An enforcement officer can use all the investigatory powers of an authorised officer (i.e. a person appointed under s. 187 of the POEO Act) but only for the purpose of issuing a Penalty Notice.

3.4 Duty to warn

The powers listed in ‘Powers of authorised officers’ above enable a council to obtain the information it needs to respond to air pollution issues.

In many cases **people volunteer information and answers** when an authorised officer asks them to do so. Where they do not, the authorised officer can require the person to provide the information or answer.

In this case, the company or individual must be warned:

- that failure to comply is an offence, and
- in the case of individuals, that they could object on the ground that the information or answer might incriminate them (POEO Act s. 212).

The person must then comply, but the information or answer provided is not admissible in evidence in any criminal proceedings against the individual (but not the company) if they have made an objection.

3.5 Charges for inspections

Councils can recover certain costs associated with inspecting premises for which it is the ARA if:

- it has approved a fee in accordance with section 610F of the LG Act, and
- the premises inspected are used for a commercial activity, and
- the inspection is reasonably required for carrying out the council’s functions, including those under the POEO Act (LG Act s. 608).

Under the POEO Act, **no recovery fee for a first inspection is possible if no need for corrective action is identified during the inspection.**

4 Environmental Planning and Assessment Act 1979

Council officers are familiar with the *Environmental Planning and Assessment Act 1979* (EP&A Act) which deals primarily with land use planning and development assessment.

Councils can regulate development which is expected to have air quality impacts or be particularly sensitive to air pollution through appropriate zoning, development standards and development consent conditions.

4.1 Environmental planning instruments

Part 3 of the EP&A Act provides for the making of State, regional and local environmental planning instruments (EPIs).

State Environmental Planning Policies and Regional Environment Plans

State Environmental Planning Policies (SEPPs) and **Regional Environment Plans** (REPs) provide for coordinated responses to planning issues associated with development proposals having impacts significant to the State and people of NSW. Councils may still retain consent authority functions under SEPPs and REPs.

Local Environmental Plans (LEPs) and Development Control Plans (DCPs) are particularly relevant to local government's management of air quality issues.

Local Environmental Plans

LEPs prepared by councils across the State are the most common tool for strategic land use planning and controlling new development.

By identifying development in particular areas as either prohibited, permissible with consent or permissible without consent, LEPs play a major role in the appropriate siting of new polluting industries, or the appropriate siting of other land uses around existing polluting industries.

See section 6 of this Module for more information on appropriate land use planning for air polluting activities.

Environmental planning instruments will also identify the relevant consent authority for particular development. In most cases it will be the council in whose local government area the development is proposed.

Development Control Plans

A council DCP can specify the types of conditions relating to air quality impacts (as part of 'environmental performance') which can be incorporated into development consents.

4.2 Using planning powers to manage air quality

There are many opportunities for a local council to improve and protect local and regional air quality through the exercise of its planning and consent powers under the EP&A Act. These are not outlined in detail here.

Consideration of likely environmental impacts of a proposed development

In assessing a development application, the consent authority must take into consideration a number of factors under section 79C of the EP&A Act, including the *'likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality'*.

Following is an example of how a council might use these powers to address air quality issues.

Example 'air quality' section in a council DCP

Principle

Minimising air pollution caused by new development, and achieving the NEPM and DECC air quality goals locally and regionally to the extent that is possible for a local council to achieve.

Rationale

Air quality in the major metropolitan areas is influenced by many polluting factors. A number of these are increasing—particularly motor vehicle emissions. Wherever possible, council should attempt to reduce air pollution by reducing the processes and equipment that contribute to it. DECC *Approved Methods and Guidance for the Modelling and Assessment of Air Pollutants in New South Wales 2005* should be used as a tool when considering air quality in the consent assessment process for developments with air pollution potential for which council is the ARA. Council should also consider cumulative impacts on the air quality goals set in the NEPM when exercising its planning powers and when granting multiple consents (e.g. in industrial areas).

Guidelines

The operation of any new premises and any machinery or plant to be installed, or any process to be used, must not cause emissions contrary to the *Protection of the Environment Operations Act 1997* and the Protection of the Environment Operations (Clean Air) Regulation 2002. Applicants will need to demonstrate that these statewide prescriptions are met. Approvals may also be required from DECC for some types of development.

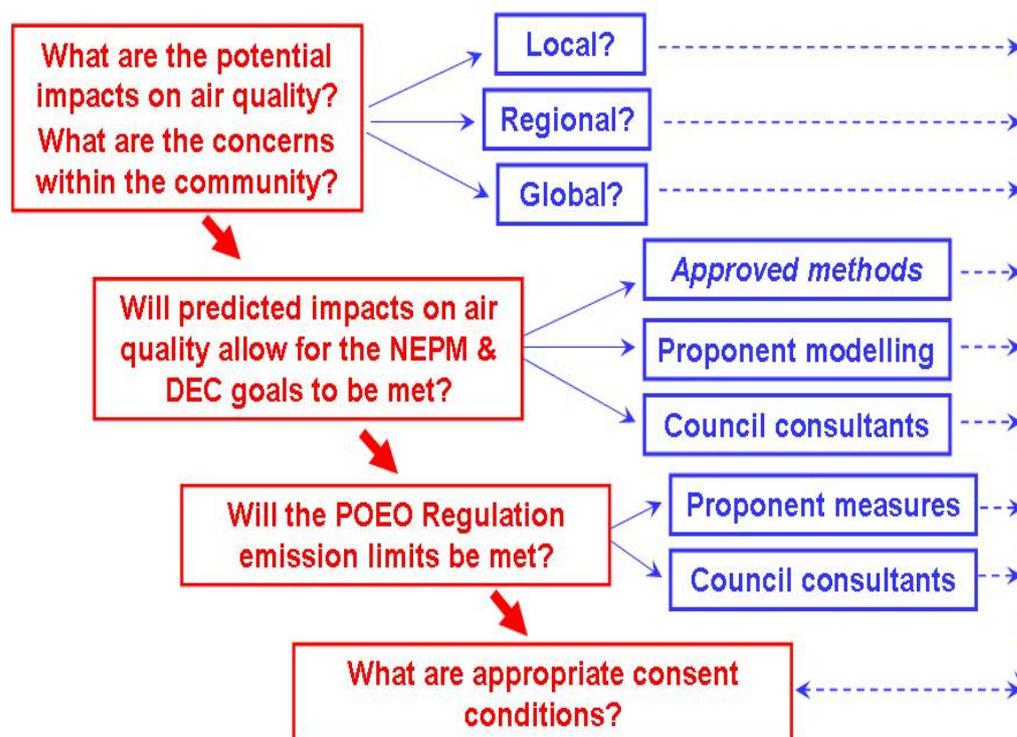
Machinery and operations should be designed to minimise the emission of air impurities. This includes minimising vehicular movements to and from the site.

Restricting the hours of operation may reduce any emissions to an acceptable level.

Controls

All development must comply with the provisions of the *Protection of the Environment Operations Act 1997* and the Protection of the Environment Operations (Clean Air) Regulation 2002.

Factors to consider in assessing development applications



5 Businesses and premises regulated by local councils

Local councils are the appropriate regulatory authorities (ARAs) under the POEO Act for most **non-scheduled activities** and premises. These generally include:

- medium-to-small industries
- commercial activities
- domestic premises and activities
- rural and agricultural activities.

All of these are becoming increasingly significant contributors to the load of volatile organic compounds, particles and odour pollutants in NSW air sheds. Certain non-scheduled industries and activities (e.g. crematoria) also generate toxic air emissions.

Regulating air pollution impacts

Only the ARA for the particular activity or premises has power to take regulatory action for air quality.

5.1 Scheduled activities

The EPA is the ARA for scheduled activities and is responsible for issuing licences to conduct those activities and for other activities and scheduled development work, see s. 43 and s. 44 of the POEO Act.

Licences are usually issued with conditions. These may include requirements to monitor, to submit certification of compliance with licence conditions, to comply with a mandatory environmental audit program, to undertake a pollution reduction program and provide financial assurances.

Under the POEO Act the EPA has sole responsibility for issuing licences.

Load-based licensing

A key feature of the licensing system is load-based licensing, which is based on the ‘polluter pays’ principle. By linking licence fees to pollution contributions, the scheme introduces an economic incentive for regulated industries to reduce their emissions.

Local government input into the licensing process

Local government can have input into the licensing process in the following ways:

- **Submissions on Environmental Impact Statements**—under the EP&A Act councils have the opportunity to make submissions on EIS for proposals (for which they are not the consent authority) located in their LGA or which they consider may impact upon the environment of their LGA. Submissions could propose possible consent or licence conditions which council considers appropriate.
- **Integration of licensing and planning processes**—integration of EPA licensing, both with the development consent procedures and with environmental assessment under Part 5 of the EP&A Act, provide for council and public participation in the licensing process undertaken by the EPA.
- **Public notification of licence reviews**—licence reviews are undertaken at least every five years, and the review of each licence must be advertised by newspaper. Local government might choose to make submissions to the EPA regarding licence reviews.
- **Variation of licences**—the EPA may vary a licence (including the conditions). If the variation authorises a significant increase in the impact of the activity controlled by the licence and the variation has not been the subject of environmental assessment and public consultation under the EP&A Act, submissions must be invited and considered before the EPA varies the licence. This provides an opportunity for local government input.
- **Public access to information**—the EPA must keep a public register containing information about a number of matters, including licences.

5.2 Non-scheduled activities

Councils are responsible for all activities in their council areas other than those that are regulated by the EPA, or where a public authority is declared by regulation to be the ARA.

Offences for causing air pollution

Under Division 1 of Part 5.4 of the POEO Act, it is an offence for anyone to cause air pollution, due to:

- maintaining plant in an inefficient condition or operating plant in an inefficient and improper manner (POEO Act s. 124)
- carrying out maintenance work on plant in an inefficient or improper manner (POEO Act s. 125)
- handling materials in an inefficient and improper manner (POEO Act s. 126)
- exceeding prescribed levels of air impurities (POEO Act s. 128).

Division 1 of Part 5.4 of the POEO Act does not apply to plant or materials or the carrying on of an activity at premises used only for residential purposes (POEO Act s. 131).

Where there are no regulations prescribing standard concentrations or rates of emission under s. 128 of the POEO Act, subsection 128(2) requires an activity to be carried on or plant to be operated **by such practicable means as may be necessary to prevent or minimise air pollution.**

Protection of the Environment Operations (Clean Air) Regulation 2002

POEOCAR replacing CAPER

The Clean Air (Plant and Equipment) Regulation 1997 (CAPER) was replaced by amendments made under s. 128 of the POEO Act to the Protection of the Environment Operations (Clean Air) Regulation 2002, Part 4 (POEOCAR) on 1 September 2005.

Regulation of particulates and smoke from non-scheduled premises

While it primarily sets emission limits for major industrial activities scheduled under the POEO Act, Part 4 of POEOCAR is also relevant to local councils for regulating emissions of solid particles and smoke from non-scheduled activities for which they are the ARA (Part 4 Division 3).

POEOCAR applies to boilers, incinerators and any other trade, industry or process—e.g. drycleaners, foundries, clothing manufacturers, service stations and large boilers in hospitals. See Table 2.

Grouping of activities and plant under POEOCAR

Activities and plant are grouped for the purposes of emissions limits depending on the age of the equipment. This is on the principle that more modern equipment is capable of meeting more stringent emission limits and should be required to meet them.

- **Group A** predates 1 August 1997
- **Group B** applies from 1 August 1997 to 1 September 2005, and
- **Group C** applies after 1 September 2005.

If an emission unit in Group A or B in the Greater Metropolitan Area is replaced it is taken to belong to Group C.

Councils should have regard to particle emission limits for non-scheduled activities in the development approval process. They could also consider seeking verification that premises are compliant with emission limits. Means of demonstrating compliance include:

- manufacturer's specifications.
- emission testing (internal, consultant, independent).

Table 2: POEOCAR provisions for non-scheduled premises

Air impurity	Activity or plant	Group	Concentration
Solid particles	Any activity or plant (except as listed below)	Group A	400 mg/m ³
		Group B	250 mg/m ³
		Group C	100 mg/m ³
Smoke	Any activity or plant in which, or in connection with which, solid fuel is burnt	Group A	Ringelmann 2 or 40% opacity
		Group B	Ringelmann 1 or 20% opacity
		Group C	Ringelmann 1 or 20% opacity
	Any activity or plant in which, or in connection with which, liquid or gaseous fuel is burnt	Group A	Ringelmann 1 or 20% opacity
		Group B	Ringelmann 1 or 20% opacity
		Group C	Ringelmann 1 or 20% opacity
	Any activity or plant in connection with which solid fuel is burnt	Group A, in relation to marine vessels or premises, in approved circumstances	Ringelmann 3 or 60% opacity
		Group A, in relation to marine vessels or premises, in other circumstances	Ringelmann 2 or 40% opacity

Air impurity	Activity or plant	Group	Concentration
		Group B or C, in relation to marine vessels or premises, in approved circumstances	Ringelmann 3 or 60% opacity, or
		Group B or C, in relation to marine vessels or premises, in other circumstances	Ringelmann 1 or 20% opacity
	Any activity or plant in connection with which liquid or gaseous fuel is burnt	Group A, B or C in relation to marine vessels or premises, in approved circumstances	Ringelmann 3 or 60% opacity
		Group A, B or C, in relation to marine vessels or premises, in other circumstances	Ringelmann 1 or 20% opacity

Test methods, sampling times and reference conditions for determining compliance with the emission limits are specified in Schedule 7 of POEOCAR.

‘**Approved circumstances**’ in which smoke emission limits may be exceeded (for start-up and soot blowing) are specified in Clause 35 of POEOCAR.

Toxic emissions

Managing toxic emissions from non-scheduled premises under POEOCAR

For certain facilities councils will need to consider toxic emissions which are not specifically regulated in the POEOCAR emission limits for non-scheduled premises. Section 128 of POEOCAR is relevant here.

For example, an issue which has proved difficult in some local government areas relates to the siting and operation of new crematoria. Mercury and dioxin and furan emissions from these facilities need careful consideration. Some other industries which are not scheduled may also on occasion involve emissions of toxic pollutants.

Should council wish to limit toxic emissions from non-scheduled premises through consent conditions, *DECC Approved Methods for the Modelling and Assessment of Air Pollutants in NSW, 2005* may be used to determine the limits.

Odour from stationary sources

Odour remains the largest source of air pollution complaints to DECC. Odour problems generally arise when residential areas and industrial or agricultural areas are located too close to one another or when odour control equipment is inadequate.

Draft Policy: Assessment and Management of Odour from Stationary Sources in NSW outlines the legislation that applies to odour assessment and management, and recommends procedures for dealing with odour issues.

Managing odour from non-scheduled premises under the POEO Act

Part 5.4 of the POEO Act requires that the operator of any facility must not cause air pollution, including odour, through a failure to maintain or operate equipment, or by failing to deal with materials, in a proper and efficient manner. As there are no regulations in NSW that specifically set concentration limits for odours, the POEO Act s. 128(2) is applicable to all premises. This provision in effect requires that appropriate management practices be employed wherever necessary to prevent the emission of odour.

The *Technical Framework for Assessment and Management of Odour* is available from the DECC website at: www.environment.nsw.gov.au/resources/odourpol.pdf.

A supporting technical document is also available at:
www.environment.nsw.gov.au/resources/odourtech.pdf

5.3 Regulatory tools available to local councils

Local councils can regulate non-scheduled activities through:

- notices under the POEO Act, such as Clean-up Notices and Prevention Notices
- prosecutions and the issuing of Penalty Notices
- planning instruments and development consents
- LG Act approvals (s. 68), orders (s. 124) and inspections (s. 192)

Notices under the POEO Act

The power to issue notices is the key environmental regulatory tool for councils under the POEO Act.

- **Councils** as well as the EPA **have the power to issue notices** but only for activities for which they are the ARA.
- Notices can be issued in respect of **all media and waste management**.
- A broad range of **reporting, remedial and preventative actions** can be required under the notice powers.
- **Councils may receive fees** for issuing Clean-Up and Prevention Notices.
- There is a process for the **recovery of costs** of checking compliance with these notices.

Under the POEO Act the relevant enforcement options available are:

- Clean-up Notices (s. 91–94)
- Prevention Notices (s. 95–100)
- Compliance Cost Notices (s. 104–107)
- No Burn Orders and Directions concerning fires (s. 133–135)
- Smoke Abatement Notices (s. 135B–135D).

Councils' power to issue notices under the POEO Act is in addition to their power to give orders under section 124 of the LG Act.

Procedural fairness before issuing a notice

Under s. 91 and s. 96 of the POEO Act there is no legislative requirement to consult with a person or occupier before issuing them with a Clean-up Notice or Prevention Notice, respectively. However, **procedural fairness (also called natural justice)** may imply that consultation should occur before a notice is issued, in order to give a person who may be affected by the issue of the notice a right to be heard before the decision to issue the notice is made.

This could be applicable where the situation is not an emergency and where it is possible and reasonable to consult before issuing the notice.

A prosecution for failing to comply with a Clean-up Notice or Prevention Notice may fail if procedural fairness has not been observed and is held by a court to apply in the particular circumstances of the case.

Powers available to local councils under the LG Act

Councils are required to comply with certain procedures under the LG Act before issuing s. 124 orders. They may also have a Local Orders Policy to take into consideration. Powers available to councils under the LG Act are summarised in section 5.6 below. The Department of Local Government may give further advice on the appropriate use of these powers.

Applicability of notices

The applicability of the different notices under the POEO Act is set out in the following box:

Applicability of notices under the POEO Act

Clean-up Notices are generally for quick response incidents. 'Pollution incidents' include situations where a leak, spill or other escape is likely to occur or is occurring—not just once it has occurred. Actions need to be specified in the Clean-up Notice.

Prevention Notices are used to address activities that are conducted in an 'environmentally unsatisfactory manner'. They are intended to address more systemic pollution and waste management problems. Actions to address these problems need to be specified in the Prevention Notice.

Compliance Cost Notices are to enable councils to recover the costs of ensuring compliance with Clean-Up and Prevention Notices. A separate notice must be served after a Clean-Up or Prevention Notice has been given.

Considerations relating to the issuing of notices

For each of these notices the following things need to be taken into account.

- the scope of the notice
- how to use the notice
- the power to issue the notice

- to whom the notice can be issued
- whether the notice can be issued orally or must be in writing
- the right (or not) of merit appeal against the notice
- the offences for failure to comply with the notice
- the penalties under the notice
- administration fees that can be imposed for applying the notice.

These details are covered in the POEO Act and explained in the *Guide to Notices under the POEO Act* which can be found at: www.environment.nsw.gov.au/licensing/guidetonotices.htm.

Clean-up Notices for air pollution

The following box gives an example of where a council might apply a Clean-up Notice where a prompt response is needed, with the requirement for a remedial plan of action in relation to an air pollution complaint.

Example application of a Clean-up Notice

Context
A contractor places a large pile of dusty material on a property adjacent to a local hospital. A sudden spell of windy weather results in large amounts of dust being blown into hospital wards and adjacent buildings with adverse health implications.

Council issues a Clean-up Notice which requires the property owner to prepare and carry out urgently a remedial plan of action to remove the dusty material. This might include requirements to:

- carry out removal during periods of the day when winds are not strong
- wet the material before disturbing it
- place the material in such a location and in such a way as to minimise the formation of air borne dust, and
- ensure all vehicles transporting the material are covered.

In relation to air quality issues, other situations where a Clean-up Notice is likely to be appropriate are:

- excessive dust blowing off-site from uncontrolled demolition activities
- excessive emissions from exhaust stacks at industrial and small commercial premises
- a spill of toxic or irritating material requiring removal to avoid evaporation and dispersion.

Prevention Notices for air pollution

A Prevention Notice can encourage an operator to apply best management practice to an activity. In the context of air quality management it is likely to be appropriate where:

- there is a need to ensure appropriate containment, management and control of dust and other air pollutants, for example, from stockpiled material, loading or emptying silos, industrial stacks and smoke from woodheaters

- there is inappropriate use of a spray booth—giving rise to air pollution (council would need to demonstrate it was operated in an environmentally unsatisfactory manner)
- odour control (to prevent or mitigate generation of odours)
- there are a number of environmental issues requiring action, e.g. air, noise, water or waste problems. A single Prevention Notice can be used to address all these problems for a particular site or activity.

The Prevention Notice is designed to set out actions that are needed so that an activity operates in an environmentally satisfactory manner. It is oriented towards finding solutions that would control the air pollution and cannot be used to simply ban an activity.

The following box sets out the POEO definition of what is meant by ‘environmentally unsatisfactory manner’.

Definition of ‘environmentally unsatisfactory manner’

An activity is being carried out in an ‘**environmentally unsatisfactory manner**’ if it:

- is carried on in contravention of, or in a manner that is likely to lead to a contravention of the POEO Act, the regulations or a condition attached to an environment protection licence
- causes or is likely to cause a pollution incident
- is not carried on by such practicable means as may be necessary to prevent, control or minimise pollution, the emission of any noise or the generation of waste, or
- it is not carried on in accordance with good environmental practice.

A prevention notice may require an **action plan** to specify the details the council expects the operator to address. For example, it may require that:

- the action plan is prepared by a suitably qualified person
- air emissions are measured or monitored, and
- certain control measures have been considered as part of the plan, for example, enclosing equipment, installing filter equipment on stacks or wetting down or covering (stabilising) stockpiles.

There could also be a requirement that the action plan is submitted to council for approval before being implemented.

Management options that are developed to reduce air pollution need to be feasible and reasonable.

An example of a Prevention Notice is given in the following box:

Example application of a Prevention Notice

Context

A rural property owner may have built a dirt bike track on his property. Use of the bike track may result in complaints from neighbours about large amounts of dust raised by those using the track.

The council could issue a Prevention Notice which requires the property owner to prepare and carry out a remedial plan of action. This might include requirements:

- to plant trees and shrubs along the length of the track to shield the track and the dust from neighbouring properties.
- that the property owner uses a water truck to dampen the track before it is used
- that the track not be used in windy weather
- that the remedial plan is submitted to council for approval before being implemented.

5.4 Duty to notify pollution incidents

There is a duty to notify the ARA as soon as practicable of pollution incidents where material harm to the environment is caused or threatened (POEO Act s. 148). Material harm includes actual or potential harm to the health or safety of human beings or to ecosystems that is not trivial, or results in actual or potential loss or property damage of an amount over \$10,000 (POEO Act s. 147). **Note that this requirement does not extend to an incident involving only the emission of an odour.**

Failure to notify a pollution incident

Failure to notify a pollution incident is an offence (POEO Act s. 152). An employer or occupier who is notified by an employee of a pollution incident related to an activity carried on by the employer, or who otherwise becomes aware of such an incident, must notify the ARA of the incident (POEO Act s. 148).

Receiving notification of a pollution incident

Where council is the ARA it should ensure it is able to receive and respond promptly to such notifications of a pollution incident.

Council should obtain from the person notifying of the incident relevant information about:

- the time, date, nature, duration and location of the pollution incident
- the nature, estimated quantity or volume and concentration of any pollutants involved
- the circumstances in which the pollution incident occurred, and
- the action taken to deal with the incident and any resulting pollution or threatened pollution arising from the incident.

Based on this information, and on inspection, council may decide to give an oral clean-up direction. This must be followed by a written notice within 72 hours. Council may also decide to encourage voluntary clean-up action.

Admissibility of notification as evidence

Any notification received by council is not admissible in evidence against the person for an offence or for the imposition of a penalty (POEO Act s. 153). The duty to notify applies to the person carrying on the activity, an employee carrying on the activity and the occupier of premises where the incident occurs.

Where a council, its contractor or some other person on land occupied by a council causes a pollution incident, the council must inform DECC as soon as practicable after the incident.

Depending on the circumstances, and the nature of the discharge, council may need to inform other public authorities such as adjoining councils, NSW Fire Brigade or NSW Health.

5.5 Dealing with offences

Part 5.1 of the POEO Act describes three tiers (or levels) of environment protection offences. They are set out in Table 3. Offences relating specifically to air pollution are contained in Part 5.4 of the POEO Act.

Prosecution by councils

Prosecutions for offences against the POEO Act and regulations are criminal offences and must be proved beyond reasonable doubt.

Table 3: Tiered offences under the POEO Act

Level	Offence
Tier 1	Willful and negligent acts (now differentiated): <ul style="list-style-type: none"> • disposal of waste—harm to the environment (s. 115) • leaks, spillages and other escapes (s. 116) • emission of ozone-depleting substances (s. 117)
Tier 2	Strict liability offences: (e.g. causing air pollution) <ul style="list-style-type: none"> • inefficient maintenance and operation of plant (s. 124) • maintenance work on plant and dealing with material in such a way as to cause pollution (s. 125, 126) • exceeding prescribed levels of air impurities (s. 128) • emission of odours from licensed operations (s. 129) • failing to notify a pollution incident (s. 152)
Tier 3	Tier 2 offences that may be dealt with by way of Penalty Notices and are prescribed by the POEO (Penalty Notices) Regulation 1999.

Maximum penalties for an offence against the POEO Act and regulations, following passage of the *POEO Amendment Bill 2005*, are:

Tier 1

- \$5,000,000 where the act was committed **willfully** and \$2,000,000 where the act was committed **negligently for a corporation**
- \$1,000,000 and/or seven years imprisonment where the act was committed **willfully** and \$500,000 and/or four years imprisonment where the act was committed **negligently for an individual**

Tier 2

- \$1,000,000 plus \$120,000 per day for continuing air pollution offences *for a corporation*.
- \$250,000 plus \$60,000 per day for continuing offences (not being for domestic air pollution) *for an individual*

Tier 3

- \$1,500 (but there are prescribed amounts for particular offences).

In respect of activities regulated by councils, both the EPA and councils have prosecution powers. **This means a council may bring a prosecution under any tier of the POEO Act.**

Councils who bring a successful prosecution will retain the right to keep the fine resulting from a conviction.

Penalty Notices

As an alternative to prosecution, councils may issue Penalty Notices in relation to air pollution offences.

A Penalty Notice is a notice to the effect that, if the person does not wish to have the offence dealt with by a court, the person may pay the penalty prescribed in the regulations for the offence within the time specified in the notice (28 days) and to the person specified in the notice (POEO Act s. 223). Payment of the penalty will excuse the person from further liability in relation to the offence (POEO Act s. 225).

Air pollution offences under sections 124, 125, 126, 128, 129 and 135 of the POEO Act are listed in the Protection of the Environment Operations (Penalty Notices) Regulation 1999 as Penalty Notice offences.

Table 4 includes a selection of offences from these regulations. The regulations should be consulted for a full list.

Table 4: Examples of offences under the POEO Act

Offence	Section of the POEO Act
Failure to comply with a Clean-up Notice	s. 91
Failure to pay the Clean-up Notice fee	s. 94
Failure to comply with a Prevention Notice	s. 97
Failure to pay the Prevention Notice fee	s. 100
Causing air pollution	s. 124–128
Failure to comply with an Air Pollution Notice concerning fires	s. 135

Prosecution or Penalty Notice?

Table 5 lists some of the things a council should consider when deciding on whether to prosecute or issue a Penalty Notice for a breach of the POEO Act or regulations.

Table 5: Considerations when deciding whether to prosecute or issue a penalty notice

Penalty Notice	Prosecution
<p>There is a minor breach of the POEO Act or regulations.</p> <p>The facts are obvious.</p> <p>A problem is a one-off situation and can be remedied easily. Up to two Penalty Notices may be reasonable for the same type of offence.</p> <p>A Penalty Notice is likely to be a viable deterrent. There is an opportunity to educate the air polluter given that the notice is immediate.</p> <p>A smaller fine is suitable for the nature of the offence.</p>	<p>There is a serious breach of the POEO Act or regulations.</p> <p>A problem is a continuing situation where previous enforcement action has been unsuccessful.</p> <p>Education and other enforcement actions have failed to change behaviour. More important to address the serious breach.</p> <p>A larger penalty more suitable for the nature of the offence is appropriate.</p> <p>Council wants to deter similar offences—successful prosecution may help change others' behaviour.</p>

Where a Penalty Notice has been issued and it becomes apparent that the offence is too serious to be dealt with by Penalty Notice, the notice can be withdrawn within 28 days of being served (even if the penalty required by the notice has been paid) and a prosecution can proceed (POEO Act s. 228).

The *EPA Prosecution Guidelines* provide guidance on deciding when to prosecute or issue a penalty notice when an offence has been committed. These guidelines are available from the DECC website at: www.environment.nsw.gov.au/legal/prosguide/index.htm

5.6 Powers under the Local Government Act

Powers to issue orders

Councils can use orders for environment protection purposes under s. 124 of the LG Act by directing a person to do or refrain from doing certain things in certain circumstances.

Examples relevant to managing air quality include:

- **Order 21**—to do or refrain from doing such things as are specified in the order to ensure that land is, or premises are, placed or kept in a safe or healthy condition.

For example, there may be industrial premises where spray painting is carried out, such as a car smash repairs business. Council could issue an order requiring that adequate barriers be erected to stop paint drifting into the atmosphere and onto neighbouring properties and vegetation.

- **Order 30**—to comply with an approval.

Councils must give the person to whom the order is directed the **reasons for the order**, and specify a reasonable period within which its terms must be complied with. The exception to this rule is where the order requires immediate compliance because the council believes there is a life-threatening hazard or a serious risk to public health or safety, or an emergency (LG Act s.129).

A council may also have adopted a Local Orders Policy containing criteria to be considered before issuing an order.

For example, an approval may have been given for a property owner to upgrade fuel burning equipment on their property. If modifications were sought to be made to the fuel burning equipment that were outside the terms of the approval, an order could be issued to the owner requiring them to comply with the terms of the approval.

Section 124 of the LG Act does not affect the power of a council to give an order, notice or direction under the authority of the POEO Act.

Power to abate a public nuisance

Section 125 of the LG Act gives councils the power to abate a public nuisance or order a person responsible for a public nuisance to abate it, without having recourse to legal proceedings.

A **nuisance** is defined as ‘interference with the enjoyment of public or private rights’.

This can occur in a variety of ways. To be ‘public’ it must materially affect ‘the reasonable comfort and convenience of a sufficient class of people to constitute the public or a section of the public’.

For example, a motocross track may generate numerous complaints from the public about noise and dust. Council may determine that the number of complaints constitutes the track being deemed a public nuisance. Council could then use its powers under s. 125 of the LG Act to order the operator of the track to abate the noise and dust by operating only within certain times.

Entry and inspection

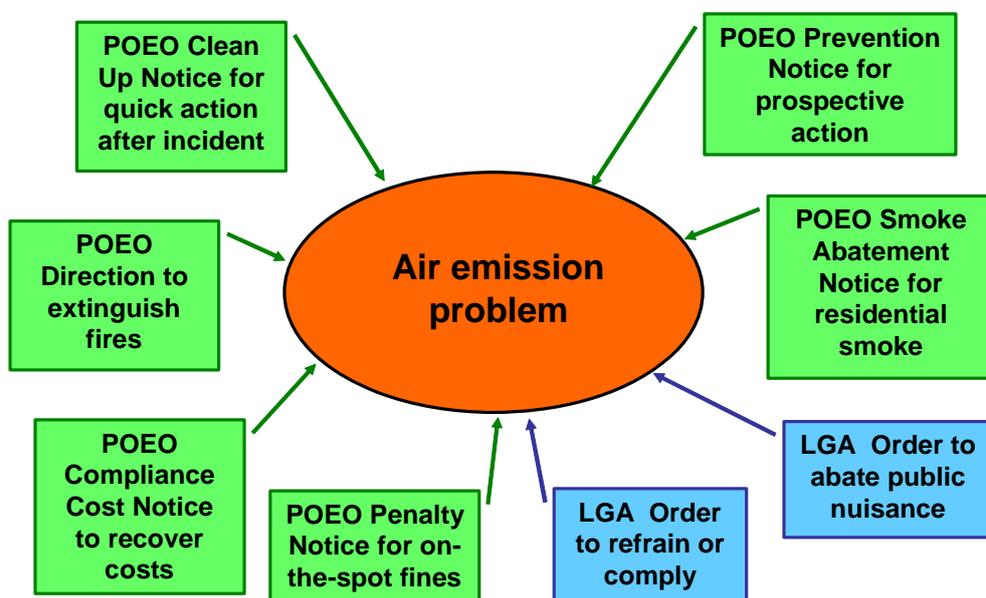
Under the LG Act authorised council officers have powers to enter and inspect premises that are reasonably required to be inspected in the exercise of the council's functions (LG Act s. 191 & 192).

5.7 Deciding on a course of action

There are many factors to consider when deciding on the best course of action in response to a specific air pollution problem. The appropriate regulatory tool will depend on the circumstances of each air pollution problem and on the judgment of the authorised officer.

It may be helpful for councils and authorised officers to discuss the statutory options available for addressing air pollution with a senior manager or with council's legal officer.

Legal instruments for compliance



The following box lists issues for councils to consider when deciding which regulatory tool to apply.

Some questions to answer when deciding which notice or direction to use

- Is the council the ARA, and is the investigating officer an authorised officer?
- If a Penalty Notice is issued by an officer, has the officer been authorised to issue Penalty Notices?
- Is a Penalty Notice appropriate in the circumstances or will a fine act as a deterrent?
- Can the problem be easily remedied? For example, extinguishing a fire?
- Is work required to reduce or avoid air pollution? For example, is the installation of new equipment required?
- Does council have or can it avail itself of the expertise and equipment to take air emission measurements?

(continued next page)

- Do measurements of air emission need to be taken or can the authorised officer assess the air pollution without testing? (e.g. by using a Ringelmann chart)
- Is it a complex air pollution problem? For example, is more than one type of pollutant being emitted?
- Is it possible to set an achievable emissions level that should be met?
- Is it more appropriate to require best management practices to be adopted to minimise air pollution?
- How will council determine compliance with any notice served?
- Does the ARA have enough evidence to act on, and to defend any appeal of a notice in court?

5.8 Concurrent enforcement actions

Sometimes it may be useful to issue notices and directions in combination, but careful management of such processes is required.

Councils may, for example, issue a direction to extinguish a fire immediately. Councils may also issue a Prevention Notice to set out an action plan, or actions needed so that an activity will operate in an environmentally satisfactory manner in the future. This approach may be appropriate where an air polluter continues to emit pollution (by illegal burning) and is causing significant pollution. The direction would operate concurrently with the Prevention Notice during the period of overlap.

Considerations for concurrent enforcement actions

Where more than one notice or direction is used to address air pollution from a certain activity, the following considerations must first be addressed:

- The notices or directions must be consistent
- **Natural justice** must be maintained.
- There should have been **more than one occurrence** of the air pollution (i.e. on separate days or times).

Any council intending to use more than one notice or direction for concurrent enforcement actions should seek legal advice to ensure the powers are being used consistently and appropriately, and the process meets the requirements of natural justice.

5.9 Public registers of prosecutions and notices

Councils must keep public registers of the following information specified under the POEO Act (s. 308):

- **environment protection notices** (Clean-up and Prevention Notices)
- **convictions in prosecutions** instituted by the council under the POEO Act, and
- **results of civil proceedings** by or against the council under the POEO Act.

The register must be available for public inspection and copies provided on request upon payment of the relevant fee. As no fee is prescribed by the regulations, each council can determine the copying fee (POEO Act s. 309).

6 Avoidance and mitigation strategies

Air pollution impacts can be very difficult and costly to address retrospectively. **The best environmental outcomes will occur where air pollution impacts can be avoided** by careful siting and design of emission-generating facilities and a sensible approach to the land use planning around existing emission-generating facilities. This includes the careful consideration of the topography of the site for the proposed facility.

It must also be recognised that emissions (e.g. odour) cannot be prevented from some activities and that a requirement for ‘no emissions’ is generally not a realistic goal. However, the operator of a facility must ultimately be responsible for managing and minimising any impacts of the operation beyond its boundary.

Proponents of new facilities should incorporate **industry best-recognised management practice** for the particular type of industry involved from the outset to limit the potential for air pollution problems.

Operators of existing facilities should employ all practical means to prevent or minimise air pollution impacts.

In new and existing facilities the use of suitable and cost-effective control equipment may be necessary to reduce air pollution impacts.

6.1 Land use planning and appropriate site selection

Air quality impacts in residential and other sensitive areas often stem from **inappropriate land use decisions** allowing air polluting industry to develop in close proximity to these areas or allowing the residential zone to grow around an established industry. Once the land is developed in this way, the range of air pollution control measures available is very restricted. Better management of the source and engineering solutions are options but may be expensive to apply retrospectively.

6.2 Developmental stages in land use planning

Where the opportunity exists to apply land use planning as a pollution control (generally newly developing areas) there are three developmental stages to consider:

The initial planning stage

A **‘green-field site’** offers the greatest management flexibility to zone industrial, commercial and air pollution-sensitive land so that the affected zone is clearly defined in planning instruments, and the land abutting the industrial or commercial zone is not zoned in an incompatible way. This would avoid any future conflict. For example, consider a transition of land uses so that sensitive receptors are not adjacent to odour-generating facilities such as a sewage treatment plant. Public transport, walking and cycling options can also be included in plans.

Considering the cumulative impacts of air pollutants

Where a grouping of industries in a location is likely to occur, for example in an industrial estate, consideration of likely cumulative impacts of air pollutants may be warranted at the planning stage.

The subdivision planning stage

Separating pollution-intensive from sensitive land uses within mixed zoning

When a commitment has already been given to locating residential, industrial or commercial land close to one another (but residential development has not started), there is an opportunity to design **internal subdivisions** so that the most air pollution-intensive land uses are located nearest to industry. It follows that the most sensitive land uses (e.g. residential, schools or nursing homes) would then be located furthest away from the air pollution sources.

The building design stage

If subdivision development has started in an area where there is a potential air pollution impact, and there is no opportunity for any flexibility in land use, consideration can still be given to introducing **controls on building design** so air pollution impact is minimised. This could involve locating areas of the building where people live or work away from the face exposed to air pollution sources, carefully designing natural airflow through buildings or incorporating an appropriate ventilation and air conditioning system. **Implementing such measures at the building design stage is much more cost effective than adding them later.**

Where existing developments have become incompatible due to changes in land use, planning authorities will need to make strategic decisions about the preferred land use in a given area.

6.3 Development consent

Using development consent conditions to manage air pollution impacts

Having assessed the likely environmental impacts of the proposed development on the natural environment under s. 79C of the EP&A Act, councils should, when formulating the conditions of consent, take into account:

- assessed **air pollution impacts**
- any **mitigation measures** required to achieve the relevant performance criteria (i.e. particle emission concentration limits)
- identifying any **practical limit for air pollution control**
- trade-offs and negotiated agreements
- where the final air pollution level needs to be underpinned by **monitoring, reporting or complaints management**.

Integrated development assessment

When a development proposal requires an EPA licence as well as consent by a local council

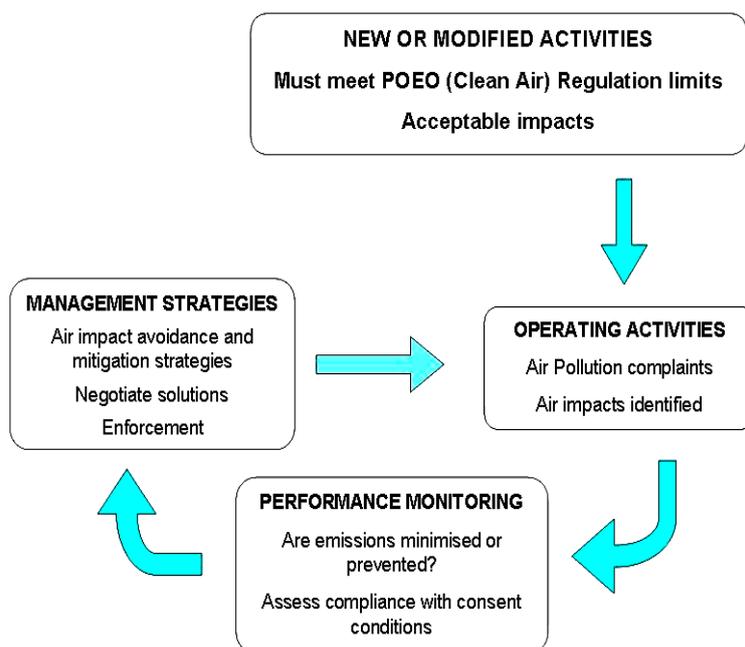
Under the ‘integrated development assessment’ provisions of the EP&A Act, where a development proposal requires an EPA licence in addition to a development consent, the consent authority (usually either local council or the Minister for Planning) must seek the EPA’s general terms of approval. The

conditions of any consent granted for the development must be consistent with these general terms of approval.

6.4 Negotiation and rejection

Where a proposed mitigation strategy will not achieve the desired environmental outcome (resulting in an unacceptable residual air pollution impact) then negotiations are needed to resolve the problem, possibly by way of a modified proposal. If a negotiated solution cannot be reached with the applicant, council should consider rejecting the application.

6.5 A simple assessment and management cycle



6.6 Other programs

DECC's Business Partnership Section, local councils and other NSW government agencies, such as the Department of State and Regional Development, work on a voluntary basis with industries, peak bodies and individual companies to promote and develop business environmental sustainability projects and programs for cleaner production. Specific industries targeted include:

- printing industry—to reduce the use of solvents
- furniture industry—using different finishes
- composites industry—reducing styrene
- dry cleaners—reducing emissions of tetrachloroethylene
- auto-servicing and mechanical and smash repairers.

The DECC Business Partnership Section provides:

- environmental information and guidance booklets like the ‘Solutions to Pollution’ and Environmental Action series
- funds and help to develop Industry Codes of Practice, model Environmental Management Plans and Environmental Management Systems
- public communication, including media material
- workshops, forums and information sessions
- training, both accredited and non-accredited, for councils and industry.

For further information on cleaner production and industry partnership programs, visit the DECC website at: www.environment.nsw.gov.au/cleaner_production/index.htm

Energy efficiency

A number of State and Commonwealth Government initiatives are aimed at encouraging energy efficiency as a means of addressing air pollution and greenhouse gas emissions.

DWE requirement for local councils to prepare water and energy saving plans

The Department of Water and Energy (DWE) now requires local councils to prepare water and energy saving plans to reduce their own water and energy consumption and promote efficient practices in the building sector and wider community.

Commercial premises

Initiatives directed at commercial premises include:

- **energy efficiency guidelines** for new commercial buildings
- **energy performance contracting**, which uses future energy savings to pay for the cost of energy efficiency upgrades
- **transport access guides**—tools to help organisations reduce greenhouse gas emissions related to transport to and from their business by promoting alternatives to car travel.

For further information on the NSW Government’s energy efficiency and conservation initiatives, visit the DWE website at: www.dwe.nsw.gov.au

Cities for Climate Protection

‘Cities for Climate Protection’ (CCP) is a joint initiative between local government, the Australian Greenhouse Office (AGO) and the International Council for Local Environmental Initiatives (ICLEI). The program comprises five milestones for reducing greenhouse gases:

- prepare an **emissions inventory** and estimate emissions growth
- establish an **emissions reduction goal**
- develop a **local action plan**
- **implement the local action plan**

- **monitor and report** on the implementation of the local action plan.

Participating councils receive wide-ranging support to undertake the program, including:

- promotion and recognition
- technical support and training
- information and publications
- access to resources
- direct funding.

For further information on Cities for Climate Protection visit the Australian Greenhouse Office website at: www.greenhouse.gov.au/local/ccp/

7 Domestic premises

The main sources of air pollution from the domestic sector are solid fuel combustion heaters and open burning in incinerators and open fires.

7.1 Solid fuel heaters

Domestic solid fuel heaters are estimated to contribute approximately 40% of air particle pollution in winter in Sydney. Their contribution to air pollution in country regions is significantly higher. This is an important issue for the community.

Regulation of domestic slow combustion solid fuel heaters

Part 2 of the Protection of the Environment Operations (Clean Air) Regulation 2002 targets the sale of domestic solid fuel heaters of the slow combustion type as these have the potential to emit significant amounts of smoke if not designed and operated correctly.

The Regulation requires all new solid fuel heaters sold (wholesale or retail) in NSW to meet the emission limits specified in *Australian Standard AS/NZS 4013:1999: Domestic solid fuel burning appliances—Method for determination of flue gas emission*.

Each heater model sold in NSW must have a **certificate of compliance** certifying that the heater model has been tested in accordance with the Australian Standard and each heater must be marked accordingly. These certificates are issued on the basis of test results from an accredited laboratory, of which there are two in both Australia and New Zealand.

Installing and altering domestic slow combustion solid fuel heaters

Installing domestic solid fuel heaters in premises requires council approval under Part F4 of the table to section 68 of the LG Act.

In addition, **building work associated with installing solid fuel heaters** may also be a development requiring consent or, alternatively, be classified as either ‘complying’ or ‘exempt’ development under an LEP or other planning instrument.

Clause 6 of POEOCAR prohibits a person from altering a heater or from marking on a heater that it complies with the Standard if it is not the subject of a certificate of compliance.

Using LEPs and DCPs to manage the use of domestic slow combustion solid fuel heaters

Councils can also assess the appropriateness of wood heating in their local government areas, and through their LEPs and DCPs, can influence the type of heating installed in new homes.

Some local councils have amended their DCPs to **prohibit** the installation of domestic solid fuel heating appliances for heating purposes. The installation of gas or electric heating alternatives is encouraged.

7.2 Community education programs

By raising awareness about the harmful impacts of woodsmoke and the benefits of correct woodheater operation, community education programs can achieve substantial reductions in the number of excessively smoky chimneys.

The NSW Woodsmoke Reduction Program

To help councils implement community education programs that target woodsmoke, DECC has available educational materials tailored for a range of media including radio, TV and newspapers, as well as checklists for developing a community education program. These include suggestions for community surveys, displays, media opportunities, special events, school programs and the like. For more information see the DECC woodsmoke webpage: www.environment.nsw.gov.au/woodsmoke/index.htm.

In 2002–2004, DEC worked with Armidale Dumaresq, Bathurst, Blue Mountains, Cooma-Monaro, Dubbo, Eurobodalla, Goulburn Mulwaree, Gunning (Upper Lachlan), Hastings, Hunter Councils Inc., Inverell, Lithgow, Mudgee (Mid-Western Regional), Orange, Queanbeyan, Shoalhaven, Tumut, Wagga Wagga and Wingecarribee councils to help ratepayers in these local government areas get the most out of their heating while protecting the environment and their health.

The program involved training and working with councils on an integrated approach to reducing woodsmoke by providing:

- **cash incentives** of \$500 (\$700 for pensioners and low income earners) to help residents and businesses replace their old woodheaters with cleaner alternatives
- **community education** on the environmental and health impacts of woodsmoke and the efficient operation of woodheaters
- **measures to enforce local air quality standards** using smoky chimney surveys.

At councils' discretion, pensioners and low income earners who did not have reticulated gas passing their property were eligible for a cash incentive for upgrading to a new woodheater that met the current Australian Standard (AS/NZS4013:1999).

Local council activities in the NSW Woodsmoke Reduction Program

Councils participating in the Woodsmoke Reduction Program undertook 'smoky chimney surveys' and provided individual instruction on correct woodheater operation where a woodheater appeared to

be consistently emitting excessive smoke. This targeted education was found to be successful in improving heater operation and reducing woodsmoke problems.

7.3 Regulatory options for domestic woodsmoke

Where a council considers educative measures have not been effective in particular situations, enforcement action may need to be taken.

Smoke Abatement Notices

Division 3 of the POEO Act addresses domestic air pollution by enabling a council officer to issue a **Smoke Abatement Notice** where **excessive smoke** from a domestic chimney is observed. The householder receiving a Smoke Abatement Notice has 21 days in which to fix the problem; for example by having the flue cleaned, purchasing better quality firewood or seeking advice on how to operate the woodheater or fireplace cleanly.

If the householder elects to take the matter to court, the maximum fine that can be imposed by the court is \$3,300. A Smoke Abatement Notice ceases to have effect after 6 months; that is, it is intended to apply only in the **one heating season**.

The offence does not apply to smoke from an incinerator or to backyard burning generally since those matters are regulated under Part 2A of the POEO (Clean Air) Regulation 2002.

Councils are encouraged to provide information or instruction on correct woodheater operation to a householder before they consider issuing a Smoke Abatement Notice.

Excessive smoke is defined as:

- a continuous emission of not less than 10 minutes
- including a period of not less than 30 seconds when the plume extends for at least 10 metres from the point of emission.

Penalty Notice for non-compliance with a Smoke Abatement Notice

If excessive smoke is observed after the 21-day period, council may issue a Penalty Notice (with an on-the-spot fine of \$200) for non-compliance with the Smoke Abatement Notice.

Characteristics of Smoke Abatement Notices for domestic woodsmoke

The Smoke Abatement Notice:

- must be in writing
- ceases to have effect after 6 months
- does not apply to a chimney in or on an incinerator to be used only in relation to smoke originating from outside a residence
- does not prevent the emission of smoke which is not excessive smoke, and
- may be revoked by the ARA or the authorised officer.

The penalty for non-compliance is 30 penalty units (\$110 is the current value of one penalty unit as at June 2006; they are revised periodically).

Prevention Notice for domestic woodsmoke

A Prevention Notice can be issued under s. 96 of the POEO Act (see section 5.4 of this Module) to a householder who uses a solid fuel heater ‘in an environmentally unsatisfactory manner’. For example, the Prevention Notice could direct the householder:

- not to use a particular solid fuel heater
- to ensure that a particular solid fuel heater has adequate air supply to prevent smoke emissions
- to burn only dry wood, and
- to operate the solid fuel heater only between stated hours.

In general, a Smoke Abatement Notice is the preferable option where the woodsmoke problem is likely to be rectified by timely maintenance or improved operation. On the other hand, a Prevention Notice may be more suitable where council has identified a specific cause for the problem, such as a need to increase the flue height.

The Local Government Act and domestic wood smoke

Alternatively, a council may issue an order under s. 124 of the LG Act (see section 5.7 of this Module) in respect of solid fuel heaters.

For example, **Order 21** could be used to protect the safety or health of people on the premises where the heater is installed. This may be relevant where the owner of the heater lives elsewhere, such as in a rental situation.

Order 30 could require compliance with an approval for solid fuel heater installation. This order could be given instead of prosecuting a person for failure to comply with the terms of an approval.

In situations where a sufficient number of people, even while in their homes, are subject to a nuisance from an existing solid fuel heater, a council may use s. 125 of the LG Act to require the owner to minimise the pollution from the heater. (See section 5.7 of this Module, ‘Power to abate a public nuisance’.)

In order for a council to be able to issue an order for woodsmoke emissions under s. 125, it will be necessary to obtain evidence (such as complaints or statements) that more than one person is being adversely affected.

An example of an order under this section would be that a particular heater not be operated at certain times. If an owner repeatedly fails to operate the heater cleanly, the council may use s. 125 to prevent its use altogether.

DECC has developed a **comprehensive woodsmoke website** to provide a one-stop shop of information on how to reduce pollution from woodheaters. This includes a resource kit for local councils designed to help them spread information about woodsmoke problems and educate residents about ways to reduce woodheater pollution. See:
www.environment.nsw.gov.au/woodsmoke/index.htm

7.4 Commonwealth and State initiatives for energy efficiency

Commonwealth and NSW Government initiatives also encourage energy efficiency and reductions in greenhouse gas emissions from the domestic sector.

Energy Smart Homes Program

The Building Sustainability Index, **BASIX**, introduced in July 2004, is a web-based planning tool for assessing the performance of new homes and renovations against a range of sustainability indices. The first stage is focussed on reducing water and energy usage. See www.basix.nsw.gov.au/.

Energy performance standards

The Department of Water and Energy has designed a program to ensure all new homes meet minimum energy efficiency requirements, by introducing minimum energy performance standards for all new residential developments. This program relies on local councils, which have authority over 76% of the State's residential development applications, adopting the Energy Smart Homes Policy.

The program at times includes subsidies for systems that otherwise are not price competitive (e.g. electric-booster solar, gas-booster solar and heat pumps).

DWE staff can help councils in developing and adapting the model Energy Smart Homes Policy for their local government areas.

For further information on the NSW Government's domestic energy efficiency and conservation initiatives, visit www.energysmart.com.au/.

7.5 Open burning

Burning of waste in the open or in incinerators with limited pollution control equipment can affect the environment and human health in a number of ways:

- through the emission of particulates and other chemicals, and
- by causing localised odours and smoke nuisance.

By far the most significant effect of burning waste in a domestic context is the emission of fine particulates.

Part 2A of the Protection of the Environment Operations (Clean Air) Regulation

Part 2A of the Protection of the Environment Operations (Clean Air) Regulation 2002 controls burning (either in the open or in incinerators) and prohibits burning of certain substances or in certain areas.

Specifically, the Regulation:

- requires anyone who burns anything in the open or in an incinerator to do so in a manner that **prevents or minimises air pollution** (POEO (Clean Air) Regulation clause 6C)
- **imposes a statewide ban** on the burning of tyres, coated wire, paint or solvent containers and residues, and timber treated with copper chromium arsenate or pentachlorophenol (POEO (Clean Air) Regulation clause 6D)
- controls the burning of **domestic waste and vegetation**

- **permits** agricultural, cooking and recreational fires.

The POEO (Clean Air) Regulation does not affect bush fire hazard reduction work allowed under the *Rural Fires Act 1997*, the destruction of prohibited plants or drugs, or the burning of diseased animal carcasses.

Flexibility for local councils in the control of open burning

Councils have flexibility in imposing controls on burning by being able to assess local conditions and community expectations about the level of burning permitted in their area, and then select the appropriate scope of burning control.

A local council can request that it be included in Schedule 8 of the POEO (Clean Air) Regulation. By requesting their local government areas be listed in Parts 1, 2 or 3 of Schedule 8 of the Regulation, councils can control different types of open burning activity by requiring an approval to be issued before burning begins. (Regulation clause 6E, Table 6.) This has effectively banned backyard burning in the Sydney metropolitan area.

Approvals to burn

Local councils can only give approval for the burning of vegetation on-site

Approvals to burn may be granted by a council listed in Part 2 of Schedule 8 in relation to the **burning of vegetation on-site** [Regulation clause 6G(2)]. All other approvals to burn can only be granted by the EPA [Regulation clause 6G(1)].

In granting approvals, both the EPA and councils are required to consider:

- the **impacts of the approval** on regional and local air quality and amenity
- the feasibility of reuse, recycling or alternative means of disposal
- the opinions of people likely to be affected by the proposed approval.

Additionally, when approvals are granted by a notice in a newspaper [clause 6G(2)(a)], the council has to consider any opinion of the EPA.

Approvals will normally note the need to comply with any requirements of the relevant fire authority.

No-burn orders

The EPA may issue a No-burn Order under the POEO Act that is different from a total fire ban under the *Rural Fires Act*.

The EPA may issue a No-burn Order when a combination of meteorological conditions and pollutant emissions has the potential to lead to high pollution levels. Such an order prohibits burning of fires in the open or in incinerators while those conditions persist or are likely to contribute to air pollution (POEO Act s. 133). It remains in effect for up to seven days and overrides any approval for certain fires or incinerators granted under the POEO (Clean Air) Regulation.

A No-burn Order is different to a total fire ban under the *Rural Fires Act 1997* which is used when there is a big risk of bushfire.

Table 6: Part 2A of the POEO (Clean Air) Regulation—open burning activities

POEO (Clean Air) Regulation 2002								
Open burning activities permitted or prohibited								
✓ Permitted burning X Prohibited burning * Includes fires associated with cooking, barbecuing, camping, scouting and picnicking ** Includes domestic waste and garden waste arising from a single household	Hazard reduction burning	Cooking & recreational purposes *	Agricultural purposes	Fire-fighting training	Domestic waste **	Vegetation	Prevent or minimise air pollution	Tyres & other prohibited articles
Listed in:								
Schedule 8 part 1 Areas in which all burning, including vegetation and domestic waste, is prohibited except with approval.	✓	✓	✓	✓	X	X	✓	X
Schedule 8 part 2 Areas in which burning of vegetation is prohibited except with approval.	✓	✓	✓	✓	✓	X	✓	X
Schedule 8 part 3—waste services available Areas in which all burning, other than vegetation, is prohibited except with approval.	✓	✓	✓	✓	X	✓	✓	X
Schedule 8 part 3—no waste services available Areas in which all burning, other than vegetation, is prohibited except with approval (Note that on-site burning of domestic waste on residential premises is permitted).	✓	✓	✓	✓	✓	✓	✓	X
Non-listed areas	✓	✓	✓	✓	✓	✓	✓	X

Directions concerning fires

An authorised officer of a local authority or of the EPA can issue **directions to extinguish a fire and not to light or maintain a similar fire at a premises** for a period of up to 48 hours (POEO Act s. 134) if:

- the fire is prohibited by an order of the EPA under s. 133 of the POEO Act, or
- air pollution from the fire is injurious to the health of any person, or is causing or likely to cause serious discomfort or inconvenience to any person.

The authorised officer may give this direction to:

- the occupier of the premises, or
- the person apparently in charge of the premises, or
- The person apparently in charge of the fire.

A direction to extinguish a fire, and not to light or maintain a similar fire at premises for a period of up to 48 hours, overrides any approval for certain fires or incinerators granted under the Regulation.

Offences related to burning

Table 7 outlines the open burning offences for which council enforcement officers can issue Penalty Notices.

Table 7: Open burning offences

Offence	Relevant part of the POEO Act or POEO (Clean Air) Regulation
Failure to comply with a No-burn Order issued under s. 133 of the POEO Act	POEO Act s. 135
Failure to comply with a direction to extinguish a fire issued under s. 134 of the POEO Act	POEO Act s. 135
Burn otherwise than by preventing or minimising air pollution	Clean Air Reg. cl. 6C(1)
Burn prohibited article	Clean Air Reg. cl. 6D(1)
Prohibited burning in a scheduled local government area	Clean Air Reg. cl.6E

Rural Fires Act 1997 and Rural Fires Regulation 2002

The burning of waste materials and the management of vegetation (fuels) on properties are also of concern from the point of view of preventing the spread of bushfires as well as protecting the community through the lighting of fires.

Open burning is therefore also regulated under the *Rural Fires Act 1997* (RFS Act) and Rural Fires Regulation 2002, for example by:

- establishing **Bush Fire Management Committees** that are required to prepare bush fire risk management plans and operations plans (RFS Act s. 52)
- requiring land owners or occupiers, including councils, to undertake the steps outlined in **bush fire risk management plans** (RFS Act s. 63)
- providing for councils (or the Rural Fire Service Commissioner) to issue **notices to implement hazard reduction** where a bush fire risk management plan requires this (RFS Act s. 66)
- **authorising hazard reduction** by the Rural Fire Service commissioner where public authorities fail to exercise their duties under the RFS Act
- controlling the lighting of fires close to buildings in fire districts (RFS Act s. 88)
- **prohibiting the lighting of fires on land** for the purposes of land clearance or for burning any fire break during bush fire danger periods without a permit (RFS Act s. 87)
- **declaring total fire bans** that prevent the lighting of fires and suspending permits for the duration of the ban (RFS Act s. 99).

EPA and the NSW Rural Fire Service have jointly developed a guide called *Regulation of Open Burning in NSW* which is available on the DECC website at:
www.epa.nsw.gov.au/air/roob/index.htm.

These guidelines are designed to give local councils and fire management authorities an outline of burning requirements under the POEO Act and RFS Act.

8 Motor vehicles

With private motor vehicle use on the rise in NSW, cleaner vehicles and integrated transport and land use measures are needed to deal with the consequent emissions. **Commercial and diesel vehicles remain the major contributors to excessive exhaust smoke on NSW roads.**

8.1 Smoky vehicles

The POEO (Clean Air) Regulation 2002 makes the owner of a motor vehicle guilty of an offence if the motor vehicle '**emits excessive air impurities**' while being used [clause 9(1)]. The maximum penalty is \$44,000 for a corporation and \$22,000 for an individual.

Local council officers cannot issue Penalty Notices for smoky vehicles but they can report smoky vehicles to the DECC Environment Line.

Local council officers, along with DECC and RTA officers and members of the public, can play a role in the NSW Government's Smoky Vehicle Program by reporting to DECC registered vehicles observed to be emitting smoke for at least 10 seconds continuously. Reports can be made via the DECC website or by calling the DECC Environment Line on 131 555.

A motor vehicle '**emits excessive air impurities**' when the emissions exceed a standard of concentration such that air impurities are visible for a continuous period of more than 10 seconds (POEOCAR clause 8).

Warning letter to the owner of a smoky vehicle

An EPA enforcement officer may issue the owner of a smoky vehicle used for private purposes with a warning letter on the first observation. The warning letter requires that the owner have the vehicle repaired within 21 days.

If it is not demonstrated that the vehicle has been satisfactorily repaired within 21 days, a fine can be issued to the owner. Subsequent observations by an EPA enforcement officer of the same vehicle smoking will result in a fine.

For commercial vehicles, the EPA generally issues a Penalty Notice if excessive smoke is emitted and requires the vehicle to be repaired.

The EPA can issue Defective Vehicle Notices and take court action against owners of vehicles who fail to repair their vehicles as directed or owners of vehicles which are observed on a number of occasions.

For further information on the Smoky Vehicle Program, visit the DECC smoky vehicle website at: www.environment.nsw.gov.au/esdsmoky/

8.2 Integration of land use and transport planning

Effective integration of land use and transport planning can help achieve 'vehicle kilometres travelled' (VKT) targets by moderating the growth of car use and supporting the community's investment in transport services.

Integration of land use and transport planning by local councils will help reduce 'vehicle kilometres travelled' to improve local and regional air quality

Local councils can play a role with LEPs and DCPs that help reduce community reliance on private cars by locating people closer to services and jobs and encouraging the development and use of public transport.

Current planning reforms

Draft SEPP No. 66—Integration of Land Use and Transport provides a framework for NSW government agencies, councils and developers to integrate land use and transport planning at the regional and local levels. It contains provisions to guide:

- the preparation of environmental planning instruments
- the approval of development control plans, master plans and precinct plans
- the consideration of development applications.

It is possible that Draft SEPP No. 66 will be superseded by planning reforms currently under consideration by the Department of Planning. See the website at:
www.planning.nsw.gov.au/planning_reforms/index.asp