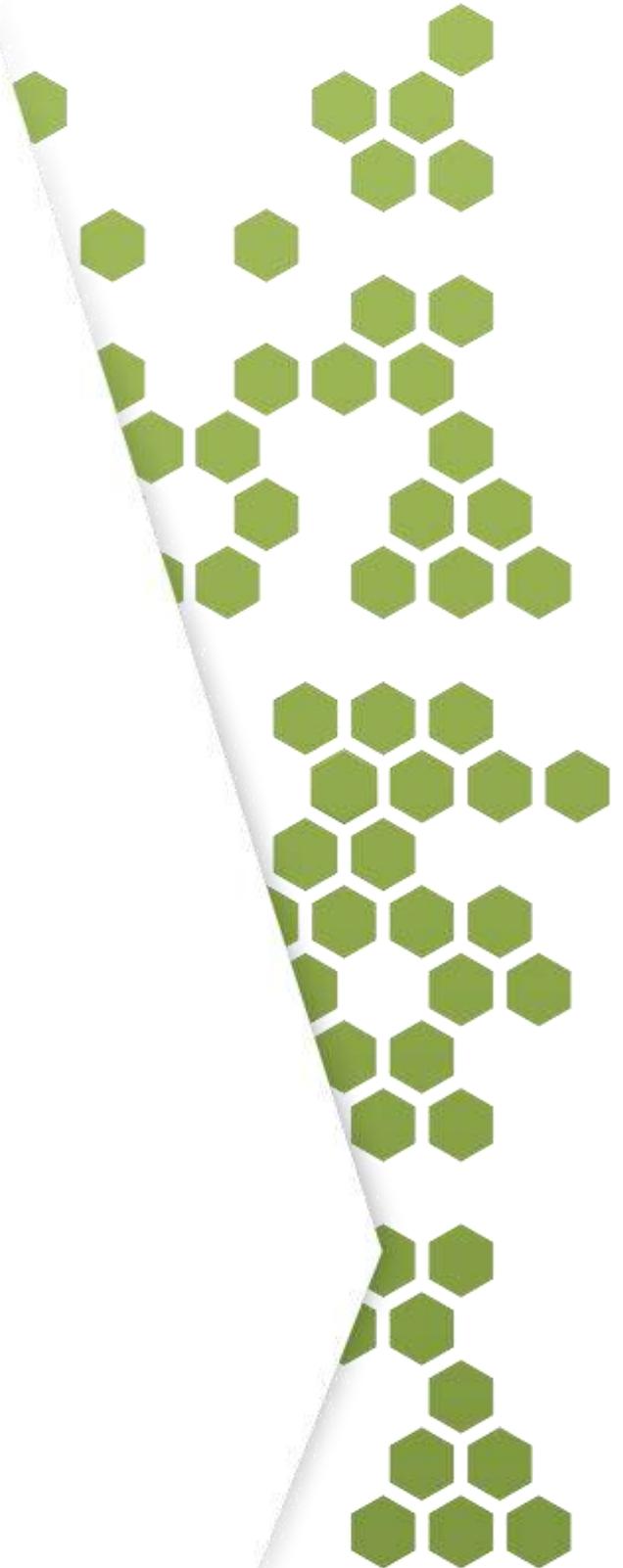


Risk-based Licensing Regulatory actions tool profiles



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Introduction

The Environment Protection Authority (EPA) uses a number of tools when undertaking regulatory action in response to non-compliance with the *Protection of the Environment Operations Act 1997* (POEO Act) and conditions attached to EPA licences.

This document outlines the profiles of these tools and explains why and when the EPA uses them.

For information about other general factors that inform the EPA decision-making process, see [Risk-based Licensing: Regulatory actions guideline](#). Note that only regulatory actions undertaken and counted in the [Environmental Management Calculation Protocol](#) for the purposes of risk-based licensing are included in this guide.

Tool profiles

Prosecution

The [Environmental Management Calculation Protocol](#) counts only successful prosecutions. Successful prosecutions are where a licensee has been convicted of an offence under the POEO Act 1997 and regulations.

Tier 1 offences are set out in Part 5.2 of the POEO Act and for the purposes of the protocol do not include offences under the *Ozone Protection Act 1989*.

Tier 2 offences are defined in section 114 of the POEO Act, and for the purposes of the protocol do not include offences under the *Waste Avoidance and Resource Recovery Act 2001*, *Environmentally Hazardous Chemicals Act 1985* and the *Ozone Protection Act 1989*.

The [EPA's Compliance Policy](#) sets out the EPA's approach to compliance and enforcement and guides EPA decision-making to ensure that its compliance activities and actions are consistent, fair and credible.

The [EPA Prosecution Guidelines](#) provide details of the basis on which the EPA will make a decision to prosecute and set out the factors the EPA takes into account in deciding whether, how and in what court, to prosecute offences under legislation administered by the EPA.

Penalty notices

Penalty notices may be issued for tier 3 offences as set out in Part 8.2 of the POEO Act.

Penalty notices – Category 1 penalty notices are issued by the EPA for the offences under the following sections of the POEO Act:

- s 48 Failure to hold a licence – licensing requirement – scheduled activities (premises-based)
- s 49 Failure to hold a licence – licensing requirement – scheduled activities (not premises-based)
- s 64 Failure to comply with condition except for the late or non-submission of an annual return
- s 91 Failure to comply with clean-up notice by occupiers or polluters
- s 97 Failure to comply with prevention notice
- s 120 Prohibition of pollution of waters
- s 128 Standards of air impurities not be exceeded
- s 142A Pollution of land

- s 143 Unlawful transporting of waste (asbestos or hazardous waste)
- s 144 Use of land as waste facility without lawful authority; and
- penalty notices issued by the EPA for the offences under the following clause 71 (Application of proximity principle to transportation in course of business) of the POEO (Waste) Regulation 2014.

Penalty notices – Category 2 are all penalty notices issued by the EPA for offences prescribed by schedule 6 of the General Regulation not categorised as Penalty notices – Category 1, with the exception of penalty notices in relation to offences under the *Environmentally Hazardous Chemicals Act 1985* and the *Ozone Protection Act 1989*.

Penalty notices for late or non-submission of an annual return are issued for the late or non-submission of an annual return, as required by licence condition under section 64 of the POEO Act.

The [EPA's Compliance Policy](#) sets out the EPA's approach to compliance and enforcement and guides EPA decision-making to ensure that its compliance activities and actions are consistent, fair and credible.

The [EPA Prosecution Guidelines](#) set out the circumstances where a penalty notice may be appropriate and the factors the EPA takes into account in deciding whether to issue a penalty notice for offences under legislation administered by the EPA.

Official cautions

Official cautions may be issued to a licensee for any offence in the POEO Act or Regulations. Official cautions are issued for offences where a penalty notice may be issued but where an official caution is considered appropriate.

Official cautions for late or non-submission of an annual return are official cautions issued to a licensee for the late or non-submission of an annual return, the requirement of which is included as a licence condition under section 64 of the POEO Act. Official cautions for late or non-submission of an annual return are not included in this regulatory action for the purposes of the [Environmental Management Calculation Protocol](#).

Official cautions issued for offences under the *Waste Avoidance and Resource Recovery Act 2001*, *Environmentally Hazardous Chemicals Act 1985* and the *Ozone Protection Act 1989* are excluded from the operation of the protocol.

Purpose of an official caution

Official cautions are a key strategic tool for responding to incidents of alleged environmental harm or other breaches of environment protection legislation.

In deciding whether to give an official caution, EPA officers must have regard to the Attorney-General's *Caution Guidelines under the Fines Act 1996*. These guidelines are available at: [Attorney General's Caution Guidelines under the Fines Act](#).

Reasons for the EPA issuing an official caution

An official caution is used where an EPA officer has reasonable grounds to believe an offence has been committed, and believes a caution is appropriate. An official caution may be used rather than a penalty notice in situations where an offence is minor in nature or was not knowingly or deliberately committed.

Enforceable undertakings

Enforceable undertakings, as referred to in the protocol¹, are set out in section 253A of the POEO Act. An enforceable undertaking is an alternative to administrative action where there has been a serious breach of legislation. An enforceable undertaking is a written undertaking by a company or individual to take action to deal with an actual or potential serious breach of legislation.

Purpose of an enforceable undertaking

The EPA's ability to accept enforceable undertakings enhances its enforcement capability. This power gives the EPA a legislative basis for negotiating administrative solutions and accepting undertakings which are enforceable by the Land and Environment Court.

The EPA has the power under section 253A of the POEO Act to enter into an enforceable undertaking in relation to an alleged breach of environmental protection legislation.

This power gives the EPA a legislative basis for negotiating administrative solutions and accepting undertakings which are enforceable by the Land and Environment Court.

The EPA has prepared [Enforceable Undertakings Guidelines](#), which set out:

- when the EPA will accept enforceable undertakings
- acceptable and standard terms of enforceable undertakings
- what happens if an enforceable undertaking is not complied with
- varying or withdrawing enforceable undertakings.

Enforceable undertakings that have been entered into by the EPA are available on the EPA's [POEO public register](#).

Reasons for the EPA entering into an enforceable undertaking

The EPA enters into enforceable undertaking to provide a legislative basis for negotiating environmental improvements which are enforceable through the NSW Land and Environment Court.

Suspension of licence

Suspension of an environment protection licence is as set out in section 79 of the (POEO Act).

If a licence is suspended, the legal authority of a licence holder to operate is removed. A licence may be suspended subject to conditions which the EPA may impose.

Purpose of licence suspension

The EPA may suspend a licence to prevent an activity being carried out and to require specific conditions of the suspension to be met before lifting the suspension.

Reasons for the EPA suspending an Environment Protection Licence

The EPA can suspend a licence for a range of reasons, including:

- the licensee has obtained the licence improperly
- a condition of the licence has been contravened
- the activities covered by the licence are completed or no longer being carried out
- the holder has failed to pay the annual licence fee by the due date
- failure to pay a contribution in respect of waste under section 88 of the POEO Act

¹ Enforceable undertakings in relation to the *Waste Avoidance and Resource Recovery Act 2001*, *Environmentally Hazardous Chemicals Act 1985* and the *Ozone Protection Act 1989* are excluded from the operation of the protocol.

- in the opinion of the EPA, the licensee is no longer a fit and proper person under section 83 of the POEO Act.

Mandatory environmental audit

A Mandatory environmental audit is an environmental audit as set out in Part 6.2 of the POEO Act.

The EPA will attach a mandatory environmental audit as a licence condition under section 67 of the POEO Act. The mandatory environmental audit must specify the purpose of the audit and may require:

- appointment of an environmental auditor to undertake the audit
- approval by the EPA of the environmental auditor before being appointed
- preparation of written documentation during the course of the audit
- preparation and submission of an audit report
- specify the format and level of detail required for the audit
- require the environmental auditor to submit the proposed format and level of detail to the EPA for approval.

Purpose of a mandatory environmental audit

A mandatory environmental audit will provide information to the persons managing the licensed activity on compliance with legal requirements, codes of practice and relevant policies relating to the protection of the environment.

Mandatory environmental audits also enable persons managing a licensed activity to determine whether the way the activity is carried on can be improved in order to protect the environment and to minimise waste.

Reasons for the EPA requiring a mandatory environmental audit

The EPA may attach a condition to a licence requiring a mandatory environmental audit be undertaken where the EPA reasonably suspects that:

- the holder of the licence has on one or more occasions contravened the POEO Act, the regulations or the conditions of the licence (a history of non-compliance), and the contravention has caused or is likely to cause harm to the environment, or
- an activity is being carried out in an environmentally unsatisfactory manner as defined in section 95 of the Act.

Clean-up notice

A clean-up notice is an environment protection notice as set out in part 4.2 of the POEO Act. The notice may direct that action is taken to prevent, mitigate, minimise, remove, disperse, destroy or remediate pollution resulting or likely to occur from an incident.

Purpose of a clean-up notice

A clean-up notice is issued to:

- require the person responsible for a pollution incident to undertake appropriate clean-up actions
- require quick and practical ways of dealing with a pollution incident, including when a pollutant release is imminent
- specify works to be done and the timeframe in which they are to be implemented
- remedy any harm to the environment.

Reasons for the EPA issuing a clean-up notice

A clean-up notice is issued when the EPA reasonably suspects that a pollution incident has occurred or is occurring. Clean-up notices are generally used when immediate action is required and are not for ongoing problems.

A clean-up notice directs the person responsible for a pollution incident to undertake appropriate clean-up actions to remedy any harm to the environment from the pollution incident.

Prevention notice

A prevention notice is an environmental protection notice as set out in Part 4.3 of the POEO Act. A prevention notice is a written direction to a person or company to do something, or not do something, to ensure that the activity is carried on in an environmentally satisfactory manner.

Under the POEO Act a prevention notice can require actions including:

- installing, repairing, altering, replacing, maintaining or operating pollution control equipment or other plant
- modifying (or carrying out any work on) plant
- ceasing to use plant or altering the way plant is used
- ceasing to carry on or not commencing to carry on an activity
- carrying on an activity in a particular manner
- carrying on an activity only during particular times
- monitoring, sampling or analysing any pollution or otherwise ascertaining the nature and extent of pollution or the risk of pollution
- action with respect to the transportation, collection, reception, re-use, recovery, recycling, processing, storage or disposal of any waste or other substance
- preparing and carrying out a plan of action to control, prevent or minimise pollution or waste
- reviewing the carrying out of an activity.

Purpose of a prevention notice

A prevention notice is issued to:

- prevent an activity from being undertaken until the environmental issue is addressed
- specify preventative actions to be undertaken and the timeframe in which they are to be implemented
- address long-term and ongoing issues that have not been solved by previous advice or warnings
- ensure the activity is carried out in accordance with good environmental practice.

Reasons for the EPA issuing a prevention notice

The EPA issues prevention notices for a number of reasons; when the EPA reasonably suspects that an activity has been or is being carried out in an unsatisfactory manner as defined in section 95 of the POEO Act.

The EPA uses a prevention notice to specify that an activity is not to be undertaken or that certain plant and equipment are not to be operated until the EPA is satisfied that appropriate controls are in place to ensure that the activity will be carried on in an environmentally satisfactory manner.

Pollution reduction programs

Section 68 of the POEO Act defines pollution reduction programs (PRPs) as:

The conditions of a licence may require the holder of the licence:

- a. to develop and submit to the appropriate regulatory authority a pollution reduction program and to comply with the program as approved by the appropriate regulatory authority, or
- b. to comply with a pollution reduction program determined by the appropriate regulatory authority.

A pollution reduction program may include but is not limited to requirements to carry out works or to install plant for the purpose of preventing, controlling, abating or mitigating pollution.

The appropriate regulatory authority may approve a pollution reduction program with or without alterations.

Note that the POEO Act also refers to conditions requiring the licence holder to undertake and submit pollution studies, these pollution studies are addressed in a separate operating procedure entitled *Pollution studies*.

Purpose of pollution reduction programs

PRPs are generally imposed by the EPA in response to continuing environmental issues or ongoing compliance problems. PRPs are intended to achieve improved environmental outcomes in a negotiated timeframe and are imposed on a licensee under a licence condition.

PRPs mandate the reduction of pollution or risk of pollution from regulated activities at licensed premises through a program of actions, including carrying out works or installing plant and equipment. PRPs developed by the EPA may apply to a single site-specific issue or may address a broader regional issue across a number of licensed sites.

Reasons for the EPA issuing a pollution reduction program

The EPA attaches pollution reduction programs to licences to:

- reduce the risk of harm to the environment caused by pollution
- set specific targets to reduce the risks posed to the environment
- legally enforce the commitment to agreed improvements
- improve community access to information on the nature and timing of the improvements being made.

Case study – pollution reduction program

An EPA compliance audit was undertaken at a premises undertaking wood preservation. Issues with surface water management were observed. Large unsealed areas of the site were used for storing treated timber. Chemicals from the treated timber, and sediment from the unsealed areas, had been previously detected in stormwater discharged from the site. The stormwater discharges were not licensed by the EPA. Below is an outline of the EPA decision-making process and main considerations in this scenario.

Consider relevant provisions in the POEO Act and regulations, and EPA guidelines

The audit highlighted potential compliance problems involving stormwater management and diffuse surface water discharges at the licensed premises and potential risk of water pollution (breach of section 120 of the POEO Act).

Assess the risk of harm to the environment

The quality of the stormwater being discharged was compared to the Australian and New Zealand Guidelines for Fresh and Marine Water Quality 2000 and the NSW Water Quality Objectives.

The EPA determined that water discharged from the premises during a significant rainfall event was likely to be contaminated and may cause environmental harm to waterways.

Licensee's compliance history

The licensee had a good environmental performance record. No regulatory actions had been undertaken by the EPA in the past three years. The licensee had good controls in place for managing wastewater discharged from the site via a licensed discharge point, and had met the licence concentration limits for this discharged water.

However, the licensee had inadequate controls in place for diffuse water discharges from the premises. This posed a risk of contaminated stormwater being discharged to an adjacent waterway and causing environmental harm.

Assess the environmental measures

Identified controls for reducing the risks posed by diffuse discharge to waters from activities undertaken at the licensed premises included diverting all uncontaminated surface stormwater away from areas where activities were undertaken.

Major upgrades to the premises to implement the diversion works would take longer than 12 months to implement. Without these upgrades, the compliance problem for diffuse water discharges would be ongoing.

Alternative and complimentary regulatory actions

After consideration of the circumstances, previous works and compliance history, the EPA considered that the most appropriate action was to require the premises to investigate the best practicable measures to reduce risks posed by diffuse discharges to waters from the premises. No other regulatory actions were considered appropriate.

Develop pollution reduction program

A PRP was developed and negotiated with the licensee. Its objective was investigate practicable measures to reduce risks posed to waters from activities undertaken at the premises and to measure and report on improvements.

The PRP required the licensee to submit a water management plan that included a program of actions that reduced the risk of pollution of waters at the premises. The plan included timeframes for implementation of the program of actions and a monitoring plan to demonstrate to the EPA that environmental improvements were being met and maintained.

The PRP set the following milestones.

1. A date for the licensee to submit a water management plan to the Regional Manager.
2. A date for the licensee to commence the program of actions outlined in the PRP.
3. A date for the licensee to have completed the program of actions described in the PRP.

Pollution studies

Pollution studies are defined in section 68 (1) of the POEO Act as follows:

The conditions of a licence may require the holder of the licence to undertake and submit, to the appropriate regulatory authority, studies into any aspect of the environmental impact of an activity or work authorised or controlled by the licence.

Purpose of pollution studies

Pollution studies are intended to inform the EPA and licensees of the environmental impact(s) of the licensee's activities on the receiving environment (air, water, land, sensitive receivers in the case of noise and the appropriate management of waste). Pollution studies can be initiated by the EPA or a licensee.

Pollution studies are a legally binding requirement attached to an environment protection licence by way of a licence condition under section 68 of the POEO Act. However, a pollution study does not contribute to a licensee's environmental management score.

For further information on regulatory actions that attract an environmental management score see the [Environmental Management Calculation Protocol](#).

Reasons for the EPA requiring a pollution study

The EPA attaches a condition to a licence requiring a pollution study to:

- monitor and review the impacts (short and long term) of pollutants discharged to the environment
- investigate best management practices and best available technology to reduce impacts of an activity
- investigate and report on alternative pollution control equipment, methods or practices
- investigate alternative monitoring procedures for measuring pollutants discharged
- report monitoring results from a new piece of plant and equipment or new procedures.

Case study – pollution studies

A licensee undertaking scheduled metallurgical activities has a number of pollution controls that collect and treat emissions from the processing area and discharges them to the atmosphere. The discharges may generate a noxious odour. The EPA would like to determine the impact of the discharge on air quality. Below is an outline of the EPA decision-making process and main considerations in this scenario.

Consider relevant provisions in the POEO Act and regulations, and EPA guidelines

The EPA has received complaints from the local community about odours in the area surrounding the licensed premises. The community is concerned about potential health and environmental effects from the odours.

Assess the risk of harm to the environment

The EPA did not have enough information to determine the risk of harm to the environment posed by the emission of air impurities from the activities at the premises.

Licensee compliance history

The EPA considers the matters set out in section 45 of the POEO Act when considering whether a pollution study is appropriate. The licensee had a good environmental performance record with controls in place for emissions of air impurities, but they had no information on the performance of these controls.

Other studies on similar activities

Existing studies developed for similar activities involving emission of air pollutants suggest further investigation of impacts from the specific premises is necessary.

Alternative or complementary regulatory actions

The EPA considered using a pollution reduction program, but was unable to determine whether the licensee had complied with the POEO Act and regulation until further information about the impacts of the activity was made available.

Further regulatory actions will be considered following submission of an air impact assessment report, as required by the pollution study.

Develop pollution studies

Pollution studies were developed and negotiated with the licensee. The objective was to assess air amenity impacts posed from activities undertaken at the premises. The pollution study required the licensee to undertake an air quality impact assessment and submit a report to the EPA. The air quality impact assessment report had to be developed in accordance with the EPA's Approved Methods and Guidance for the Modelling and Assessment of Air Pollutants in NSW, 2005.

The pollution study set the following milestone:

- A date by which the licensee is required to submit an air quality impact assessment report to the Regional Manager.

Formal warning

A formal warning as defined in the [Environmental Management Calculation Protocol](#) as:

A formal warning issued for any suspected or potential contravention of the POEO Act or Regulations, including the suspected or potential commission of an offence under the POEO Act or Regulations.

A formal warning is issued in writing and includes the following information:

- background to the suspected or potential non-compliance
- the breach of the legislative requirement or licence condition
- a reminder for the licensee of the EPA's Compliance Policy and escalating regulatory response, including potential further regulatory action.

Purpose of a formal warning

Formal warnings are used for incidents to avoid escalating environmental harm or to prompt voluntary compliance with legislative requirements. Formal warnings are used to address non-compliances at the lower range of seriousness so that further regulatory action is not required.

Reasons for the EPA issuing a formal warning

The EPA issues formal warnings to:

- prompt voluntary compliance when the licensee is unaware of a potential non-compliance that can be remedied easily
- educate licensees about their legislative requirements
- remind a licensee about the EPA's escalating regulatory response.

Inspections – incident related

Incident-related inspections are defined in the [Environmental Management Calculation Protocol](#) as inspections in response to:

- a. an incident
- b. a verified complaint (being a complaint that is verified by the EPA or the licence holder as being directly attributable to the licensed activity) or
- c. non-compliance with licence conditions or legislative requirements under the POEO Act or Regulations.

It also includes follow up inspections determined by the EPA to be related to the incident, verified complaint or non-compliance.

Purpose of an incident-related inspection

Incident-related inspections are carried out by EPA officers as part of the regulatory approach to POEO licensed premises. Incident-related inspections are undertaken to establish the facts of an incident, verify complaints or to follow up non-compliance. Follow up action may be required to remedy any environmental harm or potential harm.

The regulatory effort and environmental performance significance of carrying out an incident related site inspection is reflected by allocating this action an environmental management weighting under the protocol.

Case study – incident-related inspection

A licensee is undertaking crushing, grinding or separating activities at a quarry. The EPA receives complaints about noise from the quarry from members of the public who are concerned about the impact of noise emissions.

The EPA undertakes an inspection of the premises to examine the licensed activities and investigate the noise emissions from the licensed premises. Below is an outline of the EPA decision-making process and main considerations in this scenario.

Consider relevant provisions in the POEO Act and regulations, and EPA guidelines

Noise pollution generated by crushing, grinding and separating activities is managed by the environment protection licence. Noise limits have been developed in accordance with the industrial noise policy and attached to the licence to ensure that the risks of noise pollution impacting on the neighbouring residents is managed.

Assess the risk of harm to the environment

Due to an increase in the number of complaints received by the EPA over four weeks, the EPA undertakes a site inspection of the licensed premises to check if any changes had been made to the operations or if any new equipment was being used that may have led to an increase in noise being generated.

In addition, the EPA undertakes a noise survey and monitoring at a complainant's residence. The EPA undertakes monitoring at similar times at which noise impacts were reported to occur.

The monitoring is in addition to noise monitoring carried out by the licensee in accordance with the licence, and aims to determine whether the noise was generated by the licensed activity and if it was within the noise limits required by the licence.

Licensee compliance history

The EPA considers that the licensee has a good environmental performance record and has controls in place to mitigate noise. The licensee has adopted best management practices for controlling noise from source activities.

The licensee has implemented mitigation strategies including scheduling the use of noisy equipment at the least sensitive time of day, placing noisy equipment behind structures that act as barriers to noise and scheduling operations so that noise-generating machinery is used separately rather than concurrently.

The licensee also undertakes noise monitoring to determine compliance with noise limits on the licence and makes the results available to the public on their website. There have been no non-compliances with noise limits in the past 12 months.

Other studies on similar activities

Existing studies developed for similar activities involving noise emissions suggest that using the mitigation strategies implemented by the licensee would ensure compliance with the licence limits.

Alternative or complementary regulatory actions

Further regulatory actions may be considered following the results of the noise survey and monitoring. If noise exceeds limits a pollution study and pollution reduction program may be appropriate. The EPA may consider a penalty notice or official caution depending on the individual circumstances of the non-compliance.

Decision

The EPA determines that the noise from the licensed activities was the source of the complaints. The site inspection has identified that the licensee was operating new equipment, and even though they continued to undertake mitigation measures, EPA noise monitoring has concluded that the licensed activity was in non-compliance with the limits of the licence.

The site inspection has enabled the EPA to verify the complaint, as the noise impacts were attributable to the licensed activity.

The EPA has identified that several pieces of new equipment were being 'run in' over the four-week period over which complaints were received. This is a temporary non-compliance with noise limits, and noise emissions would return to normal in the week following.

The EPA has determined that as the licensed activity generated the noise and the noise was outside the licence limits, the site inspection is incident-related and is recorded as such in the EPA's licence management system.

If the EPA had identified that the noise was within the licence limits, the site inspection would not have been recorded as incident-related as the licensee had not caused any adverse effects and was operating in accordance with the licence conditions.

The EPA undertakes various inspections of licensed premises including routine inspections, inspections due to a change in operations as well as in response to an incident. For the purposes of risk-based licensing, only incident-related inspections count towards the environmental management category.