

# Regulation of motorway tunnel ventilation stacks

Better Regulation Statement

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# Executive summary

This better regulation statement supports the NSW Environment Protection Authority's (EPA) proposal to amend Schedule 1 of the *Protection of the Environment Operations Act 1997* (POEO Act) and Protection of the Environment Operations (General) Regulation 2009 (General Regulation). This is to include a new scheduled activity and fee for road tunnel emissions.

These proposed amendments are contained in the Protection of the Environment Operations Legislation Amendment (Scheduled Activities) Regulation 2019. This proposed amendment will require motorway tunnel operators to obtain an environmental protection licence and to pay an annual fee.

## Purpose of the proposed amendment

The purpose of the proposed amendment is to make the EPA the appropriate regulatory authority for motorway tunnel ventilation stacks under the POEO Act. By doing so, this will provide greater confidence to the community that air emissions from tunnel ventilation stacks are efficiently and appropriately regulated.

## Background and development of the proposed amendment

The number of motorway tunnels in the Sydney network is set to double by 2023. Many new tunnel projects are proposed to traverse densely populated areas. Tunnel ventilation stacks are part of a motorway tunnel's infrastructure and are used to remove vehicle emissions from within, so the tunnels can be used safely.

In 2018, the NSW Government announced a range of initiatives to address air quality issues in road tunnels. This included a new role for the EPA to regulate road tunnel ventilation stacks. These initiatives are focused on addressing community concerns about inadequate management of pollution from tunnel ventilation stacks.

The EPA has considered options to better regulate air emissions from motorway tunnel stacks. The preferred option is to require operators of road tunnels with ventilation stacks to hold an environmental protection licence. This approach will:

- provide a strong, flexible, fit-for-purpose tool for regulating air emissions from motorway tunnel ventilation stacks; e.g. licences can be varied as needed to address site-specific performance issues
- provide consistent regulatory oversight of all motorway tunnels
- provide certainty to motorway tunnel operators
- improve transparency and increase community confidence that air emissions from motorway tunnels are appropriately regulated; for example, licensees will be required to publish their monitoring data.

To inform the development of the proposal the EPA consulted with government agencies and industry stakeholders. Comments from agencies helped the EPA to ensure appropriate tunnels (current and future) are captured by the definition of the scheduled activity.

Tunnel operators were generally supportive of the proposal. However, they raised concerns about the proposed scale of the administration fee, operational difficulties associated with potentially having several licences for one tunnel and the possibility of exceeding air emission limits during emergencies.

In response to industry comments and in consultation with Treasury, the EPA made changes to the proposed fee structure to make them equitable. Changes were also made to allow a tunnel project constructed in multiple stages to be regulated via a single licence. This is by allowing the previous licence to be varied to include up to ten ventilation stacks; after which the potential impacts of the additional stages are significant enough to warrant a new licence.

## Recommendation

The recommended option is to introduce a new scheduled activity under Schedule 1 of the POEO Act to enable the EPA to regulate air emissions from road tunnel ventilation stacks via an environment protection licence. Under this option, operators of road tunnels would be required to apply for a licence and pay an annual licence fee. This is intended to capture all large motorway tunnels with ventilation stacks.

This proposal partially implements the NSW Government's initiative (announced in 2018) to address air quality issues in road tunnels; and does so with least cost to the community. The proposal aligns with government policies and will promote confidence within the community that the air emissions from road tunnel ventilation stacks are appropriately regulated. It will also provide regulatory certainty for motorway tunnel operators.

# 1. Need for government action

## 1.1. Tunnels in NSW

Sydney currently has five large motorway tunnels with ventilation stacks. Ventilation stacks are part of a tunnel's infrastructure and disperse emissions from cars travelling through the tunnel into the atmosphere. This is to ensure air quality in the tunnel is safe at all times. Another seven motorway tunnel projects are under construction or in the design stage. Some of these projects are, or will be, built in densely populated residential areas. These communities have significant concerns about the impact that new tunnel projects will have on air quality in their neighbourhoods; for example, about emissions that are normally diffusely dispersed, being collected and released from a stack near their homes. In recognition of these increased community concern, the NSW government announced a range of initiatives to address air quality issues in road tunnels. This included enabling the EPA to regulate tunnel ventilation stacks through licensing.

## 1.2. The policy problem

The NSW Department of Planning and Environment (DPE) currently regulates the operation of motorway tunnels through the development approval framework, including air emissions from ventilation stacks. The EPA provides technical advice to DPE to inform the approval process. However, the EPA only regulates motorway tunnel projects through an environmental protection licence if the **construction** of the tunnel triggers the scheduled activity definition for 'road construction' under the *Protection of the Environment Operations Act 1997*. The EPA rarely regulates the **operation** of road tunnels, unless it requires a defence for the discharge of water pollution.

Road projects offer significant benefits to the NSW community by delivering effective traffic and transport solutions. However, there are potential social and environmental issues associated with motorway tunnel projects. These include potential air quality and visual amenity issues, noise impacts, negative impacts on property values near new projects and ecological and heritage issues.

Most of these issues are considered at the development assessment stage of the project through approval conditions. For example, approvals include detailed conditions on tunnel and ventilation stack design, environmental management of air emissions (including performance requirements), air quality monitoring, reporting and auditing and the preparation of environmental management plans. Some approvals also require the provision of public access to monitoring results.

However, the current regulatory framework has limited flexibility. DPE cannot change the conditions of an approval once it has been issued, unless the proponent applies for a modification of their approval. This means that if issues arise during the operational phase of the project that were not envisaged nor considered during the impact assessment and approval process, conditions cannot be added to the project approval (or changed) to fix the issue.

The EPA generally does not have a regulatory role once construction has been completed. Therefore, once the tunnel is approved, constructed and operational, there is very limited scope for government to improve its regulation of air emissions from tunnel ventilation stacks. This is not consistent with how other significant pollution sources are regulated.

Community confidence in appropriate regulation and management of air quality around tunnels is important for acceptance of new motorway tunnel projects, and the social benefits they provide. This confidence would be increased by providing publicly available monitoring data for all tunnels, more transparent and flexible regulation and publicly available compliance records.

## 1.3. Regulation of air emissions from tunnel ventilation stacks

For the EPA to regulate air emissions from tunnel ventilation stacks via a licence under the POEO Act, legislative amendments are required. This would include amendments to:

- Schedule 1 of the POEO Act to introduce the scheduled activity of ‘road tunnel emissions’, limited to air emissions from ventilation stacks
- Schedule 1 of the General Regulation to set out the applicable licence administrative fees for the activity.

## 1.4. The risk of taking no action

If no action is taken to address this issue, there is a significant risk that the community will remain unhappy with government oversight of tunnel ventilation stacks. This could result in increased community objection to tunnel projects currently under construction and new proposed projects.

During initial consultation on the proposal, tunnel operators were generally supportive. This was largely because of the increased transparency it would provide to the community that ventilation stacks are being regulated in an appropriate way.

# 2. Objective of government action

The objective of the proposal is to effectively and efficiently regulate air emissions from road tunnel ventilation stacks and provide the community with greater transparency and confidence that this is taking place. This proposal aligns the regulation of road tunnel emissions with how other similar types of emissions are regulated in NSW. It forms part of a wider suite of measures intended to strengthen the NSW government’s approach to air quality issues in motorway tunnels.

As the regulator, the EPA’s objectives are to:

- improve the transparency and accessibility of information to the community
- provide up-front information and certainty to motorway tunnel operators about the level of environmental performance they must achieve
- provide a range of tools that are strong, flexible, proportional and fit-for-purpose to regulate tunnel ventilation stacks
- minimise costs and administrative burden for the EPA, and
- ensure a level playing field across motorway tunnel operators.

# 3. Options considered

The EPA considered three options to better regulate air emissions from motorway tunnel stacks. These included

1. no change from the existing situation
2. EPA regulation via environmental protection licences
3. regulation via a specific new regulation under the POEO Act.

## Option 1: No change

This would maintain the current situation. DPE currently regulates the design, construction and operation of motorway tunnels through project-specific infrastructure approvals. This includes air emissions from ventilation stacks. The EPA would continue to provide technical advice to DPE to inform the planning process but would have no role in ongoing regulation of operational motorway tunnels. If environmental performance issues arose from operation of ventilation stacks, there would be no way to address them.

Industry would continue to incur the same costs from obtaining planning consent, construction and operation of road tunnel ventilation stacks, managing community complaints and ongoing monitoring requirements.

## **Costs and benefits**

The EPA's role would remain restricted to providing advice at the planning stage of the project and responding to community concerns. This role would continue to incur costs for the EPA without any mechanism for recovering them.

This option would also fail to provide extra mechanisms for addressing increasing community concern about air emissions from motorway tunnels and how they are managed.

Under this option, the NSW Government would not have honoured its commitment to make the EPA the regulator of road tunnel emissions. This would be likely to further erode the community's confidence in these projects and government generally.

## **Option 2: EPA regulation via environmental protection licences**

Option 2 would involve 'road tunnel emissions' (limited to air emissions from ventilation stacks) being added as a new scheduled activity under Schedule 1 of the POEO Act. Operators of large motorway tunnels would be required to apply for and hold a licence. There are currently nine existing and planned (with development consent) tunnels with ventilation stacks in NSW. There are also three other proposed tunnels that are yet to gain development consent.

This option would also introduce an administrative fee for this scheduled activity (see Section 4 below). The fee would be based on the number of stacks associated with the road tunnel. When the Amendment Regulation starts, existing motorway tunnel operators would be given a six-month period to apply for a licence. Tunnels already in operation, will not need to pay an extra fee per stack, which will apply to new tunnels for the first two years of operation of each stack. This two-year fee covers some of the costs incurred by the EPA for its community engagement and extra technical and regulatory efforts.

## **Costs and benefits**

Under this option the EPA would have an ongoing role as the regulator of air emissions from motorway tunnel ventilation stacks. This would involve the EPA issuing licences under the POEO Act to all operators of tunnels with ventilation stacks; and to allocate resources to regulate industry and engage with the community.

## **Costs to the EPA**

This option would require the EPA to allocate more resources for the regulation of road tunnel ventilation stacks. These activities will require the allocation of extra operational, stakeholder engagement and technical air specialist staff. EPA costs are estimated to be around \$870,000 in the first year after this proposal is implemented. This figure would increase as extra licences for new road tunnels begin.

In the first year of the new licensing requirements, the cost of initially developing premise-specific licence conditions for the five existing road tunnel ventilation stacks and other technical activities is expected to be around \$321 000. Ongoing technical effort would increase over time (for example to around \$493,000 in the second year) as new road tunnels with ventilation stacks start operation and as the EPA begins monitoring and compliance activities for them.

The EPA's costs for technical activities would be due to technical analysis of information, assessment and review and development of alternate monitoring and testing methods for tunnels that do not routinely monitor emissions. Also, technical input would be needed to develop and maintain operational policy (including monitoring and reporting guidance) and potentially negotiating pollution reduction studies and other changes to licence conditions (including refined environmental performance requirements), if required.



Operational costs would be accrued from general licensing activities, which would include varying and issuing licences and undertaking licence reviews every five years. They would also come from ongoing regulation of tunnel stack emissions, site inspections as required, investigation and compliance activities, conducting audits, enforcement of air emission limits and general administration. These costs are expected to be around \$350,000 in the first year and would increase as new tunnels and additional ventilation stacks begin operating.

Stakeholder engagement is likely to be extensive. It would involve consultation with affected communities, government agencies and councils, handling complaints from the public and responding to media and community enquiries. The cost to the EPA is expected to be around \$200,000 in the first year and would increase as new tunnels with extra ventilation stacks begin operating.

Because of the high level of community concern about ventilation stacks close to residential areas, the EPA expects it will need extra resources for community engagement within the first two years of a licence for a new tunnel. The EPA expects its level of community engagement will ease off after this time because the community will be satisfied with the effectiveness of the EPA's regulation.

This option would allow the EPA to recoup much of its costs associated with regulating road tunnel ventilation stacks by collecting administrative fees from tunnel operators. The EPA expects to expend around a minimum of \$170,000 annually per licence.

## Costs to industry

This option would result in additional costs for industry. Tunnel operators would face extra compliance costs for reporting on environmental performance and air quality (including ensuring that monitoring data is publicly available). This option would not be expected to result in extra emission monitoring costs for most road tunnel operators as licence conditions would generally be consistent with their planning approval (at least initially).

For some tunnel operators that are not currently required to monitor stack air emissions under existing planning approvals, air emissions reporting costs may increase. Any new reporting requirements would be developed in consultation between the EPA and the tunnel operators. This cost cannot be quantified at present as the nature of the requirements are still unknown. However, the EPA does not anticipate that monitoring costs will be significant.

Additional costs for road tunnel operators are expected to initially be around \$30,000 per annum. This would include preparing and lodging a licence application, preparing a *Pollution Incident Response Management Plan* (PIRMP) and annual returns, as well as other administration. After a PIRMP has been developed, this cost would decrease significantly to around \$6,000 per annum across the industry.

The cost to operators to prepare a licence application is expected to be less than \$300. The cost of developing and implementing a PIRMP is expected to be under \$6,000 per operator, while continued testing is expected to cost around \$500 annually. Preparing annual returns is estimated to cost around \$200 each year. Compliance and monitoring costs are not expected to vary from existing costs under the base case, as licence conditions would be generally consistent with planning approvals.

Operators would also face the financial cost of licence administration fees. These are calculated based on fee units multiplied by the fee unit amount. The fee unit amount is increased annually (set to align with projected increases in the government wage price index) consistent with clause 9 of the General Regulation.

The proposed fee will reflect the number of ventilation stacks included on a licence. The fee will increase as the number of stacks increases. The fee for new tunnels will include an additional charge for the first two years a stack is listed on a licence (by around \$25,000 per stack per year). A higher fee is set initially to allow better cost recovery for the EPA, which will invest more resources in stakeholder engagement and technical assessment during this time. After an initial two-year period, and for existing tunnels, the fee would be set at around \$150,000 for a tunnel with up to four stacks and increase to around \$300,000 for a tunnel with nine or 10 stacks. As this fee is paid to the EPA to cover the costs of licensing tunnels, it represents a transfer (a financial cost to the industry and financial benefit to the EPA), rather than the use of any economic resources.



## Benefits

Licensing of tunnel ventilation stacks provides a flexible and transparent tool that would increase community confidence about how stacks are regulated. The EPA would become the appropriate regulatory authority for air emission from ventilation stacks. This would allow the EPA to use tools that are specifically designed to regulate environmental performance. This includes the ability to impose pollution reduction studies and programs, mandatory environmental audits, and other changes to licence conditions and performance requirements. It also allows the EPA to use other regulatory tools such as environmental protection notices and penalty notices for non-compliance. It would also provide an additional avenue for complaints, via the EPA's Environment Line.

Environment protection licensing is trusted by the community, industry and government. As licence conditions can be amended, this flexibility ensures site-specific solutions can be developed and mandated via transparent and enforceable conditions if unforeseen issues arise.

Environment protection licensing provides greater transparency for the community. All licences and the EPA's regulatory actions and decisions are available on the EPA's public register. Licensees are also required to make their monitoring data publicly available, along with some parts of their pollution incident response management plans.

The benefits of this option to road tunnel operators would be increased community confidence about how ventilation stacks are managed and regulated. This is likely to result in longer term community acceptance of ventilation stacks.

The key benefits to the community would be greater transparency about how ventilation stacks are managed and regulated. The community has confidence in the EPA as an experienced and credible regulator that will regulate ventilation stacks consistently and appropriately. The community would also benefit from increased consultation and would have a clear point of contact, via the EPA's Environment Line, for complaints or questions.

Under this option, the reputation of the NSW Government will be maintained (and not eroded as is expected under Option 1). This is because it will have honoured its commitment to make the EPA the regulator of air emissions from road tunnel ventilation stacks.

## Option 3: Develop a new regulation under the POEO Act

Option 3 would involve developing a new regulation under the POEO Act. This would include clear requirements that apply to all operators of large tunnels with ventilation stacks. Licences would not be issued under this option.

A regulation might require tunnel operators to:

- undertake stack monitoring and make the results publicly available
- meet a series of design specifications
- meet emissions limits
- keep records of complaints, and
- provide the EPA with records of compliance with air emission standards and any other requirements of the Regulation.

A regulation can be used to make the EPA the appropriate regulatory authority for specific activities. This approach would potentially result in better outcomes for the environment and the community compared to the base case. This is because it could improve transparency about how air emissions from motorway tunnel ventilation stacks are regulated.

This option, however, is not as flexible as the licensing approach (Option 2) for both the EPA and tunnel operators. A licence can be tailored to the operation of a specific tunnel, including environmental performance of an operator and the sensitivity of the surrounding environment and population. Licence conditions can be varied by the EPA to address specific matters as they arise. Operators can also apply to have their licence varied.

Developing a specific regulation could take up to two years to prepare and implement. This approach would significantly delay road tunnel emissions being regulated in a more transparent and consistent way. During that time community concerns about the regulation of ventilation stacks is likely to increase.

## Costs and benefits

Drafting and implementing a new regulation has the potential to result in better environmental outcomes than the base case. This is because it could set clear, standardised criteria around air emissions and the design of tunnels to reduce environmental impacts. For example, requiring multiple stacks to disperse pollutants rather than one concentrated source stack would minimise the impacts on local communities. However, a regulation is less flexible than licensing for both the EPA and operators.

Developing a standalone regulation and deciding on the arrangements for an agreed set of emission standards, goals and compliance requirements with the whole industry could take around two years. This would mean the measures to be implemented under this option, the outcomes and associated costs and benefits would be delayed. With seven tunnels currently in the design and construction phases, this delay is unlikely to be acceptable to the community.

Overall, Option 3 would involve costs of \$3.02 million to the EPA and \$23,000 to tunnel operators over five years.

Under this option the EPA would be expected to incur a one-off cost from setting up and implementing a new regulation. The process of establishing a new regulation would be expected to take around two years, with issues similar to those under the base case persisting throughout. The cost of developing and implementing a new regulation is estimated to be around \$600,000 per year over two years. The tasks that would need to be completed to develop a regulation, particularly technical tasks, would be similar to the tasks required under Option 2.

Once the new regulation was introduced, the EPA would need extra resources to monitor and enforce requirements compared to the base case. These costs are estimated at around \$628,000 per year. This would include the EPA's costs from receiving, investigating and following-up on community complaints about tunnel air pollution.

Until the new regulation starts, tunnel operators would face similar monitoring costs to those under the base case, as industry generally undertakes air emission monitoring according to planning approval requirements. When the new regulation takes effect, the compliance costs would be expected to marginally rise to reflect increased reporting requirements and administrative costs.

This option would be inconsistent with how other industries are regulated in NSW. Pollution from motorway tunnel ventilation stacks is not so different to pollution from other activities regulated by the EPA in terms of environmental risk, suggesting it hardly warrants a separate and unique regulation. This approach is likely to result in less transparency for the public regarding the ongoing regulation and performance of tunnel operators.

However, under this option, the reputation of the NSW Government is likely to be maintained (and not eroded as expected under Option 1). This is because it will have honoured its commitment to make the EPA the regulator of air emissions from road tunnel ventilation stacks.

## 4. Licence administrative fees

An extra regulatory burden will be placed on road tunnel operators through implementation of the proposal. Large road tunnels with ventilation stacks will be required to apply for an environment protection licence and pay the annual licence administrative fee to the EPA.

The proposal will prescribe annual licence administrative fees for road tunnel ventilation stacks. Fees have been set based on economic analysis and are designed to recover a significant portion of the costs of the EPA's expected regulatory effort.

The proposed fee is based on the number of stacks associated with a road tunnel. A limit of 10 stacks per licence would apply (see Table 1 below). The fee for new tunnels would also include an extra fee of around \$25,000 per stack for the first two years of operation. Existing road tunnels would not be subject

to this fee. The higher fee for the initial two years of a new or varied licence would cover the EPA's costs of greater stakeholder engagement required over this period.

**Table 1: Annual licence administrative fees for road tunnel ventilation stacks**

Number of stacks	Administration fee units	Annual fee
1-4	1,128	\$150,024
5-8	1,692	\$225,036
9-10	2,256	\$300,048
Extra fee per stack for the first two years of operation of new stacks	188	\$25,004

Licence fees are calculated based on fee units multiplied by the fee unit amount, which is currently \$133. The fee unit amount is increased annually consistent with clause 9 of the General Regulation.

## 5. Consultation

The EPA consulted with NSW government agencies to inform development of the proposal to regulate air emissions from motorway tunnel ventilation stacks. Agencies consulted included Transport for NSW, Roads and Maritime Services, NSW Health, Department of Planning and Environment, Office of the Chief Scientist and Engineer, NSW Treasury and the Department of Premier and Cabinet.

Agencies raised issues about the initial definition of the proposed scheduled activity, specifically the breadth of tunnels that would need a licence. The definition was amended to address these concerns.

The EPA also consulted with motorway tunnel operators. This included a series of meetings during April 2018, where the proposal was presented and discussed. Operators of both existing tunnels as well as tunnels under construction were consulted. All provided submissions.

Tunnel operators generally supported this initiative. Industry submissions raised concerns about:

- the proposed scale of administration fees
- operational and regulatory difficulties associated with a proposal that would result in several licences for one tunnel project constructed in stages, and
- the possibility of exceeding air emissions during emergencies.

In response to stakeholder feedback, and in consultation with Treasury, the EPA conducted further and more detailed cost assessments. These were to ensure the proposed fee reflects the EPA's costs for administering a licence. The proposed fee structure was then altered. Changes were also made to allow a tunnel project constructed in multiple stages to hold a single licence for all stages once operational (up to 10 ventilation stacks). Emissions exceeding allowable limits during emergencies can be addressed via conditions.

## 6. Recommendation

Option 2, licensing of tunnel ventilation stacks, is recommended. This is because it strengthens regulatory oversight of road tunnel ventilation stacks. Licensing is an established regime that is familiar to the community, industry and EPA officers and creates a level playing field for tunnel operators.

This option represents the greatest net benefit and least cost to the NSW community. The benefits of consistent and credible regulation of motorway tunnel ventilation stacks and transparency for the community outweigh the increased regulatory and administration costs.

## 7. Implementation and compliance

The proposal will be set up through amendment of the POEO Act and General Regulation. This will be via the Protection of the Environment Operations Legislation Amendment (Scheduled Activities) Regulation 2019. This will include adding 'road tunnel emissions' as a scheduled activity in Schedule 1 of the POEO Act and prescribing licence administrative fees for the activity in Schedule 1 of the General Regulation. The proposed amendment will also provide a six-month transition period for tunnel operators to apply for a licence after the amendment starts.

The EPA has developed a strategy to communicate the changes to all relevant stakeholders. It is also to ensure that road tunnel operators are aware of their new obligations under the Act; i.e. that they must apply for a licence and pay an annual administration fee.

When a tunnel operator applies for a licence, the EPA will assess the application and develop appropriate licence conditions, before issuing the licence. The EPA may also need to work with some potential licence holders to develop conditions for monitoring and testing methods for tunnels that do not routinely monitor emissions.

The operator will be required to develop and test a PIRMP and show that it can implement its plan.

Penalties for non-compliance with licence or statutory requirements will be consistent with current provisions of the POEO Act. Compliance and enforcement approaches will also be consistent with current EPA policies and procedures, as detailed in the EPA's Compliance Policy.

## 8. Evaluation and review

The EPA has not previously regulated air emissions from road tunnel ventilation stacks. The assessment of costs and benefits in this document was developed using the best estimates for both the EPA and industry, based on information about similar activities that the EPA regulates.

The EPA sought advice and review from Treasury NSW to assist with development of a robust proposal. However, the EPA will review its costs following a reasonable period of regulating this sector, when more accurate figures are known. The EPA proposes to adjust the fee structure, if required, based on a re-assessment of its costs when it has this information.

The provisions of the POEO Act and POEO General Regulation will be periodically reviewed in accordance with statutory review requirements.