

Gas Compliance Statement

EPA's approach to the regulation and compliance of gas activities

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1. Introduction

1.1 About the EPA and NSW Gas Plan

In November 2014, the [NSW Gas Plan](#) was released in response to the NSW Chief Scientist and Engineer's [Independent Review of Coal Seam Gas Activities](#) in NSW. As part of the review, it was recommended that the Government separate the planning and approval process and establish an independent regulator to focus on undertaking compliance and enforcement work.

On 1 July 2015 the EPA became responsible for compliance and enforcement of all conditions of approvals for gas activities in NSW, excluding work health and safety (WHS) issues. This process is reliant on the conditioning placed on statutory documents by other agencies.

Conditions continue to be issued by the Department of Resources and Energy or Department of Planning and Environment when an application to explore, appraise or produce gas is approved. The industry must then comply with the strict conditions imposed.

Once consents are issued, all gas activities require an Environment Protection Licence (EPL) under the *Protection of the Environment Operations Act 1997* (POEO Act) before an activity can commence. EPLs set out legally enforceable, site specific conditions and controls which holders must comply with in order to prevent and minimise pollution and safeguard the community.

The POEO Act was amended when Schedule 2A *Enforcement of Gas and Other Petroleum Legislation* was passed by NSW Government as part of a legislative package to implement the necessary changes under the NSW Gas Plan. These amendments enable the EPA to exercise its powers under the POEO Act to regulate compliance and enforcement of petroleum activities in NSW.

As the principal environmental regulator and lead regulator for all gas activities, the EPA is responsible for regulating compliance with legislation, using a range of statutory instruments to improve the environmental performance and maintain a healthy environment and community. A failure to comply with environmental laws or licence conditions can result in regulatory actions being taken by the EPA, which include formal warnings, clean-up and prevention notices, penalty notices, legally binding pollution reduction programs. For serious matters, the EPA may commence prosecution and pursue an enforceable undertaking, through the NSW Land and Environment Court.

1.2 Purpose of this Gas Compliance Statement

The Gas Compliance Statement clarifies the EPA's role as lead regulator for gas activities.

The Gas Compliance Statement outlines:

- the provisions in the POEO Act – Schedule 2A 'Enforcement of gas and other petroleum legislation' and its implementation strategy, including details of the interagency memorandum of understanding
- the EPA's regulatory approach to compliance and enforcement of gas activities and overlapping regulatory powers across various petroleum legislation
- reporting requirements and access to information.

1.3 The EPA's approach to compliance and regulation

The EPA's regulatory framework consists of an integrated series of components, including legislation, policy, education, incentives, licensing, administration, audit, investigation, and compliance and enforcement action.

The [EPA Compliance Policy](#) outlines the EPA's general approach to compliance and enforcement, and explains how the EPA undertakes activities that achieve compliance and drive improved environmental performance. It guides decision making to ensure that its compliance activities and actions are consistent, fair and credible. Section 4.1 of the *Compliance Policy* outlines the factors the EPA considers in identifying the appropriate action to take in particular circumstances.

The [EPA's Prosecution Guidelines](#) set out the factors on which the EPA will decide whether to pursue a prosecution. The guidelines take into account the decision process in deciding which charges to lay, the appropriate defendants, and appropriate jurisdiction to bring legal action. The guidelines highlight that not every breach of law is automatically prosecuted.

The [Environmental Court Order Guidelines](#) discuss the sentencing options available for environmental offences. The guidelines discuss the purpose behind each of the potential orders and the principles the EPA will take into account in deciding to seek one or more of the orders in a prosecution.

The EPA's [Risk-based licensing system](#) aims to ensure that all environment protection licensees receive an appropriate level of regulation based on the environmental risk of the activity. The EPA undertakes a risk assessment for each licensed premises, which takes into account site specific risks posed to the environment.

The EPA also considers each licensee's environmental performance, taking into account a licensee's compliance history and regulatory actions taken by the EPA for POEO Act related matters. It also takes into account, any environmental systems, procedures and environmental improvements the licensee has put in place. Based on this assessment, a licensee will be allocated an environmental management category which will determine the licensee's fee for that year.

The EPA reports on its compliance priorities in an annual [Compliance Plan](#). The plan aims to provide transparency for industry and the community about the EPA's scheduled compliance activities for the year.

There is no 'one-size-fits-all' response to non-compliance. The choice of approaches and regulatory responses depend on the issue and context. Where compliance monitoring identifies non-compliance, its significance is evaluated to determine the most appropriate response to take.

2. NSW Gas Plan

2.1 Protection of the Environment Operations Act 1997 Schedule 2A

As part of the NSW Gas Plan the POEO Act was amended to include Schedule 2A in relation to the EPA's enforcement of petroleum authorities. A petroleum authority means a:

- development consent under part 4 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), or approval under part 3A, of the EP&A Act
- water access licence, water use approval or water supply work under the *Water Management Act 2000*
- petroleum title under the *Petroleum (Onshore) Act 1991*.

The amendments to the POEO Act enables the EPA to exercise the necessary powers to undertake its compliance functions in line with the changes specified in the NSW Gas Plan. Authorised EPA officers are able to use existing powers under the POEO Act to undertake compliance and enforcement actions over gas activities. This provides EPA officers with a proven and familiar regulatory toolkit to use and apply consistently in this new regulatory field. This is in addition to the EPA's existing role in issuing and regulating EPLs.

2.2 Memorandum of Understanding

The NSW Government is committed to effective, transparent and efficient regulation of the gas industry. To facilitate this, a [Memorandum of Understanding](#) (MoU) has been developed between the following NSW Government agencies involved in regulating the gas industry:

- NSW Environment Protection Authority (EPA)
- Division of Resources and Energy (DRE) within the NSW Department of Industry, Skills and Regional Development
- Department of Planning and Environment (DPE)
- Department of Primary Industries – Water (DPI Water).

The MoU clearly defines the responsibilities of the key agencies to work collaboratively in the regulation of gas activities in NSW. It establishes systems and processes to ensure agencies perform their roles effectively and seamlessly.

The MoU also outlines how a dual regulatory model is adopted by the EPA and DRE where gas activities have both a WHS and non-WHS aspect to them, with both agencies committing to undertake a collaborative regulatory approach.

The MoU includes provisions that help the community understand and navigate the regulatory framework surrounding gas industries. The MoU also helps reduce duplication of regulatory effort by government agencies through greater collaboration, and in turn reducing the regulatory burden on industry.

3. Gas Compliance Principles

3.1 Overlapping powers

Empowering the EPA as the lead regulator for all gas activities assists in providing a consistent and streamlined regulatory approach for the gas industry. The NSW Gas Plan, MoU and the POEO Act all clearly establish the EPA as the lead regulator for gas activities, except for WHS matters.

The POEO Act does not limit the legal responsibilities of the other agencies regulating the gas industry. Rather, in the event of a reported non-compliance, the EPA will lead independent investigations using powers specified within the POEO Act. However, the EPA will liaise with the relevant consent authorities if appropriate to coordinate a regulatory response.

The DRE remain responsible for regulating WHS conditions of petroleum titles. It is recognised that whilst many engineering standards are designed primarily for human safety, where DRE is responsible for regulating under WHS, the conditions also contribute to the management and protection of the environment and resources, where the EPA comes in as a regulator. Therefore, in these circumstances a dual-regulatory approach was adopted for conditions of petroleum titles that relate to both WHS and non-WHS matters.

A dual regulatory approach means that the EPA, along with DRE will collaborate in an incident response, investigation and monitoring activities, with DRE taking the lead in compliance action for WHS issues. The MoU outlines the coordination process the EPA and DRE will follow in those cases.

Whilst other agencies have not been legally restricted from undertaking enforcement action for gas activities, the MoU, the NSW Gas Plan and the POEO Act clearly assert that the EPA will lead investigations and enforcement actions and liaise appropriately with other relevant agencies as required. Accordingly, the risk of duplicated regulatory actions has been minimised. Notwithstanding this, there are clear protections in the court system against multiple enforcement actions for the same wrongdoing.

When the EPA considers the appropriate regulatory action to take in a particular circumstance, it considers enforcement measures necessary to ensure compliance and the best environmental outcome. Penalty notices are issued for minor breaches when the facts appear obvious and a penalty notice is likely to be a viable deterrent. Simultaneous penalty notices are not generally issued for multiple breaches of the legislation. For serious compliance problems, the EPA has the option and power to deal with the matter through court proceedings.

3.2 Petroleum offences

Schedule 2A of the POEO Act calls offences under sections of other relevant legislation but does not create any new offences. Therefore, the EPA's new enforcement role only extends to offences that currently exist under the relevant legislation.

The definition of a petroleum offence within Schedule 2A includes conditions placed on a proponent's approval by DRE or DPE, after development assessment. Once an approval is given, the environmental impact that has been considered through the Part 5 assessment process informs the development of conditions placed on the both the Planning Approval and the Petroleum Title. The EPA will be responsible for enforcing compliance with these conditions.

Schedule 2A includes a general regulation-making power enabling the EPA to amend offence provisions to address issues that may arise between the POEO Act and other Acts.

3.3 Retrospectivity

The EPA's role as lead regulator for gas activities applies retrospectively. This means that the EPA can respond to issues that not only arise in the future but also to those that may have occurred before the amendment of the POEO Act. With these powers, the EPA can fulfil its responsibilities in accordance with the recommendations of the NSW Gas Plan.

Breaches of conditions may have occurred prior to the EPA commencing its expanded regulatory role on 1 July 2015. If a breach has already been investigated and a regulatory outcome determined it will not be reopened. However, if new evidence comes to light then the EPA has the appropriate powers to re-investigate an incident.

3.4 Penalties and appeals

The POEO Act provides for the EPA to undertake compliance and enforcement action with a condition of a petroleum authority, which includes petroleum titles and development consents where relevant to gas. Depending on the specific nature of the non-compliance being investigated this may involve the EPA liaising with, and/or sharing information with, other relevant agencies.

While the EPA is the lead regulator and will take regulatory action consistent with its powers under the POEO Act, such action might relate to offences contained in other petroleum legislation. In this instance the penalty or compliance action will be determined by the relevant petroleum authorities legislation. Where there are conditions that are similar or duplicated under multiple pieces of legislation, the EPA will focus on the most appropriate and relevant condition based on a case-by-case situation. For example, this would mean focusing enforcement action against the condition that has most obviously been breached, regardless of the legislation it sits under.

The penalty amounts for a non-compliance are determined under the legislation they occurred under. Whilst there is variation in penalty amounts in the relevant pieces of legislation for gas, the penalties will be served under the powers of the POEO Act.

This means that any appeals against regulatory action taken by the EPA will also need to be pursued under the POEO Act.

3.5 Confidential information and reporting

The EPA is committed to being transparent and open in its decision-making processes by keeping the public informed of regulatory activities and the performance of industry. All gas activities in NSW, including conventional gas, coal seam gas, tight gas and shale gas, require an EPL issued by the EPA under the POEO Act. The conditions of these licences require the mandatory reporting of land, noise, air and water monitoring data as specified within each licence (all EPLs can be viewed on the EPA's public register). The provision of this information and mandatory reporting of pollution incidents is also required under the POEO Act. These environmental reporting provisions within the POEO Act and EPLs remain unchanged.

The provision of confidential information, commercial-in-confidence information and monitoring data prescribed in petroleum conditions, was outside the scope of the POEO Amendment Act, and remains unchanged. Provision of this information can only be made publicly available where the relevant legislation specifies it.

The Government Information (Public Access) Act 2009 (GIPA Act) created new rights to information that are designed to meet community expectations of more open and transparent government. Some information may not be disclosed under GIPA Act requests when not in the public interests. For example, if the information will prejudice an investigation, law enforcement or procedures for protecting the environment, or is considered commercial-in-confidence information about a legitimate business.