
GUIDELINE

ENFORCEMENT OPTIONS



HCCREMS
HUNTER & CENTRAL COAST REGIONAL
ENVIRONMENTAL MANAGEMENT STRATEGY

A project delivered by the Hunter and Central Coast Regional Environmental Management Strategy (HCCREMS): a program of the Environment Division of Hunter Councils Inc.



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FOREWORD

The Enforcement Options Guideline is provided as supporting guidance to the HCCREMS model Compliance Assurance Policy and is designed to provide a consistent approach to the environmental regulatory framework implemented throughout the fourteen member councils of HCCREMS.

The model Compliance Assurance Policy provides councils with a position on the use of both proactive and reactive compliance assurance activities to manage compliance of the regulated community. **Figure 1** (below) displays the relationship of this guideline to the Regional Compliance Assurance Policy and other guidance documents.

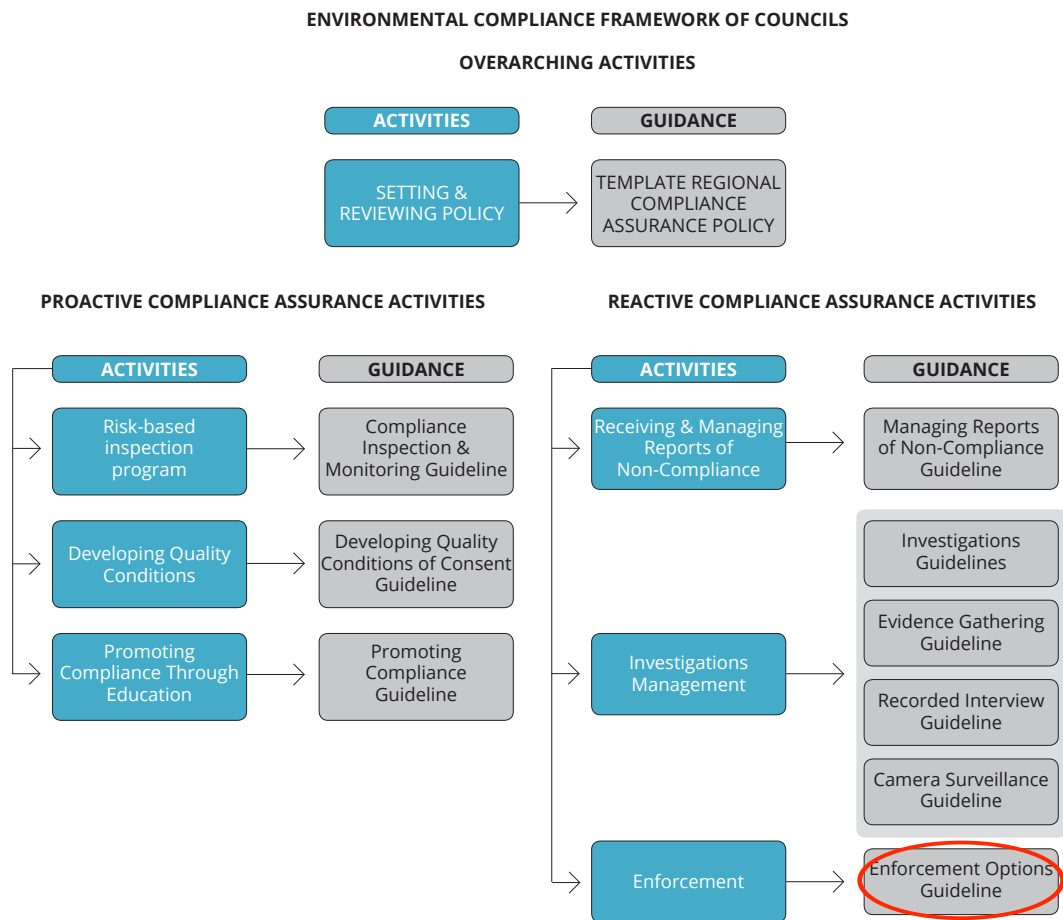


Figure 1:
Regional Compliance Assurance Framework

1. INTRODUCTION

This Enforcement Options Guideline provides guidance to council officers on what should be considered when selecting an enforcement option for environmental offences. The guideline also outlines the range of common enforcement options (e.g. warnings, orders, notices, prosecution) available to councils and applicable to the following pieces of legislation:

- Local Government Act 1993.
- Environmental Planning and Assessment Act 1979.
- Protection of the Environment Operations Act 1997.

Certain information in the guideline may be relevant to other pieces of legislation but, as the guideline focuses on environmental offences, these are not directly referred to. The Enforcement Options Guideline does not address:

- Information on investigating breaches of environmental legislation. This is covered in the HCCREMS Investigations Guideline and Evidence Gathering Guideline.
- The much broader issue of enforcement policy – officers are referred to Council's policies for specific guidance on circumstances in which the options discussed in the following document may be applied.

Figure 2 is a summary of the Enforcement Options Framework contained in the guideline and provides guidance on where further information on managing reports, or conducting inspections, can be located.

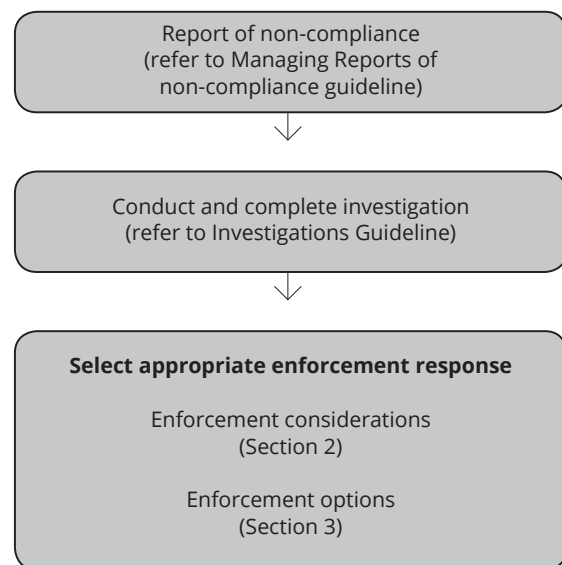


Figure 2:
Summary of Enforcement
Options Guideline

2. MATTERS TO CONSIDER WHEN SELECTING AN ENFORCEMENT OPTION

Where the legislation provides, officers with delegated powers have discretion regarding which, if any, enforcement option is selected as a response to a breach. Further information on discretionary powers can be found in **Appendix 1**. Officers must ensure that their discretionary powers are exercised in a lawful manner, which includes observing the basic rules of procedural fairness (also known as Natural Justice). Procedural fairness includes providing a fair hearing, acting impartially, making decisions based on evidence and acting in good faith (see **Appendix 1** for further explanation).

The NSW Ombudsman's Enforcement Guidelines for Councils outlines a number of matters that need to be taken into account when deciding upon an enforcement option. These matters are paraphrased below, grouped under sub-headings for ease of reference:

- *Seriousness of the breach* – Consider the offence level, impact and consequences for environment and community. Consider if the breach was only technical and inconsequential or if approval may have been given if it was sought. Also consider if the breach could be easily remedied.
- *Offender culpability* – Consider if the offence was committed knowingly or recklessly? Does a history of non-compliance exist (which would warrant an escalated response). Does the person in breach show contrition and indicate repeat offences are unlikely? Are there particular personal hardship factors that should be considered (e.g. that may prevent the offender from undertaking remedial actions, or that may make proving existing use rights unreasonable)?
- *Appropriateness* - Is the response reasonable and in proportion with the nature of the offence? Will the response be appropriate to encourage behaviour change in the future, remediate damage done and/or eliminate any economic advantage the offender obtained through avoiding compliance? Is the response consistent with previous responses for similar offences?
- *Public interest* – Consider if the response is in the public interest in terms of costs and benefits, likelihood of success, the effect of the outcomes, impacts to council resources, and potential to deter similar offences. Further information on acting in the public interest is provided in **Appendix 1**.
- *Recentness* – How long ago did the offence occur and is the proposed response within the statute of limitations for the offence?
- *Estoppel* – Have the actions of council created a legitimate expectation that no enforcement action would be taken in a specific set of circumstances? This may include “Estoppel by Laches” where a delay in a response could be seen to indicate that the offence is of low importance to Council.
- *Level of evidence* – Does sufficient evidence exist to warrant the action or response? Can the offence be proven ‘beyond a reasonable doubt’ (necessary for criminal proceedings) or ‘on the balance of probabilities’ (necessary for civil proceedings)?

3. ENFORCEMENT OPTIONS

A number of enforcement options are available to councils, when a breach or non-compliance action is identified and proven. These include:

1. Record only (no response).
2. Verbal warnings.
3. Written warnings or cautions.
4. Penalty notices.
5. Orders.
6. Notices.
7. Enforceable undertakings.
8. Prosecution.

These options are ordered to reflect an escalation in response that is proportionate to the severity of the offence. The severity of the offence can be considered to be the combination of the level of harm to the environment and culpability of the offender. The escalation of options is shown against these factors in **Table 1**. Examples of the kinds of environmental offences that reflect the severity of the offence are listed, however this is not intended to restrict discretion in selecting an appropriate enforcement response on a case by case basis.

SEVERITY OF OFFENCE (HARM TO ENVIRONMENT/ CULPABILITY OF OFFENDER)	VERY LOW	LOW	MODERATE	HIGH	VERY HIGH
Examples of environmental offences	Very minor / unknown non compliance with conditions of development consent with no or little impact	Incorrect installation of sediment or waste management control measures Small scale illegal earthworks (first offence)	One-off illegal dumping incidents, illegal tree removal (small number of trees with low significance) Small, one-off water pollution incidents	Larger scale illegal clearing, earthworks, illegal dumping or water pollution incidents (where rehabilitation is possible and likely) Hardcopy on file (location)	Large scale/ irreversible damage to environment through illegal clearing, earthworks, water pollution (repeat offenders)
Appropriate responses	Record only, verbal or written warnings	Written warnings, penalty notices	Penalty notices, orders, notices	Enforceable undertakings, orders	Prosecution

Table 1:
Continuum of escalating responses to environmental offences with escalating severity

RECORD ONLY (NO RESPONSE)

Where discretionary powers exist, council officers with delegated authority may elect to take no action in response to a breach. It is important, however that the breach, the reason for the decision to take no action and the reasons for this decision are all recorded in official notebooks and/or Council record keeping system.

The enforcement option of 'record only (no response)' is only appropriate in circumstances where the breach is very minor and unlikely to be repeated or replicated. There may also be situations where rigid adherence to enforcing the law would result in a detrimental outcome that would not be in the public interest. In these situations the officer with discretionary power may elect to take no action against the breach to ensure a more beneficial outcome. For more information on acting in the 'public interest' please refer to **Appendix 1**.

VERBAL WARNINGS

A verbal warning is oral advice to an individual advising them of the offence, cautioning them that action will be taken on further breaches and/or advising them of appropriate actions to improve compliance. Verbal warnings are only appropriate in cases of very minor breaches as there is typically no record made reducing the ability to follow-up and escalate enforcement methods if subsequent offences are encountered.

WRITTEN WARNINGS AND CAUTIONS

Written warnings, referred to in some Acts as official cautions, are written advice to an individual advising them of the offence, cautioning them that action will be taken on further breaches and/or advising them of appropriate actions to improve compliance.

The Fines Act 1996 allows officers who issue penalty notices to give cautions instead if the officer believes on reasonable grounds that a person has committed an offence under a statutory provision for which a penalty notice may be issued. The Attorney General's Caution Guidelines under the Fines Act 1996, outline matters that should be taken into account when deciding if it is appropriate to give a person a caution instead of a penalty notice. It is appropriate to use written warnings in the following situations:

- For small scale offences where there is minor environmental harm/risk.

- When a good history of compliance exists.
- When a warning will deter the offender from repeating the offence.

Written warnings may be used in conjunction with other kinds of enforcement such as penalty notices. For example, an activity that is causing minor harm to the environment but technically breaches a number of pieces of legislation may be enforced through one penalty notice for the most appropriate offence. A warning could also be given, for educational purposes, outlining the other relevant offences.

Written warnings are valuable enforcement tools when used appropriately as they:

- Provide a written record that the offender was aware of the approval requirements, illegality of actions, in case of any re-offence.
- Provide education about legislative requirements and consequences.
- Allow fairness for a first offence and communicate that any further non-compliance will result in an escalated enforcement response.
- Provide a fast and cost effective method to address minor issues.

However, written warnings should not be overused as an enforcement response as this may lead to the belief that offences are not taken seriously. In this way they may not deter further offences.

PENALTY NOTICES

Penalty notices, also called Penalty Infringement Notices (PINs), involve the issue of a fine prescribed by regulation for the identified offence. Penalty notices can be issued by enforcement officers when it appears that an offence has been committed. They are applicable for offences under a number of pieces of legislation including:

- POEO Act.
- EPA Act.
- LG Act.

For a list of commonly used penalty notices for environmental offences refer to **Appendix 2**.

Penalty notices are a way of dealing with common breaches of the law where impacts are not considered serious enough to warrant prosecution.

Penalty notices are suitable enforcement options for the following situations:

- Minor breaches that are one-off discrete offences or of short duration.
- For breaches with low-moderate environmental impacts and offender culpability.
- When facts appear obvious and well-defined (e.g. the evidence is considered 'Prima Facie' and would be sufficient to prove the elements of the offence if challenged in court).
- When the penalty can be given at, or close to, the time of the offence.
- When the penalty (fine amount) is likely to be a viable deterrent.

It would be inappropriate for penalty notices to be used in the following situations:

- When further investigations may be necessary to determine the nature of the problem, level of harm etc.
- If evidence is insufficient (would be unlikely to stand up in court).
- If the penalty is inadequate for the severity of the offence.
- If the breach is ongoing (and cannot be rectified easily) or is reoccurring.
- If many breaches are apparent (it is usually inappropriate to issue more than two simultaneous penalty notices for multiple breaches as this many breaches indicates a more serious offence).
- When a time period of several weeks or more has elapsed since the alleged breach.
- If another department/agency is involved and intends to prosecute or use another enforcement option.

Penalty notices are a valuable enforcement tool as:

- They are relatively quick and easy to issue.
- They provide a source of revenue.
- Cost recovery is undertaken by an external agency (Infringement Processing Bureau), which limits administration and follow-up.
- They are rarely contested.
- The fine amount is often a suitable deterrent in smaller cases, where local court action might not be appropriate.

ORDERS AND NOTICES

Orders and notices are written directions enforceable by law requiring some action by the identified party. There is usually an offence provision in the legislation to allow a fine for non-compliance with the order or notice.

Many orders and notices are applicable to situations that are not seriously urgent, as draft versions or a notice of the intent to give an order are often required to be provided, sometimes several weeks beforehand (see notes in table 2).

This is to allow time for the recipient to give representations and for these representations to be considered, in line with the principles of procedural fairness (see **Appendix 1** for further information on procedural fairness). In the case of certain types of emergency some orders can be given without providing a notice of intent. The appropriateness of Orders and Notices varies according to their type and the incident. **Table 2** describes Orders and Notices relevant to situations involving environmental impacts.

NOTE: PENALTY NOTICES CAN BECOME COSTLY AND TIME-CONSUMING IF THEY ARE CHALLENGED IN COURT. THEY ALSO HAVE LIMITED ENVIRONMENTAL OUTCOMES (I.E. DON'T RESULT IN REMEDIATION OR RESTORATION) AND, ONCE THEY ARE PAID, OTHER ACTION CANNOT BE TAKEN FOR THE OFFENCE THEY WERE ISSUED FOR).

Evidence type	Recommended handling and storage
Orders under Environmental Planning and Assessment Act 1979, s121b	Matters that relate to development without proper consent, including clearing, tree removal and waste storage. Note: Notice of intent required prior to issuing Order, unless emergency as specified in the legislation.
Clean-up Notices under Protection of the Environment Operations Act 1997, Chapter 4	When immediate action is required in relation to a pollution incident or where vegetation removal has or is likely to result in a pollution incident, usually sedimentation of waters. Note: Procedural fairness requirements (e.g. providing a draft notice first) are likely to be reduced but still required in urgent situations.
Prevention Notices under Protection of the Environment Operations Act 1997, Chapter 4	Able to deal with activities that are being carried out in an environmentally unsatisfactory manner where there is a risk of an incident or ongoing matter that may damage the environment. Note: Procedural fairness requirements (e.g. providing a draft notice first) are likely to be reduced but still required in urgent situations.
Orders under Local Government Act 1993, Chapter 7 Part 2	To require the preservation of healthy living conditions (including correct disposal of waste), protection of public places or compliance with an approval. Note: Notice is to be given of proposed Order, unless in case of emergency.

Orders and notices can be a valuable enforcement tool as they:

- Set a legal framework that is enforceable, with offence provisions that allow significant penalties if the order or notice is not complied with.
- Formalise the action to be taken by identifying how, when, and what to do.
- Require little or no legal fees (unless appealed).
- Some have no or limited appeal rights (e.g. Clean Up Notice under POEO Act).
- Give the offender a feedback opportunity (allow them to make representations).
- Can be issued to the new owner of land/premises (even if the old owner made the breach – this is useful in cases where land changes ownership at or near the time of the breach as there is no need to prove who is responsible for the breach).
- Some notices are able to be publically recorded (e.g. Prevention and Clean-up Notices under POEO Act) which may allow media promotion and deterrence of similar incidents.
- There are administration fees associated with notices such as those under POEO Act.

A number of constraints do exist with orders and notices including:

- Some orders (particularly 121b Orders under EPA Act) can be easily appealed which can result in increased legal costs. For these particularly, care needs to be taken to prevent overturning based on technical issues with wording.
- Challenges can defer other legal action.
- Resources may be required from council for ongoing monitoring of compliance with orders and notices (however compliance cost notices are possible under some legislation such as POEO Act to recover these costs).
- They can be time consuming to create and enforce.
- If notices/orders are complied with there is very little financial penalty (as apposed to other enforcement options such as penalty notices or prosecution which use larger penalties to help deter future offences).
- Can be used to address immediate impacts, but may need to be followed up with other response such as court action.

Table 2:
Orders and Notices applicable to environmental offences

ENFORCEABLE UNDERTAKINGS

Enforceable undertakings are binding agreements that offenders voluntarily enter into in preference to prosecution. They set out tasks required by the offender to settle the contravention of the law and potentially remediate the environment. This may include a range of tasks such as:

- Environmental restoration works.
- Monitoring and reporting.
- Payment of penalty notices.
- Public apology/notice of offence.

Once an enforceable undertaking has been entered into, and while it remains upheld, prosecution for the offence that the undertaking relates to cannot occur. However if the undertaking is breached, prosecution can occur and the undertaking can become evidence that the offender was knowledgeable of, and responsible for, the offence.

Enforceable undertakings are appropriate in situations when the offender takes active responsibility for the offence and its impacts and are cooperative in their attitude. They can be used to allow a negotiated agreement after the range of potential enforcement options has been outlined. Some councils have used enforceable undertakings in conjunction with penalty notices and clean up notices, where part of undertaking is the agreement to comply with the notice and pay the fine. This can help ensure the penalty notices are paid and clean-up notices are acted on.

Enforceable undertakings are a valuable enforcement tool for a number of reasons;

- They can achieve more effective and long-term environmental outcomes than prosecution as rehabilitation requirements can be specified (council has more control over the outcome).
- They can provide a faster outcome than prosecution, which is especially valuable when rehabilitation is required immediately for ecological reasons.
- They can be cheaper than legal action.
- In the case of re-offence, the undertaking provides written evidence that the offender was aware of approval requirements and the illegality of actions.
- They can encourage ownership of the issue by the offender and management of rehabilitation works can provide educative outcomes.

- They can lead to better relationships between Council and offenders (offenders appreciate ability to negotiate agreement so may be 'thankful' and less likely to reoffend).
- If the undertaking is breached, the offender can be prosecuted by the Land and Environment Court.

However, the use of enforceable undertakings has a number of constraints, including:

- They are likely to be inappropriate for significant incidents involving considerable public interest which would benefit from a transparent hearing in court.
- They would be inappropriate to use with offenders who are uncooperative or where ongoing compliance seems unlikely.
- There is a risk the offender will breach the agreement and there can be a loss of an opportunity to prosecute if too much time passes (statute of limitations e.g. 36 weeks).
- Some undertakings may require a court to order they are complied with before legal action against a breach can be taken.
- Negotiating and drawing up an undertaking takes time and resources.
- Council would be unable to publicise the offence and promote consequences due to the private nature of the undertaking.
- A good level of evidence is required (as in court) to allow for strength of negotiation.
- Undertakings may be complicated if rehabilitation outcomes are tied to development approval.
- Careful consultation with Council's legal advisors is needed prior to using enforceable undertakings.

PROSECUTIONS

Prosecutions occur in a court of law and seek to provide an appropriate sanction for the offence and to deter future offences by the same offender and others. They are appropriate when a reasonable prospect of conviction exists i.e. based on strength of admissible evidence, availability and credibility of witnesses.

Refer to **Appendix 2** for a list of common environmental offences that can be prosecuted in a court and penalties given. As well as issuing penalties, courts can issue environmental orders. For example under the POEO Act courts can issue the following orders:

- *Investigation costs order* – order the offender to pay costs and expenses incurred during the investigation of the offence (see s248(1)).
- *Monetary benefits penalty order* – order the offender to pay a sum up to the amount of the monetary benefit derived from the offence (see s249(1)).
- *Publication order* – order the offender to publish details of the offence and the orders made by the court in, for example, a newspaper and/or in a company's Annual Report (see s250(1)(a) and s250(1)(b)).
- *Environmental service order* – order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit (see s250(1)(c)).
- *Environmental audit order* – order the offender to carry out a specified environmental audit of activities carried on by the offender (see s250(1)(d)).

In some instances, councils have a choice between prosecution in a local court or in the Land and Environment Court. While local court prosecution may be less time intensive and costly (e.g. due to evidence being by way of witness stand which reduces legal fees for affidavit preparation), they are locally dependent on the magistrate, can often lack knowledge of land and environment matters and may view the environment as a lower importance (in comparison to other hearings). Prosecution, if successful, has a number of benefits including:

- It may allow court enforced Orders which have more strength than other Orders.
- Media coverage of the issue can be used to publicise the offence and consequences.
- Significant penalties can be handed down.
- The court can award costs.

However, prosecutions can be a lengthy process and there is a high level of risk as the outcome can be largely unknown. Unsuccessful prosecutions can result in:

- A risk of negative media coverage.
- Extensive legal costs.
- Reluctance for Council to undertake future prosecutions.

4. REFERENCES AND FURTHER INFORMATION

Department of Environment and Climate Change (DECC) 2009, Guide to Notices under the Protection of the Environment Operations Act 1997, available at: <http://www.environment.nsw.gov.au/licensing/guidetonotices.htm>

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Shoalhaven City Council, 2008, Compliance Policy, available at: <http://www3.shoalhaven.nsw.gov.au/applications/policyindexinternet/docs/1611089.pdf>

APPENDIX 1.

EXPLANATION OF ETHICAL DECISION MAKING CONCEPTS

Appendix 1: Explanation of ethical decision making concepts

Local government has an important regulatory role that brings with it a responsibility for ethical and accountable decision making. When undertaking regulatory activities and action council officers and officials must:

- Conduct activities ethically
- Ensure procedural fairness and natural justice
- Use discretion appropriately
- Act in the Public Interest

Each of these concepts are described in more detail below.

Ethical Conduct

Ethical conduct refers the behaviours and standards that society requires to protect the rights and interests of the public and its members. Local government staff and councillors are required to uphold ethical standards that are in the 'public's interest'. A number of pieces of legislation, as well as individual council policies and codes of conduct will contribute to defining behaviour that fulfils this requirement. Relevant legislation includes:

- Local Government Act 1993
- Occupational Health and Safety Act 2002
- Privacy & Personal Information Protection Act 1998
- Anti-discrimination Act 1977
- Ombudsman Act 1974
- Independent Commission Against Corruption Act 1988
- Land and Environment Court Rules and relevant Practices and Procedures

Key principles from the Model Code of Conduct for Local Councils in NSW 2008 include:

- Integrity
- Leadership
- Selflessness
- Impartiality
- Accountability
- Openness
- Honesty
- Respect

Local government staff and officials are required to behave lawfully and according to established policies and procedures. Staff may also be bound by codes of professional associations, e.g. The Planners Institute of Australia.



NSW Ombudsman states "Public officials should give effect to a lawful policy". Policies, Codes and the like should not be applied inflexibly, but on the basis of merit, with proper consideration being given to the particular circumstances of each individual case.

Public officials should have regard to circulars, practice notes, codes, guidelines and the like issued by government or relevant central agencies. They should comply with their terms unless there are justifiable grounds for taking another course of action within the scope of the discretion available to the decision-maker."

Procedural fairness and natural justice

Procedural fairness and natural justice are terms with very similar meanings that are often used interchangeably. Procedural fairness is the term most commonly used in relation to administrative decision making and will be used here to explain both terms.

Procedural fairness requires decision making to be fair and reasonable. A number of rules have developed which are grounded in common law (case law findings). These rules are:

1. Fair Hearing – Any person who is the subject of an investigation has a right to be informed of the substance of the allegations against them and be provided with an opportunity to present their side/an explanation. This must be done prior to an enforcement decision being made that would negatively affect their rights, existing interests or legitimate expectations.

The NSW Ombudsman notes "while a person who is the subject of an investigation should be informed of the substance of the allegations against them and proposed adverse comment, this does not require all the information in the Investigator's possession supporting these allegations to be disclosed to that person".

The subject of the investigation has the right to make a submission in a written or oral form to present their side of the story, rebuke any facts, present contrary evidence and explain why they think the contemplated action should not be taken. The investigator must make reasonable inquiries into matters in dispute.

Whilst adequate and reasonable time should be allowed for the above process, investigation must occur without undue delay.

2. Impartiality – The person responsible for deciding on the action to take as a result of the investigation needs to be unbiased and impartial. The easiest way to do this is to ensure the role of decision-maker and investigator is undertaken by different people. Additionally, any conflict of interest should be declared by an investigator and they should seek to remove themselves from the investigation.

DECC's Guide to Notices notes that procedural fairness is required to be exercised when issuing clean up notices. This has been clarified by the case Liverpool City Council vs L. Cauchi & Ors [2005] NSW LEC 676. One way to do this is through providing a draft clean up notice to the proposed recipient to allow them a response prior to issuing the final notice.



3. Decisions based on evidence – Investigators must ensure that all decisions are fact-based and that evidence and sound reasoning exists to support these facts. Records should exist to show how evidence has been collected and considered and why decisions have been made.
4. Act in good faith – Investigations should be conducted in an ethical manner and no individual / corporation should be subjected to any threat, inducement or other compelling circumstance in providing information. Information should be given of their own free will (unless statutory provisions make the withholding of information an offence).

The NSW Ombudsman notes “the courts emphasise the need for flexibility in the application of the rules of procedural fairness, depending on the circumstances of each individual case”. Where rare exceptions exist to following the rules expert external advice should always be sought and documented.

Procedural Fairness also requires Council and agencies to carry out the discharging of duties under law in a fair and equitable manner that is consistent with policy and procedure adopted by the regulatory authority.

Discretion

Discretion is the freedom for officers to act officially in certain circumstances, according to the dictates of their own judgment uncontrolled by the judgment of others, but in accordance with the law. Officers are provided with discretionary powers through legislation (directly or by delegation). Officers with discretionary powers must make decisions on how to best implement the legislation in an impartial, consistent and fair manner with the public interest in mind. Within certain constraints, these officers can choose whether and/or how to exercise these powers.

When making discretionary decisions, the decision-maker must only use discretionary powers within the scope and purpose for which they were provided in the legislation. They must also not exercise discretion in a way that would be considered so unreasonable that no reasonable person would have used the power in that way (Wednesbury Principle).

Rule against dictation

A decision-maker must exercise discretion independently and not act under dictation of any third party. This means that public officials including councillors and senior staff should not dictate how delegations of authority or statutory discretionary powers are to be exercised, in relation to any specific cases or circumstances.

Public officials can set down guidelines or criteria, for example in a policy, on the basis of which delegations of authority or statutory discretionary powers are to be exercised. However a policy or guideline must not fetter or limit the range of discretion conferred by a statute but instead should leave the range of discretion intact while guiding the exercise of that power. The NSW Ombudsman recommends such policies should include an objective and the criteria to be used in decision-making to help ensure that:

- all relevant legal requirements are complied with
- all relevant factors are considered



- there is consistency in decision-making, and
- the decision-making process is transparent and accountable.

Flexibility and the public interest

Councils and Council officers have a moral and ethical obligation to consider the effects of rigid adherence to the letter of the law on members of the community when exercising discretion. Unintended, inequitable or unreasonable treatment of an individual or organisation resulting from administering the law must be mitigated.

The NSW Ombudsman states "if the law does not give an agency a discretion, fairness may mean adopting a broad interpretation in certain circumstances, rather than a rigid adherence to legality".

Acting in the public interest

When making decisions, including enforcement decisions, public officials (Council Staff and Councillors) must have regard to and act in the 'public interest'. It is acknowledged by the NSW Ombudsman that the public interest is difficult to define and that it is often easier to consider what is not 'the public interest' which includes the 'Six P's':

- Private interests of a particular person (unless these are also in the Public Interest)
- Personal interests of a decision maker
- Personal circumstances
- Personal opinions
- Parochial (narrow-minded) interests
- Political interests

To assist in deciding if an action is 'in the interests of the public' the following process may be used:

1. Identify the relevant public.
2. Determine the interests of that public (through reference to legislation, policy, plans and through consultation).
3. Assess and apply weightings to the identified interests (keeping in mind the hierarchy of interests, e.g. legislative objectives have more importance than agency objectives).

It is not just the final decision that should be in the public interest but also the approach/ process utilised.



APPENDIX 2. ENFORCEMENT OPTIONS FOR COMMON ENVIRONMENTAL OFFENCES

Appendix 2: Enforcement options for common environmental offences

The following table outlines enforcement options available to councils that are specified in the following Acts for the common environmental issues of illegal dumping, pollution and illegal clearing/earthworks:

- Protection of the Environment Operations (POEO) Act 1997
- Environmental Planning and Assessment (EP&A) Act 1979
- Local Government (LG) Act 1993

Although options such as warnings and written undertakings are not included in the table these options can be used in the place of other enforcement methods where appropriate.

Please note additional guidance exists in the flow charts of Attachment 1 of the *Investigations Guideline* when considering similar offences and trying to establish which offence to enforce (based on elements of the offences).



Table 1: Enforcement options for common environmental issues (Notices, Orders, Penalty Notices and Prosecutable offences)

NB Always refer to legislation for most up to date information

Issue/s where option may be applicable	Offence/activity description	Option types/description	Relevant Act and section
Illegal dumping; Illegal clearing/earthworks; Water pollution (e.g. erosion & sediment control);	Development without or not in accordance with consent	Penalty Notice - In the case of development relating to a Class 1 or Class 10 building \$750 (individual) \$1,500 (corporation). In any other case \$1,500 (individual) \$3,000 (corporation)	EPA s76A1, 125(1)
Illegal dumping; Illegal clearing/earthworks;	Use of premises for purpose where development consent has not been obtained	Order (to cease use) which is an offence not to comply with under s125(1) - Penalty Notice \$1,500 (individual) \$3,000 (corporation)	EPA s121B (no.1)
Illegal dumping; Illegal clearing/earthworks; Water pollution (e.g. erosion & sediment control);	Development not in accordance with consent	Order (to comply with development consent) which is an offence not to comply with under s125(1) - Penalty Notice \$1,500 (individual) \$3,000 (corporation)	EPA s121B (no.15)
Illegal dumping;	Waste is present/generated and not being dealt with satisfactorily	Order (to remove/dispose of waste/refrain from keeping waste) which is an offence not to comply with under s628(2) (Penalty Notice \$330)	LG s124 (no. 22)
Illegal dumping; Illegal clearing/earthworks;	Failure to comply with terms of notice erected (sign)	Penalty Notice \$110	LG 632(1)
Illegal dumping;	Deposit litter	Penalty Notice max \$200	POEO s145(1)



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Illegal dumping;	Disposal of waste – harm to the environment	Prosecution - Maximum penalty \$5million (wilful, corporation), \$1million/7yrs imprisonment (wilful individual), \$2million (negligent, corporation), \$500,000/4yrs imprisonment (negligent individual)	POEO s115
Illegal dumping;	Pollution of land	Prosecution - Maximum penalty \$1million (corporation) \$250,000 (individual). Penalty Notice - \$1500 (corporation) \$750 (individual)	POEO s142A
Illegal dumping;	Transport waste to an unlawful place, or cause or permit transport	Prosecution - Maximum penalty \$1million (corporation) \$250,000 (individual). Penalty Notice - \$1500 (corporation) \$750 (individual), unless waste comprises asbestos or hazardous waste or is greater than 1 cubic metre in volume or 2 tonnes in weight, in which case the fine is \$5000 (corporation) \$1500 (individual).	POEO s143
Illegal dumping;	Permitting land to be used unlawfully as a waste facility (owner or occupier)	Prosecution - Maximum penalty \$1million (corporation) \$250,000 (individual). Penalty Notice - \$5000 (corporation) \$1500 (individual)	POEO s144
Illegal dumping; Illegal clearing/earthworks;	Pollution incident (as defined in POEO Act) has occurred, is	Clean Up Notice Associated Admin fee (see s99 of Regulations for	POEO s.91



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Water pollution (e.g. erosion & sediment control);	occurring or is likely to occur.	up-to-date fees) which is an offence not to pay under s94(4) Compliance Cost Notice can be issued to recover costs associated with monitoring compliance. Prosecution for non-compliance with the notice s91(5) – maximum penalty \$1million and \$120,000 for each day offence continues (corporation), \$250,000 and \$60,000 for each day the offence continues (individual). Penalty Notice for non-compliance with Clean-up Notice s91(5) - \$1500 (corporation), \$750 (individual). Note that the Clean Up notice is no longer in effect once the penalty notice is paid and council will need to reissue notice if it wishes to pursue clean up.	
Illegal dumping; Illegal clearing/earthworks; Water pollution (e.g. erosion & sediment control);	Activity has been or is being carried out in an environmentally unsatisfactory manner as defined in s.96 of the POEO Act.	Prevention Notice Associated Admin fee (see s99 of Regulations for up-to-date fees) which is an offence not to pay under s100(6) Compliance Cost Notice can be issued to recover costs associated with monitoring compliance.	POEO s.96



		Prosecution for non-compliance with the notice s97 – maximum penalty \$1million and \$120,000 for each day offence continues (corporation), \$250,000 and \$60,000 for each day the offence continues (individual). Penalty Notice for non-compliance with Prevention Notice s97 - \$1500 (corporation), \$750 (individual). Note that the Prevention notice is no longer in effect once the penalty notice is paid and council will need to reissue notice if it wishes to pursue prevention.	
Water pollution;	Pollution of waters	Prosecution - maximum penalty \$1million and \$120,000 for each day offence continues (corporation), \$250,000 and \$60,000 for each day the offence continues (individual). Penalty Notice \$750 (individual) \$1500 (corporation)	POEO s.120
Water pollution;	Leaks, spills and other escapes	Prosecution - Maximum penalty \$5million (wilful, corporation), \$1million/7yrs imprisonment (wilful individual), \$2million (negligent, corporation), \$500,000/4yrs imprisonment (negligent individual)	POEO s116(1)

