



Local Government Air Quality Toolkit

Module 2: Legislative and policy framework for air quality management

Acknowledgement of Country

Department of Climate Change, Energy, the Environment and Water acknowledges the Traditional Custodians of the lands where we work and live.

We pay our respects to Elders past, present and emerging.

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1. Introduction

This document outlines the legislative and policy framework for air quality management in New South Wales. It should be read in conjunction with the Local Government Air Quality Toolkit – *Land-use planning guidance note*.

1.1 Management framework

The ideal objective of air quality management is to avoid all air pollution and maintain pristine air quality. Such a goal is not feasible in the presence of human activities relying on energy from fuels and involving biological and manufacturing processes.

The practical objective becomes to manage air quality to the best level possible and to ensure that pollutants are kept at or below acceptable levels. In pursuit of this overall objective, we use various tools or instruments:

- Good management and appropriate control techniques (refer to Module 3) ensure the objective of reducing or removing air pollution is achieved.
- Legal instruments are the primary compliance tools governments use to achieve air quality outcomes. These instruments are reviewed in detail later in this module. Practical regulation of air emissions is a vital part of management and is discussed further in Module 4.
- Scientific information (outlined in Module 1) serves the objective of understanding the physical effects of air quality so air pollution can be controlled and the correct legal and management objectives are attained.

1.2 National level

Air quality is generally the responsibility of each state; however, there are issues that require a consistent response to protecting human and environmental health across the states and territories.

The National Environment Protection Council (NEPC), made up of the heads of the environmental agencies of the Commonwealth and the 8 states and territories, initiates and oversees the development of National Environment Protection Measures (NEPMs), which set national objectives for protecting or managing aspects of the environment.

For the Commonwealth, the key frameworks relating to air quality are the:

- National Clean Air Agreement dated December 2015, which sets a framework to help governments identify and prioritise actions to maintain and improve air quality (Australian Government 2015). These actions are listed within a work plan agreed by environment ministers
- National Environmental Protection (Ambient Air Quality) Measure (AAQ NEPM), which sets air quality standards and goals to ensure adequate protection of health and wellbeing.

The AAQ NEPM sets standards for 6 key air pollutants:

- carbon monoxide
- nitrogen dioxide
- sulfur dioxide
- lead
- ozone
- particles (PM₁₀ and PM_{2.5}).

The AAQ NEPM is the source of impact assessment criteria included in the *Approved methods for the modelling and assessment of air pollutants in NSW* (EPA 2022b) and atmospheric dispersion modelling predictions are compared against these standards as part of an air quality impact assessment. When conducting ambient air quality monitoring, the measured concentrations are also compared against the AAQ NEPM standards.

The National Environmental Protection (Air Toxics) Measure (Air Toxics NEPM) provides a framework for monitoring and reporting air toxics, and to provide information that will enable the NEPC to set future national air quality standards that are protective of human health. The NEPM incorporates monitoring investigation levels for 5 toxic pollutants: benzene, formaldehyde, benzo (a)pyrene as a marker for polycyclic aromatic hydrocarbons (PAHs), toluene and xylenes (NEPM and NEPM variation).

The National Environmental Protection (National Pollutant Inventory) Measure (NPI NEPM) is a public online database containing information on the types and quantities of pollutants being emitted from a range of industrial, commercial and transport activities. Industries that emit above the reporting thresholds set by the NPI NEPM are required to report annually to the National Pollutant Inventory (NPI) (EPA 2022d).

States may still set limitations and guidelines for a wide range of toxic air pollutants (including mercury, dioxins and cadmium) to manage local air quality issues.

Controlling emissions

The control of emissions to achieve national ambient air quality goals rests with states and territories, with the exception of standards to control emissions from motor vehicles, outdoor power equipment and marine engines, which are regulated under the *Product Emissions Standards Act 2017* (Cth).

Control of greenhouse gases, such as carbon dioxide and methane, is also guided at a national level by the Commonwealth Government. However, in varying degrees, state and territory governments, and in some cases local councils, have taken significant initiatives in this area. This includes the *Climate Change (Net Zero Future) Act 2023* (NSW).

In contrast, the stratospheric ozone depleting gases are regulated in an agreed manner by Commonwealth, state and local governments in pursuance of Australia's national responsibilities under the Montreal Protocol on Substances that Deplete the Ozone Layer.

1.3 State level

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

In New South Wales, the legal framework comprises the:

- *Protection of the Environment Operations Act 1997* (POEO Act) – key environment protection legislation including a framework for managing air emissions in New South Wales (see Chapter 2 below)
- Protection of the Environment Operations (General) Regulation 2022 – has provisions under which the NSW Environment Protection Authority (EPA) implements and enforces the NPI NEPM
- Protection of the Environment Operations (Clean Air) Regulation 2022 (Clean Air Regulation) – supports the POEO Act and contains the main set of regulations controlling air pollution in New South Wales from industry, motor vehicles and

motor vehicle fuels, wood heaters, and backyard burning. Industry emissions are also regulated through environment protection licences under the Protection of the Environment Operations (General) Regulation 2022

- *Environmental Planning and Assessment Act 1979* (EP&A Act) – the legal framework for managing land use in New South Wales, including potential land-use conflict associated with air quality (see Chapter 3 below)
- *Local Government Act 1993* (LG Act) – a legal framework for local councils to prepare strategic plans and require approval for certain activities within their local government areas (LGAs), and to issue orders to mitigate air pollution (see Section 4.6 below)
- *Climate Change (Net Zero Future) Act 2023* – legislates New South Wales’s approach to addressing climate change and meeting emissions reduction targets to deliver net zero by 2050.

Local government authorities play an important role, alongside the NSW Government, in implementing and enforcing the POEO Act, the EP&A Act and the LG Act.

1.4 Air pollution controls in New South Wales

Air pollution controls at the state level often go beyond the defined NEPC goals. In fact, a wide range of pollutants are controlled in New South Wales.

When using NSW laws, regulations and guidelines in the local government context it is important to avoid confusion between controlling pollutant emissions and meeting ambient air quality goals; the 2 are related but are regulated differently.

NSW controls, requirements and objectives are set out in regulations, policies and guidelines. For example, in New South Wales they are set out in the:

- *Technical Framework: Assessment and management of odour from stationary sources in NSW* (DEC 2006a)
- *Technical Notes: Assessment and management of odour from stationary sources in NSW* (DEC 2006b)
- Clean Air Regulation
- *Approved methods for the sampling and analysis of air pollutants in NSW* (EPA 2022c)
- *Approved methods for the modelling and assessment of air pollutants in NSW* (EPA 2022b)
- *Ambient air monitoring guidance note* (EPA 2022a)
- *NSW Clean Air Strategy 2021–2030* (DPE 2022).

Local councils

Local councils play an important role in implementing Commonwealth and state initiatives for managing air quality. In New South Wales, this role is defined through the POEO Act, the EP&A Act and the LG Act.

Local councils’ primary air quality responsibilities are in respect of small businesses, domestic premises, and urban planning. Local councils’ management of the many

sources of air pollution also contribute significantly to regional air quality impacts. Thus, local councils play a role in the broader framework of air quality management.

Brief overviews of the EP&A Act and POEO Act follow in Chapters 2 and 3 of this module, focusing on the respective roles of local councils and the EPA in administering these Acts.

The EP&A Act designates councils as the consent authority for many local development applications (DAs) (subject to exceptions), which may include development that causes air pollution. Other designated consent authorities include the Minister administering the EP&A Act, the Independent Planning Commission, and Sydney district and regional planning panels, depending on the nature of the proposed development.

In instances where development is declared to be regionally significant development (for which a Sydney district or regional planning panel is the designated consent authority), the relevant local council will still be required to prepare an assessment report for the proposed development, which will include an assessment of air quality impacts (if applicable) (see EP&A Act, s 4.7(2)(b)).

Councils are the designated consent authority for any development within their respective LGA, subject to exceptions for development declared to be regionally or state significant development, or where a public authority other than the local council is designated as the consent authority.

Local government also has a key role in regulating sources of air pollution through its powers under the EP&A Act to make local environmental plans (LEPs).

The POEO Act defines responsibility for environment protection, including control of air pollution, through a schedule of industrial activities with a potential environmental impact (see Schedule 1 of the POEO Act).

The list of activities includes thresholds for activity size, above which the activity is licensed by the EPA and below which the activity is the responsibility of local councils. The responsible body is called the appropriate regulatory authority (ARA). The POEO Act makes local councils the ARA responsible for managing the environmental performance of many small to medium-sized businesses and industries in their LGAs. This means that local councils are one of the agencies required to participate in meeting the national goals for air quality through its functions as the ARA, and as a consent authority for many local DAs with air quality impacts.

The schedule to the POEO Act divides responsibility for controlling air pollution from sources between the state agency (NSW EPA) and local government.

The responsibilities of different levels of government are provided in Table 1.

Table 1 Responsibilities of government

Level of government	Direct responsibility
Commonwealth	Facilitating the development of National Environment Protection Measures (NEPMs), including ambient air quality goals that apply nationally Emission standards for new motor vehicles, outdoor power equipment and marine engines Fuel standards Greenhouse gas policy Ozone-depletion policy Air, shipping and national highway deployment and patterns Coordination of the national response to global climate change
New South Wales	Emissions from large polluting industries Ozone-depleting emissions Some ambient goals not regulated nationally Regional traffic deployment and patterns
Local councils	Emissions from small to medium-sized industries Ozone-depleting emissions Local traffic deployment and patterns

NSW Clean Air Strategy

In February 2022, the State of New South Wales and Department of Planning and Environment (DPE) released the *NSW Clean Air Strategy 2021–2030* (DPE 2022). The strategy presents the NSW Government approach to improving air quality and protecting community health. It sets out 5 priority action areas to mitigate community exposure to poor air quality on a day-to-day basis and during extreme pollution events (such as bushfires):

- Better preparedness for pollution events
- Cleaner industry
- Cleaner transport, engines and fuels
- Healthier households
- Better places.

Local councils are most immediately involved in the management of local air quality issues connected with activities and premises in their local communities.

The NSW Government supports councils by providing management frameworks, tools, guidance and resources for local clean air initiatives. This Local Government Air Quality Toolkit is a key resource to help local council officers perform their air quality management functions.

1.5 Standards

The term 'standard' is used in 2 ways in the context of air quality management. One refers to a national standard for a maximum concentration of a pollutant (e.g. annual average PM₁₀ concentration of 50 µg/m³), the other to the procedures for performance or measurement (e.g. the Australian Standard for odour measurement methods, AS/NZS 4323.3:2001).

Air NEPM standards

NEPMs are like environmental protection policies. They may consist of any combination of goals, standards, protocols and guidelines. AAQ NEPM standards are implemented in each jurisdiction. Typically, an NEPM may contain:

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

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

Standards Australia

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

Australian Standards are not legal documents; however, many Australian Standards have been referred to in Commonwealth or state legislation and have legislative force to that extent. For example, the Clean Air Regulation references the Australian Standard AS/NZS 4013:2014: Domestic solid fuel burning appliances – Method for determination of flue gas emission, and Australian Standard AS/NZS 4012:2014 Domestic solid fuel burning appliances – Method for determination of power output and efficiency.

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

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

Regulation monitoring and test methods

The Clean Air Regulation refers to the *Approved methods for the sampling and analysis of air pollutants in NSW* (EPA 2022c) for the purposes of determining compliance with s 128 of the POEO Act. The approved methods specify methods of monitoring and testing air pollution at its source, for the purposes of determining whether the prescribed standards of concentration in the Regulation have been exceeded. These methods in turn commonly specify Australian Standard testing methods or specified methods of other recognised bodies, such as the United States Environmental Protection Agency (US EPA). These secondary methods are not regulations but are introduced into the implementation of a regulation by legal reference.¹

There may be cases where the prescribed procedures cannot be complied with due to the nature of the particular plant or activity, and another sampling, monitoring or analytical method is needed. Councils should seek technical advice in such cases.

The *Approved methods for the sampling and analysis of air pollutants in NSW* does not reference ambient air quality monitoring techniques. These techniques are covered in a stand-alone document, the *Ambient air monitoring guidance note* (EPA 2022a).

The *Ambient air monitoring guidance note* (EPA 2022a) provides general information for NSW environment protection licence holders to reference when undertaking ambient air monitoring. This guide identifies key aspects of an ambient air monitoring program that must be considered to ensure all collected data is accurate, representative, comparable and suitable for its intended use.

¹ Approved methods and other derived requirements are ‘made bureaucratically’ and are therefore open to legal challenge in a way that does not apply to regulations.

2. Protection of the Environment Operations Act 1997

The POEO Act is a key piece of environment protection legislation in New South Wales. It regulates pollution, including air pollution from commercial, industrial and domestic activities. The POEO Act also contains provisions concerning air pollution arising from motor vehicles, open burning and smoke from wood heaters.

In relation to air quality management, the POEO Act:

- allocates responsibility for environment protection between the EPA and local councils and other public authorities for particular environment protection functions
- enables the making of environment policies to protect the environment
- provides a range of tools to address air pollution, including orders and directions concerning fires, clean-up notices and prevention notices
- makes it an offence to do various things that cause the emission of air pollution and to breach the conditions of an order, direction or notice.

The POEO Act defines 'air pollution' as 'the emission into the air of any impurity'.

'Air impurity' is defined to include 'smoke, dust (including fly ash), cinders, solid particles of any kind, gases, fumes, mists, odours and radioactive substances'.

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

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

The regulations supporting the POEO Act in managing air pollution are the:

- Protection of the Environment Operations (Clean Air) Regulation 2022
- Protection of the Environment Operations (General) Regulation 2022.

In addition, the EPA has developed 'approved methods' associated with the assessment of air pollutants in New South Wales:

- *Approved methods for the sampling and analysis of air pollutants in NSW* (EPA 2022c)
- *Approved methods for the modelling and assessment of air pollutants in NSW* (EPA 2022b).

For information about authorised officers' powers please refer to the EPA's *Powers and notices guideline for authorised officers and enforcement officers* (EPA 2024).

3. Environmental Planning and Assessment Act 1997

The EP&A Act deals primarily with land-use planning and development assessment.

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

Integrated development under Division 4.8 of the EP&A Act can include development requiring an environment protection licence under the POEO Act to authorise carrying out of 'scheduled development work'. Scheduled development work means work at a premises to enable a 'scheduled activity' to be carried on at the premises. Scheduled activities in Schedule 1 of the POEO Act include many activities that are likely to have air quality impacts.

Consent for integrated development cannot be granted unless 'general terms of approval' have been obtained from the relevant approval body (e.g. EPA) (EP&A Act, s 4.47(2)).

Module 4 discusses integrated development further.

3.1 Environmental planning instruments

Part 3 of the EP&A Act provides for the making of environmental planning instruments (EPIs) such as:

- State Environmental Planning Policies (SEPPs)
- local environmental plans (LEPs).

Full details of these key instruments are provided in the Local Government Air Quality Toolkit – *Land-use planning guidance note*.

Development control plans

Local councils may also prepare development control plans (DCPs) to provide guidance on matters such as:

- giving effect to the aims of any EPI that applies to the development
- facilitating development that is permissible under any such instrument
- achieving the objectives of land zones under any such instrument.

Generally, the provisions of DCPs are **not** statutory requirements; however, an EPI may give legislative force to a DCP requirement (see for example, s 74(2)(e) of the *State Environmental Planning Policy (Housing) 2021*).

3.2 Using planning powers to manage air quality

There are many opportunities for a local council to improve and protect local and regional air quality through the exercise of its planning and consent powers under the EP&A Act.

In assessing a DA, the consent authority must take into consideration several factors under s 4.15(1) of the EP&A Act, including the 'likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality'.

Refer to the Local Government Air Quality toolkit – *Land-use planning guidance note* for further information about use of the EP&A Act to prevent air pollution, and a case study.

4. Businesses and premises regulated by local councils

Local councils are the ARAs under the POEO Act for most non-scheduled activities. These generally include:

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

All of these are contributors to the load of volatile organic compounds, particles and odour emissions in NSW air sheds. Certain non-scheduled industries and activities can also generate toxic air emissions.

4.1 Scheduled activities and scheduled development work

The EPA is the ARA for scheduled activities carried on at a premises, scheduled activities that are not premise-based, and is responsible for issuing environment protection licences to conduct those activities (see ss 48 and 49 of the POEO Act). The EPA is also the ARA for scheduled development work that is also regulated by environment protection licences (see s 47 of the POEO Act).

The EPA has sole responsibility for exercising licensing functions under the POEO Act.

Licences are usually issued with conditions. These may include requirements to monitor, to submit certification of compliance with licence conditions, to comply with a mandatory environmental audit program, to undertake a pollution reduction program or provide financial assurances. The EPA can also set air emission limits for point sources as licence conditions where appropriate to manage local air quality impacts. The EPA cannot specify licence conditions that allow poorer quality air emissions than specified in the Clean Air Regulation. The EPA may also impose air monitoring requirements in a licence.

Under the POEO Act, an environment protection licence that relates to ‘controlled development’ must not be granted or varied (other than on the initiative of the EPA) by the EPA unless development consent has been granted for the controlled development. Controlled development is development that cannot be carried out without development consent under the EP&A Act. However, this limitation does not apply to the extent that development consent is unnecessary because of an ‘existing use’.

Load-based licensing

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

Local government input into the licensing process

Local councils can have input into the licensing process under the POEO Act in the following ways:

- submissions on environmental impact statements (EIS) – under the EP&A Act, local councils have the opportunity to make submissions on any aspect of the proposed development in their LGA, including an EIS

- council and public participation in the licensing process undertaken by the EPA
- public notification of licence reviews – licence reviews are undertaken at least every 5 years. Local councils may choose to make submissions to the EPA regarding licence reviews
- variation of licences – the EPA may vary a licence (including the conditions). If the variation of a licence will authorise a significant increase in the environmental impact of the activity authorised or controlled by the licence and the proposed variation has not, for any reason, been the subject of environmental assessment and public consultation under the EP&A Act, the EPA must invite and consider submissions before it varies the licence. This provides an opportunity for local council input
- public access to information – the EPA must keep a public register containing information about several matters, including licences, which can be accessed by the public including council officers. The POEO Act public register is available on the EPA website.

4.2 Non-scheduled activities

Local councils are responsible for all activities in their council areas other than those that are regulated by the EPA, or where a public authority is declared by regulation to be the ARA, as set out in s 6 of the POEO Act.

Offences for causing air pollution

Under Division 1 of Part 5.4 of the POEO Act, an occupier will commit an offence if air pollution from their premises is caused by the occupier's failure either to:

- maintain plant in an efficient condition
- operate plant, carry out maintenance work on plant or deal with materials, in a proper and efficient manner.

In addition, s 128 of the POEO Act makes it an offence to emit air pollutants from a point that exceeds a 'standard of concentration' as prescribed in the Clean Air Regulation. For sources of air pollutants where a prescribed limit does not exist, or the emissions are not point source emissions, the occupier must prevent or minimise air pollution through practicable means.

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

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

Protection of the Environment Operations (Clean Air) Regulation 2022

Regulation of particulates and smoke from non-scheduled premises

While it primarily sets emission limits for major industrial activities scheduled under the POEO Act, Part 5 of the Clean Air Regulation is also relevant to local councils for regulating emissions of solid particles and smoke from non-scheduled activities for which they are the ARA (Part 5 Division 4).

The Clean Air Regulation applies to boilers, incinerators and any other trade, industry or process; for example, dry cleaners, foundries, clothing manufacturers, service stations and large boilers in hospitals.

Requirements include:

- Solid particle emissions are to comply with the Clean Air Regulation for any stack discharges on the site.
- Consideration of methodology, averaging periods and reference conditions in accordance with Schedule 3 of the Clean Air Regulation.
- Plant is to be operated and maintained in a proper and efficient manner that does not cause air pollution, in accordance with ss 124 and 125 of the POEO Act.
- Materials are to be handled in a proper and efficient manner that does not cause air pollution, in accordance with s 126 of the POEO Act.
- The need for compliance testing is to be considered in each situation, balancing expense to the operator against likely sensitivity and the extent of likely impact.

Grouping of activities and plant under the Clean Air Regulation

Activities and plant are grouped for the purposes of emission limits under s 128 of the POEO Act, depending on when the activity or operation of the plant commenced. This is on the principle that more modern equipment is capable of meeting more stringent emission limits and should be required to meet them:

- Group A – activity or plant that commenced operating before 1 August 1997 (not for a new development consent)
- Group B – activity or plant that commenced operating under a development consent granted after 1 August 1997 and before 1 September 2005
- Group C – activity or plant that commenced operating under a development consent granted from 1 September 2005 onwards.

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

Table 2 provides the Clean Air Regulation emission limits for Groups A, B and C.

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

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

Table 2 Clean Air Regulation emission limits for non-scheduled premises

Air impurity	Activity or plant	Group	Concentration
Solid particles (total)	An activity or plant, except as listed below	Group A	400 mg/m ³
		Group B	250 mg/m ³
		Group C	100 mg/m ³
Smoke	An activity or plant in which, or in connection with which, solid fuel is burnt	Group A	40% opacity
		Group B or C	20% opacity
	An activity or plant in connection with which liquid or gaseous fuel is burnt	Group A, B or C	20% opacity
		An activity or plant in connection with which solid fuel is burnt	Group A, in relation to marine vessels or premises – during a prescribed period
	Group A, in relation to marine vessels or premises – otherwise		40% opacity
	Group B or C, in relation to marine vessels or premises – during a prescribed period		60% opacity
	Group B or C, in relation to marine vessels or premises – otherwise		20% opacity
	An activity or plant in connection with which liquid or gaseous fuel is burnt	Group A, B or C, in relation to marine vessels or premises – during a prescribed period	60% opacity
Group A, B or C, in relation to marine vessels or premises – otherwise		20% opacity	

Note: Test methods, sampling times and reference conditions for determining compliance with the emission limits are specified in Schedule 3 of the Clean Air Regulation.

The Clean Air Regulation does not authorise the occupier of premises to carry on an activity, or operate plant, on the premises in a way that causes or permits the emission of air impurities in excess of those allowed by other controls that apply to the activity or plant. Other controls include a licence or a development consent granted under the EP&A Act.

4.3 Regulatory tools available to local councils

Local councils have a range of options available to them to manage air quality impacts from premises in their LGAs. In the first instance, council officers should refer to their council's own compliance and prosecution policies to determine an appropriate course of action.

Where regulatory action is to be pursued under the POEO Act, council officers should refer to the EPA's *Powers and notices guideline for authorised officers and enforcement officers* for information, examples and templates for undertaking regulatory functions (EPA 2024).

Local councils can regulate non-scheduled activities through:

- notices under the POEO Act, such as clean-up notices and prevention notices
- prosecutions and the issuing of penalty notices
- making of EPIs and determination of DAs under the EP&A Act
- LG Act approvals (s 68), orders (s 124) and inspections (s 192).

The *Powers and notices guideline for authorised officers and enforcement officers* (EPA 2024) aims to assist officers to consistently and lawfully use their powers under the POEO Act. This guidance provides relevant case law examples and templates for notice types including a clean-up notice, prevention notice and request for information notice.

4.4 Duty to notify pollution incidents

There is a duty to notify all relevant authorities, not just the ARA, as soon as practicable of pollution incidents where material harm to the environment is caused or threatened (POEO Act, s 148). The duty to notify applies to the person carrying out the activity, an employee carrying out the activity and the occupier of premises where the incident occurs.

All relevant authorities comprise the ARA, the EPA if they are not the ARA, the local council if they are not the ARA, Fire and Rescue NSW, the Ministry of Health, and SafeWork NSW.

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

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

Harm to the environment is material if it either:

- involves actual or potential harm to the health or safety of human beings or to ecosystems that is not trivial
- results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding \$10,000 (or such other amount as is prescribed by the regulations).

Loss includes the reasonable costs and expenses that would be incurred in taking all reasonable and practicable measures to prevent, mitigate or make good harm to the environment (POEO Act, s 147).

For the purposes of this duty, it does not matter that harm to the environment is caused only in the premises where the pollution incident occurs.

A pollution incident that is required to be notified (under POEO Act, s 148) must be notified verbally to each relevant authority and must be followed by notification in writing within 7 days of the date on which the incident occurred.

The duty to notify is explained on the EPA's *Reporting and managing incidents* webpage (EPA 2021).

Failure to notify a pollution incident

Failure to comply with the duties in Part 5.7 of the POEO Act is an offence (POEO Act, s 152).

Receiving notification of a pollution incident

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

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

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

The information contained in a notification must be the information known when the notification occurs. If information becomes known between the immediate notification given verbally and the time when written notification is required to be given, the new information will be required to be notified immediately after it becomes known and to be included in the written notification (POEO Act, s 150(3)).

Based on this information, and on inspection, council may decide to give a verbal clean-up direction under the POEO Act. This must be followed by a written notice within 72 hours. Council may also decide to encourage voluntary clean-up action. The *Powers and notices guideline for authorised officers and enforcement officers* (EPA 2024) provides advice on directions and orders.

Admissibility of notification as evidence

Any notification received by a local council under the duty to notify is not admissible in evidence against the person for an offence or for the imposition of a penalty (POEO Act, s 153). This does not apply to evidence obtained following the result of the notification.

4.5 Dealing with offences

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

Prosecution by local councils

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

Local councils may issue penalty notices in relation to air pollution offences. The *Powers and notices guideline for authorised officers and enforcement officers* (EPA 2024) provides guidance on when to issue a penalty notice.

Table 3 Tiered offences under the POEO Act

Tier	Offence
Tier 1	Disposal of waste – harm to environment (s 115) Leaks, spillages and other escapes (s 116) Emission of ozone-depleting substances (s 117)
Tier 2	Tier 2 offences are all other offences under the POEO Act or the regulations
Tier 3	Tier 3 offences are tier 2 offences that may be dealt with under Part 8.2 of the POEO Act by way of a penalty notice

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

Local councils that bring a successful prosecution will retain the right to keep the fine resulting from a conviction.

4.6 Powers under the Local Government Act

Powers to issue orders

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

Examples relevant to managing air quality include:

- **Order 21** to do or refrain from doing such things as are specified in the order to ensure that land is, or premises are, placed or kept in a safe or healthy condition. For example, there may be industrial premises where spray painting is carried out, such as a car smash repairs business. Council could issue an order requiring that adequate barriers be erected to stop paint drifting into the atmosphere and onto neighbouring properties and vegetation.
- **Order 30** to comply with an approval. Councils must give the person to whom the order is directed the reasons for the order, and specify a reasonable period within which its terms must be complied with. The exception to this rule is where the order requires immediate compliance because the council believes there is a life-threatening hazard or a serious risk to public health or safety, or an emergency (LG Act, s 129). A council may also have adopted a Local Orders Policy containing criteria to be considered before issuing an order. For example, an approval may have been given for a property owner to upgrade fuel burning equipment on their property. If modifications were sought to be made to the fuel burning equipment that were outside the terms of the approval, an order could be issued to the owner requiring them to comply with the terms of the approval.

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

Power to abate a public nuisance

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

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

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

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

Entry and inspection

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

Local councils’ investigative and enforcement powers under the EP&A Act (for development being carried out without consent or not in accordance with the terms of the consent) include:

- Division 9.2 sets out the investigative powers
- Division 9.3 authorises local councils to give development control orders in relation to planning approvals
- Schedule 5, Part 1 of the EP&A Act sets out general orders such as ‘stop use’, ‘stop work’, ‘compliance’ and other orders
- Divisions 9.5 and 9.6 provide avenues for the commencement of court proceedings under the EP&A Act.

A local council’s powers under the EP&A Act could be used in response to a specific air pollution incident where relevant.

Charges for inspections

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

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

Powers available to local councils under the LG Act

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

4.7 Deciding on a course of action

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

Chapter 5 of the Local Government Air Quality Toolkit – *Resource pack* provides a checklist of issues for local councils to consider when deciding which regulatory tool to apply.

4.8 Concurrent enforcement actions

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

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

Considerations for concurrent enforcement actions

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

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

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

4.9 Public registers under the POEO Act

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

- details of environment protection notices (clean-up and prevention notices) issued by the council
- details of convictions in prosecutions instituted by the council under the POEO Act
- details of each penalty notice issued by the council under the POEO Act
- results of civil proceedings by or against the council under the POEO Act.

The register may be kept in any form determined by the council. Different parts of the register may be kept in different forms.

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

5. Avoidance and mitigation strategies

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

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

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

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

In new and existing facilities, the use of suitable and cost-effective control equipment may be necessary to reduce air pollution impacts. See Local Government Air Quality Toolkit Module 3 – *Air pollution control techniques* for further information.

5.1 Negotiation and rejection

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

6. Domestic premises

The main sources of air pollution from the domestic sector are solid fuel combustion heaters (wood heaters) and open burning in open fires. The Local Government Air Quality Toolkit – *Neighbourhood smoke guidance note* provides information on applicable legislation to manage smoke from wood heaters and open fires and non-regulatory options to protect the community from neighbourhood smoke.

7. Motor vehicles

Cleaner vehicles and integrated transport and land-use measures are key to dealing with emissions from motor vehicles. Commercial and diesel vehicles remain the major contributors to excessive exhaust smoke on NSW roads. Excessive smoke from heavy vehicles is dealt with under the Heavy Vehicles National Law.

7.1 Smoky vehicles

The Clean Air Regulation makes the owner of a motor vehicle, other than a heavy vehicle, guilty of an offence if the motor vehicle ‘emits excessive air impurities’ while being used (s 21(1)).

A motor vehicle ‘emits excessive air impurities’ when the emissions exceed a standard of concentration such that air impurities are visible for a continuous period of more than 10 seconds (Clean Air Regulation, s 20).

Local council officers cannot issue penalty notices for smoky vehicles under the Clean Air Regulation but can report smoky vehicles to the EPA Environment Line.

7.2 Integration of land-use and transport planning

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

Integration of land-use and transport planning by local councils will help reduce VKT to improve local and regional air quality.

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

Councils can also prepare general policy statements about reducing private vehicle use and encouraging public transport use. Examples of this include the City of Sydney’s *Car sharing policy* (City of Sydney 2016) and *Environmental sustainability policy* (City of Sydney 2021).

Relevant legislation and regulations for land use and transport are:

- DPE *Development near rail corridors and busy roads – interim guideline* (2008)
- *State Environmental Planning Policy (Transport and Infrastructure) 2021*.

7.3 Vapour recovery at service stations

Petrol vapours from vehicles and service stations are a source of volatile organic compounds (VOCs) that contribute to increased ozone pollution in the air, particularly in larger metropolitan areas because of their population densities and the number of VOC sources.

Vapour recovery regulation

Part 8, Division 2 of the Clean Air Regulation requires vapour recovery (VR) control equipment at some petrol service stations in New South Wales to capture petrol vapours before they enter the atmosphere. These controls are designed in 2 stages:

- Stage 1 vapour recovery (VR1) captures displaced vapours from storage tanks when a tanker delivers petrol to a service station.
- Stage 2 vapour recovery (VR2) captures displaced vapours at the bowser when a motorist refuels.

Whether a service station is required to have VR controls and the level of control depends on its location and the volume of petrol it dispenses, as set out in the Clean Air Regulation (ss 130 and 140).

The NSW regions in which VR is required are shown on the EPA *Vapour recovery at service stations* webpage (EPA 2023).

Local councils are the ARA for service stations in New South Wales and are responsible for all planning and compliance issues relating to petrol service stations.

The Clean Air Regulation prescribes the technical requirements for equipment, operation, monitoring and testing for both VR1 (ss 141–152) and VR2 (ss 131–138).

Vapour recovery exemption requests are managed by the EPA and should be made by calling the Environment Line on 131 555 or emailing info@epa.nsw.gov.au.

Vapour recovery reporting requirements

The Clean Air Regulation requires petrol service station operators to give the relevant local council notice of commissioning of petrol storage tanks and petrol dispensers at which VR is required within one month of commissioning. Operators are also required to keep an on-site logbook outlining the control equipment installed or modified, testing and maintenance of the equipment, all commissioning reports, weekly checklists and maintenance schedules. Log books may be in electronic form. It is the responsibility of the operator to ensure appropriate checks and maintenance records are kept in the on-site log book or that they are made available to an authorised officer within 3 days if records are kept off site.

Reporting to local councils is only required when new VR systems are commissioned.

The *Vapour recovery at service stations* webpage (EPA 2023) provides comprehensive information about the regulation of vapour recovery and the reporting requirements, including VR1 and VR2 commissioning reporting templates.

Vapour recovery control technology

Module 3 – *Air pollution control techniques* (Section 4.12) provides an overview of technologies for managing vapour emissions.

8. References and other resources

All documents and webpages that are part of the [Local Government Air Quality Toolkit](#) are available from the EPA website.

Australian Government (2015) [National Clean Air Agreement](#), Australian Government, Canberra ACT, www.dcceew.gov.au/environment/protection/air-quality/publications/national-clean-air-agreement.

City of Sydney (2016) [Car sharing policy](#), City of Sydney, Sydney NSW, www.cityofsydney.nsw.gov.au/policies/car-sharing-policy.

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DEC (2006a) [Technical Framework: Assessment and management of odour from stationary sources in NSW](#), NSW Department of Environment and Conservation, Sydney South NSW, www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/air/20060440framework.pdf [PDF 259 KB].

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EPA (Environment Protection Authority) (2021) [Reporting and managing incidents](#), NSW Environment Protection Authority, Parramatta NSW, www.epa.nsw.gov.au/reporting-and-incidents/incident-management/reporting-and-managing-incidents.

EPA (2022a) [Ambient air monitoring guidance note](#), NSW Environment Protection Authority, Parramatta NSW, www.epa.nsw.gov.au/your-environment/air/industrial-emissions/sampling-analysing-air-emissions/approved-methods-sampling-analysing-air-pollutants.

EPA (2022b) [Approved methods for the modelling and assessment of air pollutants in NSW](#), NSW Environment Protection Authority, Parramatta NSW, www.epa.nsw.gov.au/your-environment/air/industrial-emissions/approved-methods-for-the-modelling-and-assessment-of-air-pollutants.

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EPA (2022d) [National Pollutant Inventory](#), NSW Environment Protection Authority, Parramatta NSW, www.epa.nsw.gov.au/licensing-and-regulation/licensing/environment-protection-licences/national-pollutant-inventory.

EPA (2023) [Vapour recovery at service stations](#), NSW Environment Protection Authority, Parramatta NSW, www.epa.nsw.gov.au/your-environment/air/reducing-motor-vehicle-emissions/vapour-recovery-service-stations.

EPA (2024) [Powers and notices guideline for authorised officers and enforcement officers under the Protection of the Environment Operations Act 1997](#), NSW Environment Protection Authority, Parramatta NSW, www.epa.nsw.gov.au/licensing-and-regulation/authorised-officers-and-enforcement-officers/powers-and-notices-guideline.