

Environment & Planning Alert

New pollution laws commence in NSW – Are you ready?

February 2012

Outline

Significant changes on the way pollution incidents are reported in NSW come into operation on 6 February 2012.

Further important changes relating to management plans and the publication of monitoring data also commence later in February and March 2012.

It is important for your business that you make certain:

- [\(Awareness & Training\)](#) that all relevant persons are aware of the new requirements and trained in relation to the new management systems which are now required;
- [\(New Systems\)](#) that pollution incident notification systems and response management plans are updated and tested; and
- [\(Make Submissions\)](#) any submission on the draft Regulations or EPA Guidelines is made by the relevant date as necessary.

Response to the Orica incident

In August 2011, an incident occurred at Orica Australia Pty Ltd's ammonium nitrate plant on Kooragang Island at Newcastle concerning an accidental emission of hexavalent chromium.

Orica notified the Office of Environment and Heritage (OEH) some 16½ hours after the incident took place. It wasn't until six days after the incident that NSW Health

was able to advise there was no health risk to the public.

In response, the NSW Government appointed Brendan O'Reilly to conduct a review into the response to the incident, and to identify any process improvements that could be made when responding to future pollution incidents.

The O'Reilly report concluded that delay in notification and a lack of communication, both by Orica and the OEH, contributed to public disquiet about the incident.

[Click here](#) for a copy of the O'Reilly report of 30 September 2011.

In response to the nine recommendations contained in the O'Reilly report, a Bill was introduced into the legislative assembly on 11 October 2011 to amend the *Protection of the Environment Operations Act 1997* (**POEO Act**). That Bill was ultimately passed on 16 November 2011.

The Governor proclaimed the commencement of the *Protection of the Environment Legislation Amendment Act 2011* (**Amendment Act**) on 18 January 2012.

Immediate notification

Perhaps the most significant change in the Amendment Act concerns the notification of pollution incidents. The changes, which commence on **6 February 2012**, include:

- pollution incidents causing or threatening 'material harm' to the environment must be notified 'immediately' (previously the requirement was 'as soon as practicable');

- the number of relevant authorities to be 'immediately' notified has increased and now includes (each to be contacted in the following order):
 - the appropriate regulatory authority for the activity under the POEO Act (usually the EPA or local council);
 - the EPA (if it is not the appropriate regulatory authority);
 - the Ministry of Health (via the local Public Health Unit);
 - the WorkCover Authority;
 - the local authority (if it is not the appropriate regulatory authority);
 - Fire and Rescue NSW;
- a continuing requirement to 'immediately' notify the relevant authorities about a pollution incident as further information becomes known;
- a doubling of the maximum penalty, for failure to notify a pollution incident in accordance with the POEO Act, to \$2 million for a corporation and \$500,000 for an individual; and
- allowing the EPA to direct the occupier of premises where a pollution incident has occurred to notify such other persons of the incident as the EPA requires.

The new term 'immediate' is not defined in the Amending Act. However, it can be taken to mean 'prompt', 'without delay' or 'no intervening event of significance'.

The EPA considers that the changes to the notification requirements will not increase the number of incident notifications. This is because the type of incident required to be notified has not altered, only the timing has changed. Strictly speaking, the EPA's view is accurate.

However, practically, it seems likely that this amendment will lead to increased initial reporting. This is because business (now faced with significantly increased penalties) is likely, as a respectable risk management strategy, to 'immediately' notify 'pollution incidents' to all relevant authorities, without having the time to properly characterise whether or not the incident is actually causing or threatening 'material harm' to the environment.

Analysis of a pollution incident

Health risk

Also commencing on **6 February 2012**, the EPA may request the Chief Health Officer of the Ministry of Health

to undertake an analysis of the human health risk of a pollution incident. Consultants may be engaged by the Chief Health Officer to carry out such analyses.

Environmental risk

The EPA may also undertake an analysis of:

- the nature and extent of a pollution incident, including actual or likely harm to the environment; and
- the actual or likely pollution resulting from a pollution incident.

Similarly, consultants may be engaged by the EPA to carry out such analyses.

Cost recovery

The reasonable costs of health and environmental risk analyses are recoverable from the occupier of premises from which the pollution incident occurred, or the person who caused the pollution incident.

Mandatory Audits

Again commencing on **6 February 2012**, the Amendment Act expands the circumstances in which the EPA can impose a mandatory environmental audit.

The Amendment Act provides that the appropriate regulatory authority may now also impose a mandatory environmental audit where it believes that an activity has been, or is being, carried out in an environmentally unsatisfactory manner.

Pollution incident response management plans

The Amendment Act also requires that the holder of an Environment Protection License (**EPL**) must prepare a pollution incident response monitoring plan (**PIRMP**). A PIRMP is to include the following:

- the procedures to be followed by the holder of the EPL, or occupier of premises, in notifying a pollution incident to:
 - owners or occupiers of premises within the vicinity;
 - the local authority for the area; and
 - persons or authorities requiring notification under the POEO Act;
- a detailed description of the action to be taken immediately after a pollution incident to reduce or control any pollution;

- the procedures for co-ordinating, with persons or authorities notified, any action taken in combating the pollution and, in particular, the person through whom all communication will be made; and
- any other matter required by the regulations.

The EPA also has the power to require the occupier of premises at which 'industry' is carried out to prepare a PIRMP that complies with the requirements of the POEO Act and regulations.

New PIRMP offences

New offences associated with PIRMPs are also introduced by the Amendment Act, including failure to:

- prepare a PIRMP in accordance with the POEO Act;
- keep a PIRMP at premises to which the EPL relates;
- make a PIRMP available in accordance with the regulations; and
- test a PIRMP in accordance with the regulations.

The maximum penalty for each of these offences is \$1 million for a corporation and \$250,000 for an individual.

It is also an offence for failing to immediately implement a PIRMP in circumstances where a pollution incident occurs in the course of an activity so that 'material harm' to the environment is caused or threatened. The maximum penalty for this offence is \$2 million for a corporation and \$500,000 for an individual.

Commencement

The commencement proclamation on 18 January 2012 specifically noted that the only amendment not coming into operation was the one relating to PIRMPs.

However, it is anticipated that these new requirements will commence on **29 February 2012**. If these changes come into operation at that time, all PIRMPs are required to be in place by **1 September 2012**.

Draft regulations

The EPA has prepared draft regulations to further specify the detailed contents of PIRMPs.

[Click here](#) for a copy of the draft amendments to the *Protection of the Environment Operations (General) Regulation 2009*.

The EPA is also in the process of developing guidance to assist in the preparation of PIRMPs.

Written submissions

The EPA is seeking response and feedback on the draft regulations by **8 February 2012**.

At the Sydney public information session on 30 January 2012, there was some public concern about the level of detailed, potentially sensitive and confidential business information that the EPA proposes to require the holder of an EPL to provide in their PIRMP, for example:

- the quantity, location and an inventory of pollutants at premises;
- the names and 24 hour contact details of key personnel; and
- detailed maps of the premises.

Concerns were also raised about the testing regime for PIRMPs and making full copies available on company websites.

As a suggestion, those wishing to make a written submission could consider similar issues as they relate to their individual circumstances.

Publishing pollution monitoring data

The Amendment Act also provides that the holder of an EPL is to publish certain monitoring data. In summary, the new provisions require that:

- the holder of an EPL who undertakes monitoring as a result of an EPL condition is to publish monitoring data that relates to pollution with 14 days of obtaining the data;
- the holder of an EPL who maintains a website, that relates to the business or activity the subject of the EPL, is to make that monitoring data publicly available in a prominent position on the website;
- the holder of an EPL who does not maintain a website is to provide a copy of that monitoring data to anyone who requests a copy of that data at no charge;
- monitoring data must be published in accordance with requirements issued in writing by the EPA.

These changes commence on **31 March 2012**. This obligation does not apply to monitoring conducted before 31 March 2012, however monitoring data obtained from 31 March 2012 must be published. The holder of an EPL has until **1 July 2012** to comply with these requirements.

Guidelines on the publication of monitoring data

The EPA has prepared draft Environmental Guidelines on the Publication of Monitoring Data. [Click here](#) for a copy of the draft Guidelines.

Written submissions

The EPA is now seeking response and feedback on the draft Guidelines by **24 February 2012**.

At the Sydney public information session on 30 January 2012, it was evident that there was ambiguity about what was intended by a *'website that relates to the business or activity the subject of the EPL'*.

As a suggestion, any written submission could request that the EPA provide clarity on this issue in the ultimate Guidelines.

Public registers

On **31 March 2012**, the information to be included on the public registers of appropriate regulatory authorities, like

the EPA and local councils, will be expanded to include details of:

- any mandatory audit required to be undertaken from that date in relation to an EPL;
- each pollution study required by a condition of an EPL undertaken from that date;
- each pollution reduction program required by a condition of an EPL undertaken from that date; and
- each penalty notice issued from that date.

Additional information

[Click here](#) for additional information about the changes available at the OEHL website.

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