



Access to Justice: Regulation of power stations

1. Overview

What is this factsheet about?

This factsheet provides an introduction to the laws around power stations, the regulation of emissions, and your rights to enforcing power station pollution under the *Environmental Protection Act 1994* (Qld) (**EP Act**).

Nearly 80% of Australia's energy generation comes from coal fired power stations.¹ In addition to accounting for around 35% of Australia's greenhouse gas emissions each year,² coal fired power stations can also be responsible for significant air particulate pollution, including emitting heavy metals such as cadmium; mercury; copper, sulphur and other dioxins.³ Further, concerns have been raised about the health implications of fine particulates (PM10 and PM2.5), including by the World Health Organisation and health professionals such as Doctors for the Environment.⁴ Water contamination may also occur through the operation of a power station, by air borne contaminants landing in water supplies and by the contents of ash dams leaching into water supplies or overflowing into existing water sources.⁵ While power stations may have approval to pollute the air and water to some level, exceeding the levels provided in an approval is an offence under the EP Act.

The key points you need to be aware of are:

1. Power stations are subject to an environmental authority (**EA**) under the EP Act, which regulates the permissible levels of pollution allowed to be generated by a power station.
2. The Qld Department of Environment and Science (**DES**) is responsible for enforcing breaches of EAs that cause environmental damage or harm.
3. Individuals can also bring enforcement action for breaches. There are considerations around who has standing to bring an enforcement action.
4. Environmental nuisance, which may not be as serious as environment harm, may also be caused by a power station. This can include unreasonable interference or likely interference with an environmental value⁶ caused by aerosols, fumes, light, noise, odour, particles or smoke; or an unhealthy, offensive or unsightly condition because of contamination.

¹ Refer to the "National Electricity Market" Fact Sheet at <http://aemo.com.au/>.

² The "Quarterly Update of Australia's National Greenhouse Gas Inventory: December 2017" is available online at www.environment.gov.au.

³ The "Review of Coal Fired Power Stations Air Emissions and Monitoring" is available online at www.epa.nsw.gov.au.

⁴ See <https://www.dea.org.au/doctors-alarmed-at-new-air-pollution-data-call-for-immediate-action-healthy-planet-healthy-people-dea/>.

⁵ AGL was fined \$15,000 after slurry overflowed from an ash dam at the Liddell power station in March 2018, following the NSW EPA prosecuting the company for breaching their environmental protection licence.

⁶ *Environmental Protection Act 1994* (Qld), s 9.

Table of contents:

1. Overview.....	1
2. Regulating environmental impacts of power stations	2
3. Enforcement options available e.g. environmental protection orders.....	3
4. What can I do if I suspect illegal activity by a power station?	3
5. Who can apply to enforce an environmental offence?.....	4
6. Who bears the cost of third party enforcement?	4
7. What is environmental nuisance?	5
8. Private nuisance	6
9. Useful contacts and further information	7
10.Noise log sheet example	8

2. Regulating environmental impacts of power stations

Operating a coal fired power station is a notifiable activity under the EP Act,⁷ which means its operations are regulated by the terms of an environmental authority (**EA**). An EA creates a duty for people carrying out certain activities, including notifiable activities, to notify the Department of Environment and Science (**DES**) of environmental harm.⁸

Section 319 of the EP Act also creates a general environmental duty requiring a person not to carry out an activity which causes or is likely to cause environmental harm, unless the person takes all reasonable and practicable measures to prevent or minimise the harm.⁹ The EP Act also makes it an offence to wilfully or unlawfully cause serious or material environmental harm.¹⁰

Environmental harm is defined in the EP Act as any adverse effect, or potential adverse effect (whether temporary or permanent and of whatever magnitude, duration or frequency) on an environmental value, and includes environmental nuisance.¹¹ The EP Act also clarifies that environmental harm may be used by an activity whether the harm is a direct or indirect result of the activity or whether the harm results from the activity alone or from the combined effects of the activity and other activities or factors.¹²

⁷ *Environmental Protection Act 1994* (Qld), Schedule 3, Item 9.

⁸ See for example sections 320B to 320DB of the *Environmental Protection Act 1994* (Qld).

⁹ *Environmental Protection Act 1994* (Qld), s319.

¹⁰ *Environmental Protection Act 1994* (Qld), s437-438.

¹¹ See section 14 of the *Environmental Protection Act 1994* (Qld).

¹² See section 14 of the *Environmental Protection Act 1994* (Qld).

3. Enforcement options available e.g. environmental protection orders

DES is responsible for enforcing the EP Act, and can take a range of enforcement actions where environmental harm or damage can be proven,¹³ One of these options is issuing an ‘environmental protection order’.

DES may issue an environmental protection order to a person in circumstances including:

1. if the person does not comply with a requirement to conduct or commission an environmental evaluation and submit it to DES;
2. if the person does not comply with a requirement to prepare a transitional environmental program and submit it to DES;
3. if DES is satisfied, because of an environmental evaluation conducted or commissioned by the person, unlawful environmental harm is being, or is likely to be, caused;
4. to secure compliance by the person with the general environmental duty, an environmental protection policy;
5. a condition of an environmental authority;
6. a development condition of a development approval;
7. if the person is, or has been, contravening any of the following provisions: section 363E of the EP Act (not complying with a direction order); section 440Q of the EP Act (contravening a noise standard); section 440ZG of the EP Act (depositing prescribed water contaminants in waters); or a provision of chapter 8, part 3E or 3F.

•

4. What can I do if I suspect illegal activity by a power station?

Individuals can report pollution or a breach of an environmental authority under the EP Act to DES. Contact details are at the back of this fact sheet.

Your call will be logged and reviewed, or you will be referred to local government or an alternative department if the matter is within their jurisdiction. If you can send in a letter with details and evidence of the alleged breach that may assist DES or the local council to investigate the matter. You should keep a record of every call and correspondence you make to DES as it may be required in later enforcement actions.

Community members and landholders can assist DES in monitoring activities that impact on the environment by taking photographs, videos or making notes of things that appear to be causing or have caused illegal harm or nuisance to the environment.

For example, if your complaint is about noise or dust, keep a written record of each instance, noting the time, intensity and any other details you can think of (eg wind direction, temperature). Attached at the back is an example of a record keeping tool created by the Queensland Government for logging noise activities.

¹³ *Environmental Protection Act 1994* (Qld), s358.

5. Who can apply to enforce an environmental offence?

In the event DES does not seek enforcement action, the EP Act provides that third parties may apply to remedy or restrain a breach of environmental order.¹⁴

Any person, including a member of the community or community group may go to the Planning and Environment Court for an order to remedy or restrain illegal activity such as an environmental offence, lack of approval or breach of a condition of approval. However, you may need to undertake steps to ensure you have standing if you are not personally affected by the offence.

A person whose interests are affected by the offence, such as if your health was affected by air pollution from a nearby factory, has standing to bring an action.¹⁵

If your interests are not affected, you need to undertake certain steps to obtain standing via leave of the Court.¹⁶

The EP Act provides that the Court must be satisfied of the following, along with other relevant matters when considering if it will allow someone whose interests are not affected to bring an action before the Court:

1. environmental harm has been or is likely to be caused; and
2. the proceeding would not be an abuse of the process of the Court; and
3. there is a real or significant likelihood that the requirements for the making of an order under this section would be satisfied; and
4. it is in the public interest that the proceeding should be brought; and
5. the person has given written notice to the Minister or, if the administering authority is a local government, the administering executive, asking the Minister or authority to bring a proceeding under this section and the Minister or executive has failed to act within a time that is a reasonable time in the circumstances; and
6. the person is able to adequately represent the public interest in the conduct of the proceeding.¹⁷

•

If you cannot prove a connection with the alleged offence, you can report it to DES and ask that they bring proceedings under the EP Act.

6. Who bears the cost of third party enforcement?

The general practice in the Planning and Environment Court is that each side bears his or her own costs.¹⁸ The Court may award costs against a party subject to a successful enforcement order, however the decision to do so is discretionary.¹⁹

¹⁴ *Environmental Protection Act 1994* (Qld), s505.

¹⁵ *Environmental Protection Act 1994* (Qld), s505(1). Cf “interests” can include proprietary, material, financial or special interest.

¹⁶ *Environmental Protection Act 1994* (Qld), s 505(2).

¹⁷ *Environmental Protection Act 1994* (Qld), s505(2).

¹⁸ *Planning and Environment Court Act 2016* (Qld), s59.

¹⁹ *Planning and Environment Court Act 2016* (Qld), s61.

Before going to Court over an environmental matter you will need legal advice and assistance and usually the opinion of a relevant expert, for example an air quality expert, who is able to be an “expert witness” for you in your case.

7. What is environmental nuisance?

People living within close proximity to a power station may additionally be able to enforce their personal rights to a peaceful environment, by pursuing an action against a power station in nuisance under the EP Act.

Where an EA condition allows for an activity, including particular levels of emissions, you are unlikely to have an action against the EA holder for an activity allowed under the EA. However, where the activity is not allowed under the EA, you may have an action in environmental nuisance.

The offence of environmental nuisance occurs with ‘any unreasonable interference or likely interference with an environmental value’ caused by things such as:

- aerosols;
- fumes;
- odours;
- contamination; and
- particles.²⁰
-

The EP Act defines noise that interferes with an environmental value, such as public safety or public amenity as “environmental nuisance”.²¹

Please note to be successful you will need to show:

The interference is **unreasonable** – what is unreasonable depends upon the circumstance of each case. In determining whether an interference is unreasonable the Court will consider the locality (e.g. what is unreasonable in a residential area may be reasonable in an industrial area), as well as possibly:

- how long the interference lasted and whether it is ongoing;
- where the interference occurred/occurs;
- the time of day or night the interference occurred/occurs;
- the impact the interference is having on you;
- whether the interference was pre-existing when you moved into your property;
- how useful or necessary the activity causing the interference is; and
- what reasonable people would think of the interference.²²

²⁰ *Environmental Protection Act 1994* (Qld) s15, s440

²¹ *Environmental Protection Act 1994* (Qld) s15, s440.

²² *Onus v Telstra Corporation [2011] NSWSC 33 1* at [45]-[51].

8. Private nuisance

In the alternative you may be able to bring an action in “private nuisance” if the pollution caused by the power station affects your property. For example if the noise, odours, dust or ash from a power station substantially and unreasonably interfere with your enjoyment of your property, you may be able to seek damages.

There are a number of defences to a claim for nuisance:

- statutory authority – it is a defence to a claim for nuisance if an Act expressly authorises the activity that causes the nuisance and the activity is done in a careful manner.
- reasonable precautions – it is a defence to a nuisance claim if the person causing the nuisance has taken all reasonable precautions to guard against the nuisance.

The remedies for private nuisance include an injunction to restrain the activity that is causing the nuisance, and/or damages. You should therefore record any financially quantifiable impacts you have had as a result of the coal dust impacts, such as cleaning bills or damage to property. As with any legal action, if you are considering an action in nuisance, you should first contact a solicitor.

9. Useful contacts and further information

Department of Environmental and Science:

<https://www.ehp.qld.gov.au/>

Reporting pollution:

phone the 24/7 Pollution Hotline - 1300 130 372 (option 2)

<https://www.qld.gov.au/environment/pollution/reporting>

Prescribed environmentally relevant activities (ERAs):

<http://www.ehp.qld.gov.au/licences-permits/business-industry/>

13 QGOV 13 74 68

Local government directory:

<http://www.dilgp.qld.gov.au/local-government-directory/>

13 QGOV 13 74 68

Environmental Defenders Office (Qld) Inc.

Ph: 07 3211 4466

Fax: 07 3844 0766

Post: 8/205 Montague Rd West End Qld 4101

Email: edoqld@edoqld.org.au

Web: <http://www.edoqld.org.au>

Click here for more information



DISCLAIMER: This factsheet is for general information purposes and is not legal advice. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.

DONATE

While all of our factsheets are free to download, they do take time and effort update. As a community organisation, we rely solely on donations to continue our work. If you find our factsheets useful please consider making a donation via <https://www.givenow.com.au/edoqldfactsheets>. Thank you for your continued support.

10.NOISE LOG SHEET EXAMPLE

Name Phone

Address

Date	Time Frame at Home & Awake ²	Time Frame Noise Detectable ³	Noise		Wind		Comment ⁸
			Source ⁴	Description ⁵	Direction ⁶	Strength ⁷	
Monday							
Tuesday							
Wednesday							
Thursday							
Friday							
Saturday							
Sunday							

Declaration

I hereby certify that to the best of my knowledge the above information is correct and I understand that the information may be used by the Environmental Protection Agency as evidence if required.

Signature Date

HOW TO COMPLETE YOUR NOISE LOG SHEET

PLEASE COMPLETE ALL COLUMNS (NUMBERS 2 THROUGH TO 7) WHEN NOISE IS DETECTED. ON DAYS WHEN NO NOISE IS DETECTED, PLEASE COMPLETE COLUMNS 2 AND 7 ONLY (IE. TIME AT HOME IN COLUMN 2 AND “NIL Noise” COMMENT IN COLUMN 7).

1. Please endorse your name and address in full on each sheet. Each participating person in the household should complete a separate sheet. Each sheet should be signed.

2. Time frame at home is used to indicate the time frames when, if noise was present, you were in a position to detect this noise. The times indicated should be in a 24 hour time. Eg. 700 - 830, 1715 - 2230. This would indicate you were at home and awake from 7 am - 8:30 am and from 5:15 pm - 10:30 pm.

3. Time frame noise detectable is filled out similarly to item 2 above. Please complete in 24 hour time the duration of the noise detected.

Eg. 710 - 715, 755 - 820, 1715 - 1717. This indicates noise was detected from 7:10 am - 7:15 am, 7:55 am - 8:20 am and again from 5:15 pm - 5:17 pm.

4. Noise Source - where you believe the noise to be coming from (use “not identified” if unsure).

5. Noise Description - what the noise sounds like, how loud and/or its pitch.

6. Wind Direction - if you know what direction the wind is coming.

Eg. N - North, SE - South East, from “X” towards my home.

7. Wind Strength is to be classified as follows:

N - None F - Faint M - Medium S - Strong G - Gusty

8. Comment - Please complete whether noise detected or not. If there is no noise detected on that day please indicate this. If noise was detected please describe its impact upon you and/or what action you took.