

## Fact sheet

# Your rights and coal-fired power stations in New South Wales

## Introduction

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New South Wales is home to five coal-fired power stations located in the Hunter Valley (Bayswater and Liddel), Central Coast (Eraring and Vales Point) and Central West (Mt Piper). In 2014, three coal-fired power stations were closed: Redbank, Munmorah and Wallerawang C station. NSW coal-fired power stations are powered by black coal mined in open-cut mines and collieries.

The NSW Environment Protection Authority ('EPA') and the *Protection of the Environment Operations Act 1997* ('PoEO Act') regulate emissions from coal-fired power stations in New South Wales. Power stations release pollutants that can be harmful to the environment and the community.

Communities who live in close proximity to power stations in NSW have some rights to enforce licence conditions and seek remedy for pollution offences. There are ways that communities can assert their rights including reporting pollution and emissions to the EPA and taking legal action when emissions appear to be unlawful.

## Licences

The PoEO Act provides the legal framework for licensing and regulation of pollution, and the power the EPA has to enforce these laws and regulations. The EPA issues licences to power stations, which set out the conditions for operation including pollution management and emissions restrictions. The PoEO Act sets out the enforcement mechanisms for breaches of licence conditions, and prosecution of serious pollution breaches.

## EPA licences for power stations

Power stations with a generating capacity of 30 megawatts or more that do not generate electricity using solar or wind power are identified as a scheduled premises-based activity for electrical power production.<sup>1</sup> As such, they require an 'Environment Protection Licence' ('EPL').<sup>2</sup> Power stations must not conduct any activity except in accordance with a licence granted by the EPA.<sup>3</sup>

<sup>1</sup> *Protection of the Environment Operations Act 1997* (NSW) Sch. 1, Part. 1, cl. 17(1), (2) ('PoEO Act 1997 (NSW)').

<sup>2</sup> PoEO Act 1997 (NSW) s. 48(1); Sch. 1, cl. 17 Electricity generation of more than 30MW generating capacity.

<sup>3</sup> PoEO Act 1997 (NSW) s. 48.

The EPA can impose conditions on licences to minimise and manage environmental impacts from emissions and waste from a power station. Non-compliance with licence conditions is an offence.<sup>4</sup> The licence conditions include the amount of pollution and waste that power stations are allowed to discharge onto land, into water and into the air.

Air pollution is defined in PoEO Act as ‘emission[s] into the air of any air impurity’.<sup>5</sup> ‘Air impurity’ is defined as including ‘smoke, dust (including fly ash), cinders, solid particles of any kind, gases, fumes, mists, odours and radioactive substances’.<sup>6</sup>

## Emissions Standards

Emissions standards for coal-fired power stations are outlined in the PoEO Act, the *Protection of the Environment (Clean Air) Regulation 2010* (NSW) (‘PoEO Regulations’), and individual licences. These standards cannot be exceeded from a single emission source (‘point-source’ emissions), for example, stacks, chimneys, or release points.<sup>7</sup> It is an offence to exceed standards of air impurities.<sup>8</sup> The occupier who operates the plant must maintain the plant in an efficient condition and operate the plant in a proper and efficient manner.<sup>9</sup> Failure to do so is an offence.<sup>10</sup>

The PoEO Regulations separate scheduled premises such as coal-fired power stations into different groups based on the date the premises commenced activities.<sup>11</sup> This grouping determines the emissions standards for each premises in the PoEO Regulations.<sup>12</sup> The emissions standards for coal-fired power stations in NSW differ based on these groups. The licence for each power station imposes additional emissions limits.

## Conditions

Failure to comply with licence conditions is an offence.<sup>13</sup> The maximum penalty for failure to comply with a licence condition is \$1,000,000 and \$120,000 per day for each day the offence continues for a corporation,<sup>14</sup> and \$250,000 and \$60,000 per day for each day the offence continues for an individual.<sup>15</sup>

## Licence renewal

Licences are in force until suspended, revoked or surrendered.<sup>16</sup> Licences must be reviewed in intervals not exceeding five years, and this must be carried out by an appropriate regulatory authority.<sup>17</sup>

## Public register

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The EPA must keep a public register of information about licences and licence holders.<sup>18</sup> The public register must contain information about licences and licence holders including:

- EPA decisions made in regards to that licence;
- licence variations;
- details of pollution reduction programs required by a condition of a licence;
- details of convictions for prosecutions and results of civil proceedings in the Land and Environment Court; and
- details of penalty notices issued by the EPA.<sup>19</sup>

<sup>4</sup> PoEO Act 1997 (NSW) s. 64.

<sup>5</sup> PoEO Act 1997 (NSW) *Dictionary*.

<sup>6</sup> PoEO Act 1997 (NSW) *Dictionary*.

<sup>7</sup> PoEO Act 1997 (NSW) ss. 128(1), (1A).

<sup>8</sup> PoEO Act 1997 (NSW) s. 128(3).

<sup>9</sup> PoEO Act 1997 (NSW) s 124.

<sup>10</sup> PoEO Act 1997 (NSW) s 124.

<sup>11</sup> PoEO Regulations 2010 (NSW) cl. 32(1).

<sup>12</sup> PoEO Regulations 2010 (NSW) Sch. 3.

<sup>13</sup> PoEO Act 1997 (NSW) s. 64.

<sup>14</sup> PoEO Act 1997 (NSW) s. 64(1)(a).

<sup>15</sup> PoEO Act 1997 (NSW) s. 64(1)(b).

<sup>16</sup> PoEO Act 1997 (NSW) s. 77(1).

<sup>17</sup> PoEO Act 1997 (NSW) s. 78(1).

<sup>18</sup> PoEO Act 1997 (NSW) s. 308.

<sup>19</sup> PoEO Act 1997 (NSW) s. 308(2).

The Public Register is online, and copies must be available for public inspection.<sup>20</sup> If you would like a copy of part of the register you can do so for a fee.<sup>21</sup>

Search the Public Register [on the EPA website](#).<sup>22</sup>

## Air monitoring in NSW and access to monitoring data

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Air quality is monitored by the EPA, the NSW Office of Environment and Heritage ('OEH'), and by industry. In 2010, the OEH partnered with coal and power industries in the Upper Hunter Valley region to establish the [Upper Hunter Air Quality Monitoring Network](#).<sup>23</sup>

The pollutants monitored by air quality monitors vary, but generally include any combination of nitrogen oxide, sulphur dioxide, ozone, carbon monoxide, visibility particles (e.g. dust), and PM<sub>10</sub> and PM<sub>2.5</sub> fine particles.<sup>24</sup>

The OEH air monitoring website allows you to search for air quality data in a number of ways, including by date, monitor location, and pollutant.<sup>25</sup> You can download this information at any time without charge.

You can search and download air-monitoring data on the [OEH air monitoring quality website](#).

## EPA enforcement of licences

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The EPA has power under the PoEO Act to investigate potential licence breaches, follow up on complaints made by communities, and prosecute for breaches of the PoEO Act. These powers include:

- issuing clean-up notices;
- issuing prevention notices;
- issuing prohibition notices;
- issuing enforceable undertakings;
- prosecutions in court for more serious offences.

### Clean-up notices

The EPA can direct the operator of a coal-fired power station to clean up pollution where the EPA reasonably suspects that pollution has or is occurring.<sup>26</sup> The clean-up notice may require the person to whom the notice is given to report to the EPA on the clean-up process.<sup>27</sup> It is an offence not to comply with a clean-up notice.<sup>28</sup>

### Prevention notices

Where the EPA reasonably suspects that an activity is or has been carried out in an environmentally unsatisfactory manner, the EPA can direct the occupier of the premises to take action to ensure that the activity is carried on in the future in an environmentally satisfactory manner.<sup>29</sup> An activity being carried out in an 'environmentally unsatisfactory manner' includes where that activity is in breach of the PoEO Act or Regulations, is likely to cause a pollution incident, is not carried on in such a way as to reasonably prevent, control or minimise pollution, or is not carried on in accordance with good environmental practice.<sup>30</sup>

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<sup>20</sup> PoEO Act 1997 (NSW) s. 309(1).

<sup>21</sup> PoEO Act 1997 (NSW) s. 309(2).

<sup>22</sup> <http://www.epa.nsw.gov.au/prpoeo/index.htm>.

<sup>23</sup> <http://www.environment.nsw.gov.au/aqms/uhunteraqmap.htm>.

<sup>24</sup> <http://www.environment.nsw.gov.au/aqms/aboutaqi.htm#goal>.

<sup>25</sup> <http://www.environment.nsw.gov.au/AQMS/search.htm>.

<sup>26</sup> PoEO Act 1997 (NSW) s. 91(1).

<sup>27</sup> PoEO Act 1997 (NSW) s. 91(3).

<sup>28</sup> PoEO Act 1997 (NSW) s. 91(5).

<sup>29</sup> PoEO Act 1997 (NSW) s. 96.

<sup>30</sup> PoEO Act 1997 (NSW) s. 95.

If the EPA issues a prevention notice, actions that can be enforced include repairing and modifying operational equipment, monitoring and analysing pollution, and preparing and carrying out pollution control, minimisation or prevention plans of action.<sup>31</sup> The EPA charges a fee for issuing prevention notices.<sup>32</sup> It is an offence to not comply with a prevention notice.<sup>33</sup> In the event that the prevention notice is not complied with, the EPA can take action against power station employees, agents or contractors.<sup>34</sup> This means that liability for failure to comply with a prevention notice is not limited to the occupier of the premises.

## Prohibition notices

Prohibition notices can only be issued by the Environment Minister where the EPA recommends to the Minister that pollution emissions from an activity on a premises is or is likely to cause harm to the environment, is or is likely to be injurious to public health, or is likely to be causing discomfort or inconvenience to any person not associated with the management or operation of the activity.<sup>35</sup> The Minister can either direct the occupier of the premises or the person carrying out the activity to cease operations, or an aspect of operations, for a specified time period.<sup>36</sup>

It is an offence not to comply with a prohibition notice.<sup>37</sup> If a prohibition notice is not complied with, the EPA can force compliance by taking action itself or by its employees, agents or contractors.<sup>38</sup>

## Enforceable undertakings

If a power station contravenes or allegedly contravenes any provision of the EP Act for which the EPA can take proceedings, instead of prosecuting for an offence the EPA can enter into an enforceable undertaking with the power station operator.<sup>39</sup> An enforceable undertaking is a legally binding agreement between the EPA and the person who contravened environmental protection legislation. There are [Guidelines](#) for enforceable undertakings that outline how the EPA can use enforceable undertakings instead of prosecuting for an offence or an alleged offence.<sup>40</sup>

Enforceable undertakings must be applied for by the person who has, or may, contravene pollution law. The EPA will assess whether the application for an enforceable undertaking is an appropriate response by considering the [EPA Compliance Policy](#),<sup>41</sup> and [EPA Prosecution Guidelines](#).<sup>42</sup>

## Community enforcement actions

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There are a range of enforcement actions available to communities in NSW who are concerned about pollution from coal-fired power stations. You should seek legal advice before commencing an enforcement action to determine what is the best way to seek remedy for an alleged pollution offence.

### Civil enforcement actions

Breaches of the PoEO Act that may allow you to take legal action in relation to air pollution include:

- a breach of an air pollution licence or the conditions of that licence;<sup>43</sup>
- failing to maintain or operate an industrial plant in a proper and efficient manner;<sup>44</sup> and
- emitting pollution in excess of state limits.<sup>45</sup>

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<sup>31</sup> PoEO Act 1997 (NSW) s. 96(3).

<sup>32</sup> PoEO Act 1997 (NSW) s. 100.

<sup>33</sup> PoEO Act 1997 (NSW) s. 97.

<sup>34</sup> PoEO Act 1997 (NSW) s. 98.

<sup>35</sup> PoEO Act 1997 (NSW) s. 101(1).

<sup>36</sup> PoEO Act 1997 (NSW) s. 101(2).

<sup>37</sup> PoEO Act 1997 (NSW) s. 102.

<sup>38</sup> PoEO Act 1997 (NSW) s. 103.

<sup>39</sup> <http://www.epa.nsw.gov.au/legislation/prosguid.htm>.

<sup>40</sup> <http://www.epa.nsw.gov.au/resources/publicregister/enforceable-undertaking-guide-160640.pdf>.

<sup>41</sup> <http://www.epa.nsw.gov.au/resources/legislation/130251epacompol.pdf>.

<sup>42</sup> <http://www.epa.nsw.gov.au/resources/legislation/20130141EPAProsGuide.pdf>.

<sup>43</sup> PoEO Act 1997 (NSW) ss. 48, 64.

<sup>44</sup> PoEO Act 1997 (NSW) ss. 124, 125.

<sup>45</sup> PoEO Act 1997 (NSW) ss. 128.

Time limits of three years (for prescribed offences) or 12 months from the date of the conduct may apply.<sup>46</sup> You will need to show evidence of air pollution emissions in excess of the company's pollution licence conditions or in excess of the state standards. Evidence of the environmental/health impact caused by the air pollution is relevant, but not required. The burden of proof that you have to meet is that 'on the balance of probabilities' (i.e. it is more likely than not) that the breach occurred.

## Criminal enforcement action

The primary responsibility for prosecuting polluters lies with the EPA. However, where the EPA has failed to prosecute and the Land and Environment Court grants permission, a member of the public is entitled to bring their own case prosecuting an offence under the POEO Act.<sup>47</sup>

A criminal enforcement action can be difficult and expensive to run. You should first try to convince the EPA to prosecute. Where the EPA prosecutes, a successful prosecution provides a relatively easy avenue to seek a modest award compensation and restorative action by the defendant.

## Common law claim for damages

Where a person has suffered injury or economic loss as a result of exposure to air pollution, it is possible to seek compensation from the court, under common law principles of negligence and/or nuisance.<sup>48</sup>

For a negligence claim you will need to provide evidence that the polluter failed to take reasonable care to protect the community from predictable injuries or losses. The evidence must also establish a strong connection between the damage that was caused and the negligent act or omission.

For a nuisance claim you will need to provide evidence that the polluter has significantly interfered with the business or lifestyle of its neighbours.

Nuisance and negligence claims can be expensive and difficult to run, as they require a lot of expert evidence and legal expertise.

## Reporting pollution to the EPA

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Report pollution by calling the EPA's 24 hour pollution hotline on 131 555. Alternatively you can [contact your local EPA office](#) directly.<sup>49</sup>

When reporting pollution it is best to take as many detailed notes as possible while you witness the event, or write notes in as much detail as possible as soon as you can. Things to include are what happened, when and where you observed the event, and your contact details. Once you have made your report, the EPA will assess the information you have provided to determine what action to take next, including:

- advising another government agency about the report, such as emergency services;
- conducting an inspection of the incident site;
- conducting a desktop investigation; or
- referring the report to another agency for investigation.

Alternatively it may take no action.

When you make a report to the EPA, it will notify you of the investigative actions it has taken in response to your report.

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<sup>46</sup> PoEO Act 1997 (NSW) s. 216.

<sup>47</sup> PoEO Act 1997 (NSW) s. 219.

<sup>48</sup> Modified by the *Civil Liability Act 2002*(NSW).

<sup>49</sup> <http://www.epa.nsw.gov.au/contact/Locations.htm>.

Reporting pollution is one of the most important actions communities can take when concerned about emissions from coal-fired power stations and ensuring that information about pollution is recorded by the EPA.

## Power stations have a duty to report pollution

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Under the PoEO Act, premises licensed by the EPA have a duty to report pollution incidents when such events are causing or threatening material harm to the environment.<sup>50</sup> 'Material harm to the environment' is defined as causing actual or potential harm to the health or safety of humans or to ecosystems; harm that is not trivial, or results in actual or potential loss or property damage exceeding \$10,000.<sup>51</sup> The PoEO Act outlines the manner and form that pollution must be reported, and the information required in the pollution report.<sup>52</sup>

Failure to comply with the duty to report pollution is a serious offence. The maximum penalty for a corporation is \$2,000,000 and/or \$240,000 for each day the offence continues.<sup>53</sup> For individuals, the maximum penalty is \$500,000 and/or \$120,000 for each day the offence continues.<sup>54</sup>

If you feel that a pollution incident has or is occurring, and that the operator of the coal-fired power station has not reported the pollution, you should contact the EPA immediately on 131 555.

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<sup>50</sup> PoEO Act 1997 (NSW) s. 148.

<sup>51</sup> PoEO Act 1997 (NSW) s. 147.

<sup>52</sup> PoEO Act 1997 (NSW) ss. 149, 150.

<sup>53</sup> PoEO Act 1997 (NSW) s. 152(a).

<sup>54</sup> PoEO Act 1997 (NSW) s. 152(b).