Guideline

Environmental Protection Act 1994

Dealing with unlicensed environmentally relevant activities

This procedural guide is intended to assist Environmental Officers (officers) of the Department of Environment and Heritage Protection (the department) to respond to instances where operators are found to be carrying out a chapter 5 environmentally relevant activity without an environmental authority as required by the Environmental Protection Act 1994.

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1. **What is a chapter 5 environmentally relevant activity?**

The *Environmental Protection Act 1994* (the Act) states that chapter 5 environmentally relevant activities (ERAs) include:

- prescribed ERAs - an activity prescribed under Schedule 2 the *Environmental Protection Regulation 2008* (EP Reg); and
- resource activities defined in section 107 of the Act as:
  - a geothermal activity;
  - a GHG (greenhouse gas) storage activity;
  - a mining activity;
  - a petroleum activity.

Operators are required to hold an environmental authority (EA) prior to commencing a chapter 5 ERA. Prescribed ERAs that are listed as a concurrence activity in schedule 2 of the EP Reg (i.e. have a ‘C’ in the right hand column) also require a development approval (DA) under the *Sustainable Planning Act 2009* (SP Act) to be in place if there is a material change of use, before commencement of an ERA.

Some mining ERAs also require approval from the Department of Natural Resources and Mines (NRM) for tenure. For new mining projects, an applicant must apply for an EA and a mining tenement under the *Mineral Resources Act 1989* (MR Act).

ERAs are regulated because they have been assessed as posing a medium or high risk to the environment.

The process for obtaining the correct approvals to carry out one or more ERAs is outlined in chapter 5 of the Act. It is a requirement under section 426 of the Act for a person to hold or act under an EA if they are carrying out a relevant ERA. It is an offence for a person not to comply with this requirement.

2. **Chapter 5 ERAs operating in excess of relevant ERA threshold**

An EA holder who carries out a chapter 5 ERA in excess of the relevant threshold, as defined in schedule 2 of the EP Reg, may be carrying out an unlicensed ERA. This is on the basis that the aspect or part of the ERA which is in excess of the relevant threshold is still considered to be an ERA itself in accordance with the definition of an ERA contained in schedule 2 of the EP Reg.

However if there is a condition in the EA which limits the activity’s threshold, then the appropriate offence may be a breach of EA condition under section 430 of the Act. This is a complex issue which depends upon the circumstances of each matter.

3. **Procedure for identifying an unlicensed ERA**

Officers who become aware of a potentially unlicensed ERA should be guided by the following procedure.

3.1. **Meet with the person carrying out the activity**

Where possible, officers should meet with the person responsible for carrying out the activity and advise the person of the requirements under the Act. Officers should ask questions to establish whether or not an ERA is being carried out without an EA (and DA/or tenure) and whether there are any mitigating or aggravating circumstances. Contemporaneous notes must be made in an officer’s official notebook as soon as possible.
Accordingly, officers should, as far as it is practicable, obtain evidence that an ERA is being conducted, e.g. take photographs of the activity, and note the details of any suppliers, customers or contractors on site who may be able to provide evidence that an ERA was being conducted.

During the site visit, officers also need to determine if any other offences have been committed and ascertain whether there are any other issues on the site which need to be responded to and managed, i.e. is the activity causing environmental harm and how does this need to be dealt with?

3.2. Send a letter to the person carrying out the ERA

The next step that officers should take in dealing with an unlicensed ERA is to send a follow-up letter to the person informing them that the department is satisfied that an ERA is being carried out without the appropriate approvals and that this is an offence under the Act. This letter notifies the person that the department considers the activity to be in contravention of the Act and provides the person an opportunity to respond and/or rectify the matter. Further information can also be requested if the officer is not satisfied that an offence has occurred (i.e. if it is unclear if the person is conducting an ERA because the thresholds are in dispute).

The letter should refer to the meeting/site visit and include the following:

- the information which leads the department to believe that the person may be carrying out an ERA without the correct approvals (e.g. the site visit and the evidence obtained);
- the requirement under the Act to operate an ERA with an EA, and that it is an offence not to comply under section 426;
- for prescribed concurrence ERAs, the requirement under section 578 of the SP Act to have a DA for assessable development and that it is an offence not to comply;
- for mining ERAs, a reminder to contact NRM to obtain the relevant approvals under the MR Act;
- the opportunity to provide a written response to the department by a certain date (usually two weeks from the date of the letter), with information relevant to the matter including any mitigating or aggravating circumstances that may exist;
- the maximum penalty amounts (individual and corporation) for the offence under section 426 of the Act;
- if the department determines that the person is carrying out an unlicensed activity the following information should also be included:
  - the person is required to cease the ERA;
  - enforcement action may be taken in response to this identified contravention of the Act; and
  - to obtain an approval to carry out the ERA, the person needs to submit a valid application including payment of the appropriate fee.
- Attach a PIN if an authorised person has a reasonable belief that an offence has been committed and a PIN is an appropriate response in accordance with the enforcement guidelines.

When completing the letter, officers should use the department’s current letterhead template, and the correspondence checklist (ESR/2016/2263) may also provide officers with additional assistance in drafting correspondence. Relevant application forms and guidelines should be enclosed with this letter or, alternatively, the person should be referred to the forms and guidelines available on the department’s website.
3.3. Additional compliance options

If a response to the letter is not received or the response does not contain further relevant information, an officer should consider the evidence they have obtained and whether it is sufficient to take enforcement action. The matter should be escalated further and depending on the circumstances, the compliance options available to officers include:

- issuing a statutory notice under section 451 of the Act requiring the person to provide the relevant information. To determine whether this option is appropriate and for further details regarding issuing section 451 notices, refer to the requiring relevant information, answers to questions and documents procedural guide (ESR/2016/2312);
- issuing a penalty infringement notice (PIN) to the person conducting the unlicensed ERA if sufficient mitigating or aggravating circumstances have not been provided and the officer is satisfied that an offence has been committed.

Other compliance tools should also be utilised, where appropriate, to deal with any environmental impact occurring or that is likely to occur on the site.

After receiving a response from the person, officers should consider the information provided and take action as required. However if the information supplied indicates that the operation does not require an ERA and they are operating lawfully, then the matter should be finalised and information supplied to the person to ensure they are aware of their responsibilities, should their operation exceed the limitations for the relevant activity.

4 Enforcement action

The decision to use enforcement action, and the choice of enforcement tool(s), will take into account the department’s enforcement guidelines, the environmental outcome that is sought in each case, the current environmental harm, and the evidence that has been or could be obtained. Sometimes a combination of enforcement tools will be appropriate.

This guideline does not preclude the department from taking any immediate enforcement action.

For example, if environmental harm is occurring or likely as result of the activity being undertaken, the department should take immediate action to mitigate the impacts through an environmental protection order or restraint order for example. The use of tools should also include responding to the unlawfulness of the activity and provide for steps to ensure the person applies for the necessary approvals in order to manage the activity appropriately in the future.

4.1. Penalty infringement notice

A PIN is normally issued when an offence is not serious enough to warrant prosecution. A PIN may be considered appropriate and can lawfully be issued for the offence of a person carrying out an ERA unless the person holds, or is acting under, an EA for the activity in the amount of:

- 20 penalty units for an individual;
- 100 penalty units for a corporation.

For offences that do not warrant prosecution, a PIN may provide sufficient punishment for the offence that has occurred so far. This may be the necessary incentive for the person to obtain an EA for the activity or cease the activity. A PIN is a way of showing that the department is serious about dealing with unlicensed operators.

For example, a PIN is appropriate when the risk and/or impact on the environment for the particular operation is assessed to be low, and the desired outcome is that the person obtains the correct approvals so that the operation is subject to appropriate controls and monitoring, and the operation is lawful.
If the person continues to operate without correct approvals, after a PIN has been issued, the department will consider this to be a separate offence. Circumstances such as whether, since being notified of the need to have correct approvals in order to conduct the activity, the person has taken genuine and prompt steps to obtain the correct approvals, or whether the person unsuccessfully applied for an EA, are relevant considerations in determining whether to escalate the department’s response, e.g. to prosecution action.

For further information about PINs, consult the ERAs compliance and enforcement guideline.

4.2. Direction notice

A direction notice is a statutory enforcement tool, which may be issued by the department if it is reasonably satisfied that there has been a contravention of certain prescribed provisions of the Act including:

- section 426–conducting an ERA without an EA;
- section 440–offence of causing environmental nuisance;
- section 440Q–offence of contravening a noise standard;
- section 440ZG–depositing prescribed water contaminants in water and related matters.

A direction notice requires a person contravening one of the prescribed provisions to remedy the contravention. The purpose of a direction notice is to provide the person receiving it with an opportunity to remedy the situation and cease creating a nuisance before any further action is taken. Where the person continues to conduct the activity and a contravention of these prescribed provisions has resulted in environmental harm, a direction notice is not appropriate and other enforcement tools provided for in the Act should be considered.

For further information on direction notices, see the direction notice guideline (ESR/2016/2274).

4.3. Environmental protection order

An environmental protection order (EPO) may be issued on certain grounds including for example, to secure compliance with the general environmental duty or if there is a contravention of the prescribed provision involving water contamination. The EPO may require the person to cease an activity, remediate environmental harm and/or take action to minimise the risk of environmental harm. Failing to comply with an EPO is an offence. For further information on EPOs, see the environmental protection order guideline (ESR/2016/2520).

Example:
The department became aware of a property that appeared to be used for waste management activities. These activities require an approval and the department had no record of any approval. On a site visit, officers saw scrap metal, building waste and green waste in stockpiles and also buried within fill. The buried waste was approximately 10 metres from waters that potentially drain into a nearby creek. There was also stockpiled waste, that possibly included asbestos, being burned. The department decided to issue an EPO to the occupier of the property to secure compliance with their general environmental duty. The EPO required the occupier to refrain from receiving, burying, burning, moving or disposing of material (other than clean earthen materials) at the premises. The occupier stopped accepting material and ceased conducting an unlicensed activity that was potentially causing environmental harm.

4.4. Clean-up notice

Where the activity has resulted in an incident involving contamination of the environment that has caused or is likely to cause serious or material harm, a clean-up notice may be issued to require a prescribed person to

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1 This is the publication number. The publication number can be used as a search term to find the latest version of a publication at www.ehp.qld.gov.au.
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remediate any environmental harm done. It is an offence to contravene a clean-up notice. For further information on clean-up notices, see the clean-up notice guideline (ESR/2016/2278).

Example:
The department became aware of an unlicensed ERA after the site was involved in a fire incident that caused the release of oils and greases to land. The department was notified of the incident and in response, a clean-up notice was issued to the owner of the land instructing them to remove the waste and remediate the site within three months. The owner of land was also required to provide a report to the department stating how they complied with the notice. Post site clean-up, the operator and owner of land were served PINs for operating an unlicensed activity and causing water contamination.

4.5. Restraint order

In some circumstances, the department may obtain an order from the court requiring a person to immediately stop an activity or to do any other action required to cease contravening the Act (e.g. causing environmental harm or nuisance). Restraint orders should be utilised when the operator of an unlicensed activity is refusing to comply with other enforcement action requirements and environmental harm is serious and imminent. Where a restraint order is considered the appropriate enforcement response, officers should complete a formal investigation request.

4.6. Prosecution

For serious or persistent offending, prosecution is generally the appropriate enforcement response. It is an offence under section 426 of the Act for a person to carry out an ERA unless the person holds, or is acting under, an EA for the activity.

- The maximum penalty for an individual is 4500 penalty units.
- The maximum penalty for a corporation is 22,500 penalty units.

Section 2B of the Penalties and Sentences Regulation 2005 prescribes the monetary value of a penalty unit. This offence does not apply to a person carrying out:

- an agricultural ERA;
- a small scale mining activity;
- a geothermal activity that, under the Geothermal Energy Act 2010 (Geothermal Act) is:
  - geothermal exploration for exempt heat pump production or to evaluate the feasibility of exempt heat pump production;
  - exempt heat pump production; or
  - other geothermal production that, under the Geothermal Act, is not of a large-scale.

It is also not an offence if the person is the Coordinator-General, or another person acting on behalf of the Coordinator-General, in performing the functions or exercising the powers of the Coordinator-General under the State Development and Public Works organisation Act 1971.

It is also an offence under section 427 for the holder of an EA to carry out an ERA if the person has become the holder of the authority under a non-assessable transfer under resource legislation and is not a registered suitable operator.

There may also be other applicable offences such as causing environmental harm, releasing a contaminant and contravening statutory or court orders.
4.7. Other enforcement action

If the department reasonably believes that a person has committed, or is committing, a development offence, the department may issue a show cause notice or an enforcement notice under the SP Act. Under section 578 of the SP Act, carrying out assessable development without a development permit is a development offence.

- The maximum penalty for an individual is 1665 penalty units.
- The maximum penalty for a corporation is 8325 penalty units.

If the assessable development is on a Queensland or local heritage place:

- The maximum penalty for an individual is 17,000 penalty units.
- The maximum penalty for a corporation is 85,000 penalty units.

Only appropriately delegated officers may give a show cause notice or an enforcement notice under SPA.

5. Provide for natural justice

Prior to the department making a decision to take administrative action, which may adversely impact on an individual or corporation, the department must:

- Notify—notify the individual/corporation that the department is considering making adverse findings;
- Respond—provide the individual/corporation with an opportunity to respond to the allegation; and
- Consider—consider any representations made by the affected individual/corporation before finalising the decision.

The seriousness of the matter will dictate the process by which natural justice is provided and is likely to vary from case to case. Accordingly, officers are encouraged to use their discretion in determining how to best ensure natural justice is afforded and the amount of time provided to the affected person to respond.

While in some circumstances it may be appropriate for an officer to discuss the above information with the affected person during a site inspection or a telephone interview and to take contemporaneous notes, in more serious circumstances a written notification which includes a specific closing date for submissions should be used.

Regardless of the manner in which natural justice is afforded, any information provided by the affected person is to be documented. The summary of information should include how natural justice was provided as well as any representations or submissions provided by the affected person.

6. What follow up is required by the department?

It is important that the matter is appropriately followed up to make sure that the person who was carrying out the ERA without the correct approvals is complying with any requirements imposed. Follow-up is to be scheduled by the relevant officer and confirmed with their manager. This is usually achieved by checking that the ERA is no longer being conducted whilst the operator is unlicensed.

Officers may also wish to follow up by checking that an application/s (and any associated fees, supporting documents etc.) has been received by the department (and the relevant local government or the State Assessment and Referral Agency (SARA) for prescribed concurrence ERAs or NRM for mining activities.

Officers are encouraged to use tools such as diary reminders to ensure the matter is followed up in a timely manner.
If the person fails to obtain the appropriate approvals and continues to conduct the unlicensed ERA, officers must consider what further action should be taken to deal with the offending, and any risks or harm to the environment.

7. Record keeping responsibilities

Officers must record all allegations of non-compliance in the Ecotrack system. This includes creating a complaint report/compliance activity, uploading copies of any relevant documents, updating the run sheet with commentary on actions and recording any decisions made on the enforcement measures screen (this includes a decision to take no further action).

Copies of any letters, relevant assessment reports and any accompanying documents, or documents relating to further compliance tools used, must be placed on the hard copy file. The department is required to make, and record, an informed decision about all allegations of non-compliance.

It is important that officers adequately respond to and report on all enquiries and complaints in order to assist in building a comprehensive compliance history.

## Approved by:

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Date: December 2014

### Version history

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<tr>
<td>1.00</td>
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<td>The document template, header and footer have been updated to reflect current Queensland Government corporate identity requirements and comply with the Policy Register.</td>
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### Disclaimer

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