

Remedial Notices Policy

ENVIRONMENT PROTECTION AUTHORITY



Environment
Protection
Authority Victoria



Contents

1. Purpose of the remedial notices policy	1
2. Scope of the remedial notices policy	1
3. Remedial notices explained	1
3.1 What is a remedial notice?	1
3.2 How and why are remedial notices used?	2
3.3 Who can EPA serve remedial notices on?	2
3.4 What are the different types of remedial notices?	2
3.5 What is the structure of remedial notices?	4
4. Applying remedial notices	5
4.1 Provision of drafts	5
4.2 Amending notice requirements	6
4.3 Applying multiple notices	7
4.4 Financial assurance	8
4.5 Review rights	8
4.6 Revoking remedial notices	9
4.7 Remedial notices and permit requirements	9
4.8 Breach of notice	9
5. Further Information	9



Environment
Protection
Authority Victoria



Publication 1418.4* December 2017.

* This replaces publication 1418.3 published May 2015.

Authorised and published by Environment Protection Authority Victoria.

200 Victoria Street, Carlton, 3053.

1300 372 842 (1300 EPA VIC)

This publication can be found online in PDF format at epa.vic.gov.au

1. Purpose of the remedial notices policy

The purpose of this policy is to ensure that remedial notices served by Environment Protection Authority Victoria (EPA) are applied consistently, constructively and effectively.

It defines:

- what they are
- why EPA uses them
- when they are applied

The policy reinforces remedial notices as tools that are:

- **remedial and preventative.** Remedial notices are served to prevent or remedy a range of non-compliances or likely non-compliances. They are designed to help businesses control and prevent future pollution events and to address non-compliances
- **clear and easy to understand.** Remedial notices include requirements that are easily understood and clear without being overly prescriptive. Requirements are focused on the outcome required of the recipient to address the observed non-compliance or likely non-compliance
- **constructive and achievable.** Remedial notices include one example of how the notice recipient may achieve compliance with the requirements of the notice. It is an example that demonstrates that the requirements are achievable. The example is not a legal requirement and does not have to be followed. This provides flexibility for businesses to consider alternatives that achieve compliance and suit their operations.

2. Scope of the remedial notices policy

The policy covers the following most commonly used remedial notices:

- pollution abatement notices (PANs) and notices to amend PANs
- minor works pollution abatement notices (MWPANs) and notices to amend MWPANs
- clean up notices (CUNs) and notices to amend CUNs

3. Remedial notices explained

3.1 What is a remedial notice?

A remedial notice is a written statutory direction that requires, by law, that a notice recipient undertake works or activities as detailed in the notice. For example, the direction may be to conduct a clean-up, stop works, install controls, or change a process or activity.

The *Environment Protection Act 1970* (EP Act) creates offences for failing to comply with the notice. The notice itself is not a form of punishment. A remedial notice is a legal record that EPA has required action to remedy a risk or prevent further harm.

3.2 How and why are remedial notices used?

Remedial notices are served to prevent or remedy a range of non-compliances or likely non-compliances. They are served when a non-compliance or unacceptable risk to the environment cannot be remedied in the presence of an EPA authorised officer.

Notices are used:

- to help businesses remedy, fix or clean up an existing impact or harm
- to help businesses prevent future pollution events, or manage environmental risks or hazards
- to address a non-compliance or likely non-compliance with an EPA approval, licence, permit, regulation or policy
- as a temporary tool to prevent or remedy non-compliance. They are not used as a tool to manage issues or risks that are ongoing.

EPA authorised officers are empowered to serve remedial notices where their observations enable them to conclude that a non-compliance or likely non-compliance has occurred.

In accordance with EPA's *Compliance and Enforcement Policy*¹, remedial notices are not usually served to address minor environmental risks.

EPA checks compliance with all notice requirements.

3.3 Who can EPA serve remedial notices on?

The EP Act states that a remedial notice may be served on a range of persons, including:

- the occupier of the premises
- any person who has caused or is likely to cause pollution
- any person who has permitted pollution to occur
- any person who emits noise considered to be unreasonable in the circumstances
- any person who appears to have abandoned or dumped industrial waste or a potentially hazardous substance
- any person who is handling industrial waste (or a potentially hazardous substance) in a manner that is likely to cause an environmental hazard.

EPA can serve CUNs on a company that has control of a subsidiary, related entity or associated entity that has caused pollution or abandoned or dumped any industrial waste or potentially hazardous substance. In this case the company must conduct clean-up and any ongoing management measures specified in the notice.

3.4 What are the different types of remedial notices?

The EP Act provides a number of different remedial notice types to cater for the different circumstances encountered by EPA authorised officers.

The notices differ in what they can be used for, how they can be used, when the notice takes effect, and the level of review or appeal available to the recipient.

Table 1 outlines the key features of the most common remedial notices. The scale, urgency and type of remedial measure, rather than the nature of the environmental issue itself, guide the type of notice to be used.

¹ EPA Victoria *Compliance and Enforcement Policy*. Publication 1388, December 2017.

Table 1: Key remedial notice features

Remedial notice	Key features
Pollution abatement notice (s31A)	<ul style="list-style-type: none"> • Does not require an urgent² response. • Comes into effect no less than 30 days after service of the notice. • Aims to prevent further occurrence of pollution or potential environmental risk through installation of risk controls and/or changes to on-site processes and practices. • Generally requires a response that results in permanent, long-term or systematic change/s to avoid a repeat of the non-compliance or likely non-compliance. • Can be reviewed by EPA within 14 calendar days of being served. • Can be reviewed by the Victorian Civil and Administrative Tribunal (VCAT), either within 21 days of being served or, if after this time, at the discretion of VCAT. • Generally does not run for longer than 18 months. <p><i>Amendment options</i></p> <ul style="list-style-type: none"> • Can be amended under section 31A(5) of the EP Act. • Allows compliance dates to be extended where the recipient can justify to EPA that an extension is required. • Allows notice requirements to be revoked or amended where the recipient can justify to EPA that change is required, or where EPA requires it. • Any amended requirement takes effect within 30 days of the notice of amendment being served. • Any amended requirement can be appealed to VCAT within 21 days of the notice of amendment being served.
Minor works pollution abatement notice (s31B)	<ul style="list-style-type: none"> • Is only applied where an urgent response is required and the estimated cost of compliance is less than \$50,000³. • Takes immediate effect. • Requires an immediate response that may result in a quick and often short-term or temporary change to on-site processes and practices. • Aims to prevent further occurrence of pollution or potential environmental risk through installation of risk controls and/or changes to on-site processes and practices. • Can be reviewed by the Supreme Court (within 60 days). • Generally does not run for longer than three months. <p><i>Amendment options</i></p> <ul style="list-style-type: none"> • Can be amended under section 31B(5) of the EP Act. • Allows compliance dates to be extended where the recipient can justify to EPA that an extension is required. • Allows notice requirements to be revoked or amended where the recipient can justify to EPA that change is required, or where EPA requires it. • Any amended requirement can be reviewed by the Supreme Court (within 60 days).

² Urgent is defined as pressing, compelling or requiring immediate action or attention; imperative (Online Macquarie Dictionary).

³ This total includes costs associated with construction or works only; lost revenue or opportunity costs are not included.

Remedial notice	Key features
Clean up notice (s62A)	<ul style="list-style-type: none"> • May be served on either the occupier of a site, the past or current polluter or the person who appears to have abandoned or dumped waste. • Can require, but is not limited to: <ul style="list-style-type: none"> • removal of industrial or prescribed industrial waste to an appropriate location • an investigation to determine the extent and impact of contamination • provision of documentation concerning a directed investigation • an occupier or polluter to clean up the site. • Aims to prevent further contamination and impact on beneficial uses through: <ul style="list-style-type: none"> • removal of waste • undertaking cleanup activities • ongoing management of pollution • altered handling, storage or location of industrial or prescribed industrial waste. • Takes immediate effect. • Can be reviewed by EPA within 14 calendar days of being served. • Can be reviewed by the Supreme Court (within 60 days). • Measures directed in a CUN must be undertaken notwithstanding anything to the contrary in the <i>Planning and Environment Act 1987</i> and/or the <i>Building Act 1993</i>. <p><i>Amendment options</i></p> <ul style="list-style-type: none"> • Can be amended under section 62A(1AB) of the EP Act • Allows compliance dates to be extended where the recipient can justify to EPA that an extension is required. • Allows notice requirements to be revoked or amended where the recipient can justify to EPA that change is required, or where EPA requires it. • Any amended requirement takes effect immediately. • Any amended requirement can be reviewed by the Supreme Court within 60 days of the notice of amendment being served. • Measures directed in an amended CUN must be undertaken notwithstanding anything to the contrary in the <i>Planning and Environment Act 1987</i> and/or the <i>Building Act 1993</i>.

3.5 What is the structure of remedial notices?

The purpose of a remedial notice is to bring the notice recipient back into compliance with the law and prevent future non-compliance. Notices are structured to ensure this purpose is met and that anyone can understand:

- why the notice was served
- what part of the law has not been or is likely not to be complied with
- what the specific risk or harm was that requires remedy
- what is required to remedy the situation and comply with the law
- one possible way that compliance could be achieved.

The structure of the notice partly reflects the process used by EPA authorised officers to legally serve a remedial notice; the officer considers information, puts it in the context of the law, determines whether action is required and, if so, develops a notice to require it.

Notices are structured to follow this logical approach by:

1. listing the observations that occurred during the site inspection or desktop assessment
2. linking the observations to the reasons for forming a view that a non-compliance or likely non-compliance occurred
3. listing requirements to address the actual or likely non-compliance based on the view formed
4. providing one way compliance with notice requirements may be achieved through a non-binding example.

3.5 What is the structure of remedial notices? *continued*

The structure of any remedial notice is:

EPA observations

This section details factual observations, relevant to the non-compliance or likely non-compliance, made by EPA officers during a site inspection or desktop assessment. The main purpose of recording observations is to substantiate that non-compliance exists or is likely to exist.

Reasons for view formed

This section interprets the observations and articulates why the EPA believes, on the balance of probabilities, that a non-compliance occurred or is likely to occur. The officer's view should be articulated with reference to the language of the EP Act.

Requirements – what outcomes are required to comply

This section lists the actions required for compliance. Notice requirements define the outcomes EPA requires of the recipient to remedy the harm or risk.

Requirements may instruct recipients to put in place suitable controls, cease a process, activity or use, modify a process or activity, undertake an investigation, or conduct a clean-up.

An example of how you can comply

This section provides one example of how the notice recipient may achieve compliance with the requirements of the notice. The example is not legally binding. It demonstrates that compliance with the notice is achievable and provides one way to comply. The notice recipient may implement another means that meets the same level of compliance.

4. Applying remedial notices

In accordance with EPA's public *Compliance and Enforcement Policy*, if an authorised officer observes a non-compliance or likely non-compliance that requires intervention and cannot be remedied in their presence, a remedial notice should be served.

This policy ensures that EPA's authorised officers apply remedial notices in an appropriate, consistent and fair manner. It also aims to ensure that the same process is applied uniformly across the state.

4.1 Provision of drafts

EPA's current practice is to issue a draft notice to the notice recipient prior to serving a remedial notice. The purpose of issuing a draft notice is to:

- ensure the recipient understands their requirements and obligations
- ensure the recipient understands when compliance must be achieved
- reduce the need for notice amendments
- reduce the number of notice recipients seeking to appeal their notice at VCAT.

In the case where works are urgent and the requirements of the notice must be complied with immediately, a draft notice will not be issued.

Comments on a draft notice must be made in writing, and be received by the authorised officer within three working days of the issue date of the draft notice.

Authorised officers often discuss compliance dates with the notice recipient during a site inspection. These discussions may occur when the officer observes a non-compliance or likely non-compliance that requires intervention and cannot be remedied in their presence.

Discussing compliance dates and requirements during a site inspection is particularly important where urgent works are required and an MWPAN needs to be served. As MWPANs require immediate action there is no time for drafts to be issued to the recipient. As no drafts can be issued, discussion during an inspection is the only avenue for authorised officers and notice recipients to ensure any proposed compliance obligations are understood and suggested compliance dates achievable.

The authorised officer who conducted the site inspection generally provides draft notices to a contact nominated by the site representative. Draft notices are either emailed or faxed, generally within three to five working days of the inspection.

A recipient of a PAN or CUN can provide written comment on:

- any compliance dates
- the intent of any requirements

or

- how easily understood the example of compliance is.

EPA will consider any comments received within three working days of issuing the draft notice. If no comments are received within this time, EPA will serve the remedial notice. An absence of comment from the notice recipient signals to EPA that:

- notice compliance dates are achievable
- the intent of all notice requirements is clear and understood.

Once a remedial notice is served it becomes a legal requirement to comply with the notice and penalties may apply for failure to do so.

If the recipient disagrees with the requirements of the notice they can seek review. Review options are available to notice recipients regardless of whether comments were, or were not, provided on the draft notice.

See section 4.4 of this policy for an overview of appeal options.

4.2 Amending notice requirements

Once a notice is served and takes effect, all requirements are legally binding and penalties may apply for non-compliance. While EPA is not required to amend a notice once it is in force, the EP Act does allow for amendments of PANs, MWPANs and CUNs.

Where EPA is satisfied that the circumstances warrant an amendment, the EP Act allows:

- compliance dates to be extended
- requirements to be amended

or

- requirements to be revoked.

A notice recipient may apply in writing to EPA for a notice amendment. For the application to be considered, it must provide adequate justification and information to support the case for any amendment.

Generally, EPA only makes amendments to requirements where the recipient can demonstrate that all efforts to comply with the notice requirements have been made and either:

- factors exist beyond their control (e.g. weather events) that mean compliance dates are not achievable and an extension of a time is required to achieve compliance

or

- changing one or more requirements will restore compliance with the law and deliver greater levels of control and a better longer term environmental outcome.

As applications for amendment are not assessed by the issuing officer, the application must provide sufficient information to allow the relevant EPA manager to understand why an amendment is necessary.

Applications for amendment must be received by EPA at least:

- 10 working days prior to the relevant compliance date/s for PANs and CUNs.
- three working days prior to the relevant compliance date/s for MWPANs.

Note that MWPAN requirements with immediate or extremely urgent deadlines within this three-day window cannot and will not be amended.

EPA will respond within five working days of receiving the application. Lodging an amendment application does not suspend or disable the requirements contained in the served notice. These requirements remain in force.

Applications must be addressed to the manager of the issuing EPA office (e.g. EPA Victoria Manager North East) with the subject line 'Application for notice amendment x' where x is the served notice number.

By providing drafts to notice recipients, providing notices that are clearly structured and comprehensible and having appropriate peer review processes in place, notice amendments should rarely occur. In exceptional circumstances EPA may initiate a notice amendment without an application from the notice recipient. This will generally relate to a clerical error or mistake rather than a substantive change to the notice.

Requests for substantive changes to notices are more likely to be initiated by an application from the notice recipient. On rare occasions, to address a substantive issue EPA may choose, rather than amending the notice, to:

- serve an additional notice

or

- serve a new notice and revoke the existing notice.

4.3 Applying multiple notices

Remedial notices are designed to address a single non-compliance or likely non-compliance per notice. This ensures that each notice:

- is focused on addressing a specific non-compliance or likely non-compliance
- is easy for the recipient to understand what is required to remedy the situation
- is easier to comply with
- can be more effectively monitored and enforced by EPA.

There may be situations where EPA serves multiple notices for the same type of non-compliance or likely non-compliance. Authorised officers who apply multiple notices are not restricted to using the same type of notice.

Common scenarios that require multiple notices are where:

1. **urgent and longer term works** are required to address the non-compliance or likely non-compliance. For example, the officer may serve a MWPAN to put in place an immediate fix and two other PANs requiring larger scale works
2. the remedy for actual or likely non-compliance can be broken down into manageable parts based on **different processes or activities** at the site
3. there are **different priorities for management** of works to address the non-compliance or likely non-compliance
4. it is not possible to include **only one example of compliance** because the notice contains too many varied requirements.

Ultimately, the division of notices will be based on the nature and type of issues associated with a process or activity on the inspected site.

4.4 Financial assurance

Financial assurance is a financial instrument such as a bank guarantee, certificate of title or trust deposit that is lodged by the duty holder and can be used by EPA for clean up in the event that the duty holder defaults on its obligations. Financial assurance may be required by EPA for high risk sites. Where EPA has determined the need for a financial assurance, it may be included as a requirement of a pollution abatement notice (PAN). Financial assurance can be submitted in a number of formats, as described in EPA's *Types of financial assurance* (publication 1595). The amount and type of financial assurance required is determined by EPA.

EPA can require a financial assurance for any site defined in the *Environment Protection (Scheduled Premises) Regulations 2017* as required to have financial assurance. Typically, for PANs, these are sites that meet the definition of either LO2: Contaminated sites - onsite soil containment; LO4: Contaminated sites - long term management; A01: Prescribed Industrial Waste Management; A05 - Landfills; and GO4 - Bulk Storage Facilities.

4.5 Review rights

In requiring a party to undertake works to comply with the law, fundamental checks must exist that enable the regulator and government to be accountable.

Notice recipients have two avenues for review of remedial notices served by EPA.

Review options within EPA

EPA's remedial notice review process gives notice recipients a timely and inexpensive way to have a PAN or CUN reviewed.

The review process involves the notice being reviewed by an EPA employee who did not make the original decision.

Applications for a review must be received by EPA within seven calendar days of the notice issue date.

EPA will inform the notice recipient of the review outcome within 14 calendar days of the notice issue date. This allows the notice recipient to seek an external review, if required.

For more information refer to EPA's *Remedial notice review policy* (publication 1531).

External review options

The EP Act and Supreme Court rules provide for notice recipients to review any remedial notice served by EPA. This allows the recipient to seek review on whether EPA had power to issue the notice, or whether the works or requirements set by EPA are appropriate.

Review options for each remedial notice are as follows:

PAN - pollution abatement notice

- Following service of the notice, the recipient has 21 days to apply for a review.
- Reviews can be lodged with VCAT.
- VCAT will review the PAN and may affirm, vary or set aside the notice.
- The notice is suspended until 30 days after VCAT's decision.

MWPAN - minor works pollution abatement notice

- Following service of the notice the recipient can, within 60 days, seek review by the Supreme Court.
- The review can include an order under Supreme Court Rules (Order 56) to restrain EPA from enforcing the notice.
- The notice remains in force unless an order is applied by the Supreme Court.

CUN - clean up notice

- Following service of the notice the recipient can, within 60 days, seek review by the Supreme Court.
- The review can include an order under Supreme Court Rules (Order 56) to restrain EPA from enforcing the notice.
- The notice remains in force unless an order is applied by the Supreme Court.

4.6 Revoking remedial notices

Remedial notices are an important tool to ensure environmental risks and harms are addressed by the recipient. They are a statutory direction requiring works to be completed by set dates to ensure compliance with the law. Remedial notices will be revoked once compliance with notice requirements has been achieved.

EPA will always check compliance with notice requirements. Compliance monitoring may occur during the life of the notice or on, or after, the final date of compliance. A field inspection will occur to ensure compliance has been achieved and an inspection report provided to the notice recipient. Inspections will generally occur within 10 working days of the final compliance date.

All notices require the notice recipient to provide the issuing officer with a report that demonstrates compliance with all notice requirements. This report must be signed by the managing director, the most senior executive of the company or a person authorised to speak on behalf of the notice recipient. It is a serious offence under the EP Act to provide false or misleading information to EPA.

The findings of the final compliance inspection and the report provided by the notice recipient form the basis of any decision to revoke a remedial notice.

On rare occasions where substantive changes to a notice are required, EPA may choose to serve a new notice and revoke the existing notice rather than amending it.

4.7 Remedial notices and permit requirements

EPA may require a notice recipient to meet an outcome, control a risk or manage harm. This may require them to undertake works to comply with the law. Often local planning provisions require a planning permit to construct a building or carry out certain works.

The EP Act (section 62A(1B)) and the *Planning and Environment Act 1987*, through the Victorian Planning Provisions (clause 62.02-1), allow compliance with remedial notices without the need to obtain a planning permit.

The requirement to obtain a building permit, under the *Building Act 1993*, still applies to MWPANs and PANs.

A building permit is not required under section 62A(1B) of the EP Act for CUNs.

4.8 Breach of notice

Where a notice recipient fails to comply with their notice(s) EPA will take enforcement action in accordance with EPA's *Compliance and Enforcement Policy*.

5. Further information

For further details on this policy, contact EPA Victoria on 1300 372 842 (1300 EPA VIC).