

Guideline

Environmental Protection Act 1994

The duty to notify of environmental harm

This guideline outlines the duty to notify of certain events, including those that may cause serious and material environmental harm, under ss. 320 to 320G of the Environmental Protection Act 1994.

Table of contents

1. Introduction	2
2. Summary of this guideline	2
3. When is there a duty to notify?	3
3.1 The duty to notify of serious or material environmental harm	3
3.2 Additional duty to notify when carrying out chapter 5A activities	3
3.3 How does the duty to notify arise?	4
4. The duty to notify employers and the administering authority	4
4.1 The duty of a person who is an employee, contractor, or agent to notify their employer	4
4.2 The duty of an employer to notify the administering authority	5
4.3 The duty of persons other than an employee to notify the administering authority	5
4.4 Reasonable excuse for failing to give written notice to the administering authority	5
5. The duty to notify owners or occupiers of affected land	5
5.1 The duty to notify owners or occupiers of affected land	5
5.2 How to give notice to owners or occupiers	6
5.3 Reasonable excuse for failing to give notice to owners or occupiers	6
6. What information is required in a written notice or in a public notice?	7
7. Penalties for failing to notify	7
7.1 Defence to failing to notify owners or occupiers	7
7.2 A written notice cannot be used as evidence in court proceedings	7
8. How to tell if activities are likely to cause or threaten environmental harm	7
9. Action not limited to when environmental harm is caused or threatened	8
10. More information on how to notify	8
10.1 Jointly providing notice to the administering authority or notice to registered owners or occupiers of affected land	9
10.2 Phoning the pollution hotline	9
10.3 Notification by emergency services	9
Further information	10
Appendix A—Table summarising the duty to notify	11
Appendix B—Scenarios involving the duty to notify	12

1. Introduction

This guideline outlines the duty to notify under the *Environmental Protection Act 1994* (EP Act). The duty to notify under the EP Act does not negate any notification requirements in other Queensland legislation or the common law. Similarly, because a person has met the notification requirements under other Queensland legislation does not mean the EP Act's notification requirements have been met.

Many activities may cause environmental harm. Pollution incidents and activities that cause or threaten serious or material environmental harm must be reported quickly to the administering authority, as well as to local governments so appropriate action can be taken to prevent or limit possible environmental harm. In some cases, the owner or occupier of the land must also be notified.

2. Summary of this guideline

The duty to notify requires a person or company to give notice where serious or material environmental harm, that is not authorised under the EP Act, is caused or threatened.

There is an additional duty to notify for chapter 5A activities (i.e. a petroleum, gas, geothermal or greenhouse gas activity licensed by an environmental authority) where the activity:

- causes or threatens a negative impact on the water quality of an aquifer that is not authorised under the EP Act; or
- causes the connection of two or more aquifers that is not authorised under the EP Act.

Where notification is required, notice must be given of the event, its nature and the circumstances in which the event happened.

Notification will be verbal, written or by public notice depending on who is notifying and being notified.

Where the duty to notify arises, a person may have a duty to notify one or more of the following, depending on their obligations (see Appendix A for summary of the different obligations):

- their employer or the person who has contracted or engaged their services;
- the administering authority¹; and/or
- owners or occupiers of affected land.

Employees are not required to notify owners or occupiers.

Notification is required to be given by a person who carries out an activity where either:

- their activities have caused or threatened the harm
- activities carried out by another person which are associated with their activities, have caused or threatened the harm.

Notification must be made within the timeframes outlined in the EP Act, unless the person has a reasonable excuse for not meeting these timeframes.

Note: It is necessary to read the full guideline to understand the detail of the duty to notify.

¹ If carrying out an environmentally relevant activity, the administering authority may be either the Department of Environment and Resource Management (DERM), the Department of Employment, Economic Development and Innovation (DEEDI) (for intensive agriculture) or the relevant local council. As a matter of good practice, both the local council and DERM should be notified. For any other activities, the administering authority is DERM.

3. When is there a duty to notify?

The duty to notify does not apply to an event that is authorised under EP Act. An event is authorised under the EP Act if it is authorised to be caused under:

- an environmental protection policy
- a transitional environmental program
- an environmental protection order
- an environmental authority
- a development condition of a development approval
- a standard environmental condition of a code of environmental compliance for a chapter 4 activity
- an emergency direction
- an accredited environmental risk management plan.

3.1 The duty to notify of serious or material environmental harm

A person has a duty to notify when—while carrying out any activity—the person becomes aware that an event has happened that causes or threatens serious environmental harm² or material environmental harm³ (an **environmental harm event**). The environmental harm event can be caused by:

- the act or omission of the person or another person carrying out the activity; or
- the act or omission of another person carrying out another activity, that is being carried out in association with the activity being carried out.

3.2 Additional duty to notify when carrying out chapter 5A activities

There is an additional duty to notify for a person who carries out a chapter 5A activity (such as a coal seam gas activity). That person must notify the administering authority where:

- the activity negatively affects (or is reasonably likely to negatively affect) the water quality of an aquifer; or
- the activity has caused the unauthorised connection of two or more aquifers.

For the purposes of this document such events are referred to as a chapter 5A aquifer event.

There may be a duty to notify an environmental harm event for a chapter 5A activity even if there is no chapter 5A aquifer event.

² **Serious environmental harm** is defined in the *Environmental Protection Act 1994* as environmental harm (other than environmental nuisance)—

- (a) that is irreversible, of a high impact or widespread; or
- (b) caused to an area of high conservation value or special significance; or
- (c) that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than \$50 000; or
- (d) that results in costs of more than \$50 000 being incurred in taking appropriate action to—
 - (i) prevent or minimise the harm; and
 - (ii) rehabilitate or restore the environment to its condition before the harm.

³ **Material environmental harm** is defined in the *Environmental Protection Act 1994* as environmental harm (other than environmental nuisance)—

- (a) that is not trivial or negligible in nature, extent or context; or
- (b) that causes actual or potential loss or damage to property of an amount of, or amounts totalling, more than \$5000 but less than \$50 000; or
- (c) that results in costs of more than \$5000 but less than \$50 000 being incurred in taking appropriate action to—
 - (i) prevent or minimise the harm; and
 - (ii) rehabilitate or restore the environment to its condition before the harm.

3.3 How does the duty to notify arise?

The duty to notify of an environmental harm event applies to all persons, including:

- holders of environmental authorities
- persons operating under a registration certificate, development approval or environmental code of compliance
- persons who carry out an activity for which an environmental approval is not required.

The duty to notify a **chapter 5A activity aquifer event** only arises where a person is carrying out a chapter 5A activity.

Events that give rise to a duty to notify—whether an environmental harm event or a chapter 5A activity aquifer event—are referred to in this document as a **notifiable event**. The duty to notify that arises from a notifiable event is referred to as the **duty to notify harm**.

A condition of an environmental authority, development approval, code of environmental compliance or other type of environmental approval (an **approval condition**) may include a separate requirement to notify the administering authority in certain circumstances. This is separate and in addition to the duty to notify harm. An approval condition that requires the operator to notify the administering authority will generally be more prescriptive and may require different information to be provided to that required under the duty to notify harm.

The notification requirement under an approval condition may also arise in circumstances that do not trigger the duty to notify harm (that is notification may be required under an approval condition for an event that does not trigger the duty to notify harm).

Where a person has a duty to notify harm under ss. 320–320G of the EP Act, they may also be required to give notice under an approval condition.

Where notice is required to be given for both the duty to notify harm and for a notification requirement under an approval condition, it may be possible to provide a single notice to the administering authority. In order to comply with both requirements the written notice must:

- include relevant information to satisfy the necessary requirements of the duty to notify harm and the relevant approval condition
- clearly indicate that the written notice is given in compliance with ss. 320–320G and the relevant approval condition
- be given within the earliest expiring timeframe.

While the EP Act does not contain a duty to notify the relevant local government, unless it is also an owner or an occupier, as a matter of good practice, notification is encouraged, especially for large scale events.

4. The duty to notify employers and the administering authority

4.1 The duty of a person who is an employee, contractor, or agent to notify their employer

A person who is an **employee**⁴ and causes or becomes aware of a notifiable event must notify their **employer**⁵ within 24 hours of becoming aware of the event.

⁴ That is a person who carries out an activity as part of their employment, as a contractor, or as an agent under the engagement of another person.

⁵ That is the person who has engaged them as an employee.

The duty to notify of environmental harm

The notice given to the employer does not have to be in writing but must contain sufficient details to provide notice of the event, its nature, and the circumstances in which it happened. An employee should always keep a record of when and to whom they gave notice of an environmental harm event.

If notice is given to the employer it is then the employer's responsibility to report the matter in writing to the administering authority no later than 24 hours after becoming aware of the event.

If the employer cannot be contacted, then the employee must notify the administering authority directly in writing no later than 24 hours after first becoming aware of the event.

4.2 The duty of an employer to notify the administering authority

If an employee reports a notifiable event to their employer, then the employer has a duty to provide written notice of the event to the administering authority no later than 24 hours after becoming aware of the event.

4.3 The duty of persons other than an employee to notify the administering authority

A person who is carrying out an activity may be neither an employer nor an employee. For example, they could be self employed (and not working as a contractor), or carrying out an activity as a hobby, outside of their work duties. In this case, if the person causes or becomes aware of a notifiable event, they must notify the administering authority within 24 hours of becoming aware of the event.

4.4 Reasonable excuse for failing to give written notice to the administering authority

A person will not be guilty of an offence for failing to comply with the duty to notify, where they have a reasonable excuse.

Whether an excuse is a reasonable excuse is a legal point to be decided by a Judge or Magistrate. It will depend on the circumstances and facts of each case and will be considered on a case by case basis. A concern that notification might tend to incriminate the person is not a reasonable excuse for not complying with the duty to notify.

An example of a reasonable excuse could be that the incident occurred in an isolated area of the state and it was not physically possible to provide written notice to the administering authority within 24 hours.

5. The duty to notify owners or occupiers of affected land

5.1 The duty to notify owners or occupiers of affected land

In addition to notifying DERM or DEEDI and/or the local council, a person may also be required to notify owners⁶ or occupiers⁷ of affected land⁸ where they are:

- an employer who has been given notice of a notifiable event; or
- a person who had a duty to notify the administering authority because they caused or became aware of a notifiable event (e.g. people who are self employed or carrying out the activity as a hobby).

The person must notify **owners or occupiers** as soon as reasonably practicable after becoming aware of the event.

⁶ An owner is either the registered owner of the land under the *Land Title Act 1994* or the lessee of the land under the *Land Act 1994*.

⁷ An **occupier** is a person who lives or works on the affected land.

⁸ **Affected land** is land on which an event has caused or threatens serious or material environmental harm. This may include the land on which an incident has occurred, or it may be land next to, abutting or even remote from the land on which the incident has occurred, e.g. where an incident causes contamination to water downstream of the incident.

The duty to notify of environmental harm

The duty to notify is necessary to ensure that any potentially affected persons have notice of the occurrence of an event which exposes them or their land to potentially adverse impacts. This gives these persons an opportunity to take the appropriate action to respond to any adverse impacts of an event.

Section 5.2 outlines how owners or occupiers can be identified and given notice.

5.2 How to give notice to owners or occupiers

Where the notifiable event occurs on the person's own land and does not spread beyond that land, there will be no owners or occupiers to notify under ss. 320–320G of the EP Act.

Where the notifiable event occurs on land which is not owned by the person, or spreads beyond the boundary of that land (e.g. enters a watercourse and flows downstream to your neighbour), there will be owners or occupiers to notify under ss. 320–320G of the EP Act.

In many cases, you will know your neighbours who are owners or occupiers and can choose any written form of communication to notify them of the notifiable event. However, where you do not know the owners or occupiers, you may choose to notify them by any of the following means:

- leaving the **written notice** with someone who is apparently an adult living or working on the affected land
- where there appears to be no-one present on the affected land, or the person has been denied access to the affected land, leaving the written notice at the affected land in a position where it is reasonably likely to come to an occupier's attention
- posting the written notice to the affected land (the notice may be addressed simply to 'The Occupier')
- doing a search of the Titles Registry⁹ to identify the owner registered on the title, and notifying the registered owner.

In addition, the owners or occupiers can be notified via public notice (e.g. a radio or television broadcast). The decision to give written notice or to give public notice should be considered from a commonsense approach keeping in mind the intention of the provision. The intention is to ensure persons likely to be exposed to any adverse impacts of a notifiable event have adequate time to respond to the event.

In circumstances where it is reasonable to believe that there are large numbers of registered owners or occupiers of affected land, or there is uncertainty as to whom the registered owners or occupiers of affected land may be, it would be appropriate to give public notice.

Public notice has not been defined and a commonsense approach should be adopted when deciding to give public notice. A public notice will generally be a radio or television broadcast to ensure there is rapid communication of the information. Public notice may also include the publishing of a written notice of the event in a newspaper or the erection of appropriately sized signs in the vicinity of the affected area.

5.3 Reasonable excuse for failing to give notice to owners or occupiers

Notice must be given to owners or occupiers (either by written notice or public notice) as soon as reasonably practicable after becoming aware of an event. However, a person will not be guilty of an offence for failing to comply with the duty to notify, where they have a reasonable excuse.

Whether an excuse is a reasonable excuse is a legal point to be decided by a Judge or Magistrate. It will depend on the circumstances and facts of each case and will be considered on a case by case basis. A concern that notification might tend to incriminate the person is not a reasonable excuse for not complying with the duty to notify.

⁹ See <www.derm.qld.gov.au/property/titles/searchregisters.html> for more information on how to search the Titles Registry.

An example of a reasonable excuse could be that the harm was threatened (not caused) and the person was able to quickly take action to remove the threat of harm, so no harm was actually caused.

6. What information is required in a written notice or in a public notice?

Where a written notice of an event that has caused or threatened serious or material environmental harm is required to be given to the administering authority or owners or occupiers the notice must contain details of:

- the event
- its nature
- the circumstances in which it happened.

The administering authority's standard notice Duty to Notify of Environmental Harm (EM468) may be used for providing written notice to the administering authority. The notice may also be used where a person is required to give written notice to owners or occupiers. The notice is available at <www.derm.qld.gov.au>.

Use of the administering authority's standard notice is not required by law, however providing the information specified in the template will ensure that the written notice requirements of ss. 320–320G are satisfied.

Where a decision is made to give public notice the notice should as a minimum contain the same information as required in a written notice.

7. Penalties for failing to notify

There are significant penalties that apply where a person fails to comply with the duty to notify. These penalties are listed in Appendix A.

7.1 Defence to failing to notify owners or occupiers

It is a defence to a charge of failing to notify owners or occupiers to prove that the person or employer made reasonable efforts to identify the affected land and give written notice to each owner or occupier.

Whether the person's efforts are considered reasonable is a legal point to be decided by a Judge or Magistrate. It will depend on the circumstances and facts of each case and will be considered on a case by case basis. In the past, courts have considered matters such as the capacity of the person to comply with the obligations and the physical or practical difficulty in compliance in deciding whether a person had a reasonable excuse.

7.2 A written notice cannot be used as evidence in court proceedings

Where a written notice advising of an incident is provided to the administering authority pursuant to the provisions of ss. 320–320G, s. 320G prevents the use of the notice as evidence in any court proceedings under the *Environmental Protection Act 1994* against a person in relation to the event about which the notice is given. However, the section does not prevent the use of other evidence obtained because of the written notice in legal proceedings against the person or the employer.

8. How to tell if activities are likely to cause or threaten environmental harm

It is not possible to comprehensively list all activities or events that are likely to cause or threaten serious and material environmental harm. However, the following information and the scenarios at Appendix B may be used as a guide for people to know when an activity is likely to give rise to the duty to notify.

Emergency incidents such as those involving the release of hazardous materials from fires, vehicle accidents, and spillage of explosive, flammable or toxic chemicals often involve public safety matters and require an immediate response from emergency services. These types of incidents may also threaten or cause serious or material environmental harm.

In some circumstances these events may not represent a widespread threat to life and property, and are therefore categorised at a lower level than more serious incidents that require an immediate response. Incidents that are categorized at a lower level may still cause or threaten serious or material environmental harm.

Whether an act or omission leading to an incident or event is likely to cause or threaten serious or material environmental harm will depend on the scale and nature of the impacts on the receiving environment.

The scale and nature of the impacts from these incidents will depend on the type, toxicity and quantity of materials released and specific circumstances of the location such as terrain, proximity to residences and the sensitivities of the receiving environment.

Short and long term impacts need to be considered including contamination of land and waters, toxic effects on biota, such as plants and animals, and public health risks from exposure to chemicals.

Where a person is in doubt as to whether their activities or the activities of another person are likely to have caused or threatened serious or material environmental harm, it is better to be cautious and provide notice in accordance with this guideline, and be in compliance with the duty to notify.

Sometimes the full impact of an event is not known until some time after the event. In these circumstances, the duty to notify will trigger as soon as the person becomes aware that the event is now threatening serious or material environmental harm.

9. Action not limited to when environmental harm is caused or threatened

Where a person undertakes an activity or becomes aware of the actions of another person that have caused environmental harm which falls short of serious or material environmental harm, they may still be required to take action to prevent the continuance of environmental harm or mitigate the environmental harm.

The requirement to take such further action may arise because of a condition of an environmental authority, development approval, code of environmental compliance or other type of environmental approval—or may arise under the general environmental duty.

Actions taken at an early stage in response to an incident may result in the environmental harm falling short of the threshold at which it would be considered to have caused or threatened serious or material environmental harm.

10. More information on how to notify

Where local government is the administering authority, written notice is to be provided to the relevant local government by email, fax or registered post to the appropriate email address, fax number or postal address.

Where written notice is required to be given to DERM, the written notice should be clearly marked 'Duty to notify of environmental harm' if DERM's standard notice is not used.

Written notification to DERM may be given by one of the following methods:

- Email: <pollutionhotline@derm.qld.gov.au> Include 'Duty to notify of environmental harm' in the subject line and including details of the event, its nature and the circumstances in which the event happened or attaching a completed copy of the notice Duty to Notify of Environmental Harm (EM468).
- Fax: (07) 3896 3342

The duty to notify of environmental harm

- By registered post of a written notice with details of the event, its nature and the circumstances in which the event happened or a completed copy of the notice Duty to Notify of Environmental Harm to:

Permit and Licence Management
Implementation and Support Unit
Department of Environment and Resource Management
Level 3, 400 George Street
Brisbane QLD 4000

10.1 Jointly providing notice to the administering authority or notice to registered owners or occupiers of affected land

In some circumstances the duty to notify may arise for a number of different people concerning the same event. In such circumstances a number of persons may comply with their individual duty to notify by jointly issuing one notice advising of the event where this can be done within the timeframes. To comply with the duty to notify the notice should clearly state on whose behalf the notice is given.

If the notice does not clearly state by whom the notice is given, then it may not be sufficient to verify at a later date that a person has complied with their statutory requirement to give notice.

10.2 Phoning the pollution hotline

In addition to the written notice, if a person becomes aware of an event which has caused or threatened to cause serious or material environmental harm, the person should immediately call the pollution hotline on **1300 130 372** and report the matter. This allows for an appropriate response to be initiated for matters involving serious or material environmental harm.

It is also good practice to always notify the relevant local government area in which the event occurs.

10.3 Notification by emergency services

For major incidents that require response from emergency services such as the Queensland Police Service or Queensland Fire and Rescue Services (QFRS), procedures are in place for QFRS to notify the administering authority through the pollution hotline. Where notification is given by QFRS, officers of the administering authority then provide advice on appropriate response actions and make decisions on whether it is necessary for officers of the administering authority to attend.

Further information

The latest version of this publication can be found at <www.derm.qld.gov.au> using the publication number EM467 as a search term.

Disclaimer

While this document has been prepared with care it contains general information and does not profess to offer legal, professional or commercial advice. The Queensland Government accepts no liability for any external decisions or actions taken on the basis of this document. Persons external to the Department of Environment and Resource Management should satisfy themselves independently and by consulting their own professional advisors before embarking on any proposed course of action.

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Appendix A—Table summarising the duty to notify

Notification				Relevant section	Penalty (penalty units)	
By:	To:	Within	In writing?		Environmental harm event (s. 320(1)(a))	Chapter 5A activity aquifer event (s. 320(1)(b))
Employee	Employer	24 hours of becoming aware of the event ¹⁰	No. Can be verbal	320B	100	100
Employee	Administering authority (if employer is not available)	24 hours of becoming aware of the event	Yes.	320B	100	100
Employer	Administering authority	24 hours of becoming aware of the event	Yes.	320D	500	100
Employer	Owners or occupiers	As soon as reasonably practicable of becoming aware of the event ¹¹	Yes and/or by public notice.	320D	500 ¹²	100
Another person	Administering authority	24 hours of becoming aware of the event	Yes.	320C	500	100
Another person	Owners or occupiers	As soon as reasonably practicable of becoming aware of the event	Yes and/or by public notice.	320C	500	100

¹⁰ Unless there is a reasonable excuse for not meeting the timeframe. A concern that notification might tend to incriminate the person is not a reasonable excuse.

¹¹ Unless there is a reasonable excuse.

¹² It is a defence to a charge of failing to notify owners or occupiers to prove the person or employer made reasonable efforts to identify the affected land and give written notice to each owners or occupiers. What would be accepted as reasonable efforts would depend on the circumstances and facts of each case and will be considered on a case by case basis.

Appendix B—Scenarios involving the duty to notify

Determination of whether an activity has caused or threatened serious or material environmental harm will be dependant on a wide range of variable factors including:

- chemical characteristics
- toxicity and reactivity
- amount or volume of release
- extent of area impacted
- pathways for contaminant release and spread
- weather conditions at the time of the event or incident including exacerbating or mitigating factors like rain or temperature
- proximity of urban areas
- proximity, size, value and sensitivity of adjacent environmental areas.

The following scenarios may be used as a general indication of when activities are likely to cause or threaten serious or material environmental harm, when the duty to notify is likely to arise and what steps are required to ensure a person has discharged their duty to notify.

Scenario 1

A local government sewage treatment plant located within an urban area fails during a major flood and an unknown quantity of untreated effluent is released into the surrounding environment including a local waterway. In such a scenario it is highly likely that the release would cause or threaten serious or material environmental harm, and consequently the duty to notify would arise.

Under the circumstances, there may be a large number of owners or occupiers of affected land and it may be difficult to identify them. In such circumstances a decision to give notice to registered owners and occupiers of affected land by way of public notice would be appropriate. It would be appropriate to give public notice through a series of local press notices, radio and television broadcasts. Best practice would also include the use of temporary signs erected in the immediate vicinity providing notice of the event, its nature and the circumstances around the event.

If the local water supply for a downstream town was sourced from the impacted waterway, then best practice would require additional measures be taken to ensure appropriate public notice is given to occupiers of affected land. Appropriate notice in such circumstances would include providing written notices to the operator of the water treatment plant and other water users, in addition to press notices, public broadcasts and use of signs.

Scenario 2

A truck carrying a container of regulated waste has arrived at its destination and the truck driver has become aware that a substantial volume of waste has leaked from the transported container along the route from the point of origin. The nature of the material and volume lost is such that it is likely to cause or threaten serious or material environmental harm.

At the point at which the driver becomes aware of the event (the leakage of the material) the driver is under a duty to notify. If the driver is an employee he/she must notify his/her employer no later than 24 hours after becoming aware of the event. If the driver is **another person** he/she would have a duty to notify the administering authority in writing no later than 24 hours after becoming aware of the event and an additional duty to notify owners or occupiers as soon as practicable.

The duty to notify of environmental harm

If the driver is an employee, the employer will have a duty to notify the administering authority in writing no later than 24 hours after becoming aware of the event and an additional duty to notify owners or occupiers as soon as practicable.

In such a scenario it may be difficult to identify and notify all registered owners or occupiers of potentially affected land and consequently a decision may be made to provide public notice. In the circumstances an appropriate public notice may consist of a radio and/or television broadcast. The decision to broadcast the notice locally or to a larger audience would depend on factors including the scope of the spill; area over which registered owners and occupiers of affected land are likely to be affected; and the nature of the material that was lost. If the material has leaked into the roadside drains, and pedestrians and the owners and occupiers of properties adjacent to the road are potentially affected, it may also be necessary to erect temporary signs and undertake a doorknock and letterbox drop along the route where the material was lost.

Scenario 3

An explosion and subsequent fire occurs at a chemical factory resulting in the output of a large volume of noxious odours, fumes and gases causing or threatening serious or material environmental harm. In such circumstances the duty to notify the administering authority and duty to notify owners or occupiers will arise. The contaminants would be initially airborne and likely to disperse over a wide area—subsequently resulting in a large number of potential owners or occupiers to whom notice would be required to be given. The employer must, as soon as reasonably practicable after becoming aware of the event (unless the person has a reasonable excuse), give public notice of the event, including details of its nature and the circumstances in which it happened, to owners or occupiers in the area. Under such circumstances it would be appropriate to give public notice by press notices, and radio and television broadcasts to provide notice to the widest possible audience in the shortest possible timeframe.

Scenario 4

A vessel is tied up at a wharf in a port area and awaiting refuelling. A road tanker has arrived at the wharf to refuel the vessel. A second vehicle equipped with a pump specifically designed for pumping fuel is also onsite to pump the fuel from the tanker to the vessel. During the refuelling the fuel hose comes away from the fuel inlet coupling and a large amount of fuel is pumped directly into the river.

There are mangroves and other sensitive marine and estuarine environments nearby exacerbating the effect of the incident and distribution of contaminants. The effect of the incident will be influenced by factors such as prevailing currents, tides, and weather and amount of fuel lost. A fuel pump delivering fuel at a rate of 1000 litres per minute is likely to dispense a substantial amount of fuel within a short time and will likely cause or threaten serious or material environmental harm.

In such circumstances the duty to notify the administering authority and owners or occupiers will arise.

The crew of the vessel supervising the refuelling, the pump operator and the tanker driver could all be employees and so have a duty to notify their respective employers within 24 hours of becoming aware of the event. Their respective employers would have 24 hours from when they were notified of the event to notify the administering authority and an additional duty to notify owners or occupiers as soon as practicable.

Depending on the state of the tide, how quickly booms can be put in place and other factors, it may be possible to individually identify and notify owners or occupiers. Alternatively a decision may be made to provide public notice by erecting temporary signs, placing press notices and making public broadcasts.