

# *Water Resources Policy*

*Policy #2004/1*

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## ENFORCEMENT POLICY FOR THE *WATER MANAGEMENT ACT 1999*

### Interim Policy

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Water Resources Division

Department of Primary Industries, Water and Environment

*September 2004*



## **Acknowledgments**

The Water Resources Division within the Department of Primary Industries, Water and Environment (DPIWE) wishes to acknowledge that it has drawn much of this policy document from “Enforcement Policy for the *Environmental Management and Pollution Control Act, 1994*” prepared by the Environment Division in DPIWE.

## **Further information**

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## **1. Purpose of this Policy**

This policy applies to the enforcement of the provisions of the *Water Management Act 1999* (“The Act”) and its subordinate legislation by the Department of Primary Industries, Water and Environment (DPIWE). This policy sets out the principles, criteria and measures that DPIWE will use to enforce the provisions of the Act.

DPIWE is currently developing a whole-of-Agency approach to enforcement matters and this policy will be reviewed in due course to take account of the outcomes of this work. Hence, it has been labelled as an “interim policy”.

## **2. Application**

This policy is to guide decision-making about the application of enforcement measures under the Act. It does not relate to decisions about the suite of other instruments and tools within the Act that can be used to achieve compliance in partnership with water users and dam permit holders.

This policy applies to the way in which Notices and Directions issued under the Act, Water Infringement Notices and court action can be used to ensure that if a breach of the Act has occurred the Department can appropriately address the issue, require remediation and prevent occurrences of the breach.

## **3. The Legislative Framework for Water Resource Management in Tasmania**

The DPIWE has responsibility for the administration of Act and its subordinate legislation. The Act provides for the use and management of Tasmania’s freshwater resources having regard to the need to:

- Promote sustainable use and facilitate economic development of water resources;
- Recognise and foster the significant social and economic benefits resulting from the sustainable use and development of water resources for the generation of hydro-electricity and for the supply of water for human consumption and commercial activities dependent on water;
- Maintain ecological processes and genetic diversity for aquatic ecosystems;
- Provide for the fair, orderly and efficient allocation of water resources to meet the community’s needs;
- Increase the community’s understanding of aquatic ecosystems and the need to use and manage water in a sustainable and cost-efficient manner; and
- Encourage community involvement in water resources management.

Section 6(2) of the Act states that it is the obligation of the Minister, the Secretary, a water entity and any other person on whom a function is imposed or a power conferred under this Act to further the objectives detailed above as

well as the objectives of the Resource Management and Planning System of Tasmania.

The State Policy on Water Quality Management 1997 is the chief vehicle for ensuring the sustainable management of the State's water resources through the protection and enhancement of water quality. Enforcement in relation to water quality breaches is mainly dealt with through the provisions of the *Environmental Management and Pollution Control Act, 1994*.

The main purpose of enforcement is to achieve compliance with the legislation by:

- identifying breaches of the Act;
- bringing them to the attention of the offender;
- applying penalties (either directly or through the courts); and
- providing deterrence.

Enforcement should be taken by the Crown (through DPIWE) where required, in the public interest to protect the State's water resources from the impact on the rights of other water users and the environment and to minimise the risk of a dam safety incident. Enforcement is one of a range of responsibilities under the Act, which DPIWE administers. Other responsibilities include developing water management plans, licensing water use, issuing permits for undertaking dam works, provisions for the safety of dams, establishing water districts and trusts, metering, administering regulations and policies.

Discretion exists as to when enforcement is required and which measures are appropriate for particular situations. This Policy is intended to guide the making of decisions in relation to enforcement.

## **4. Principles**

The following principles will be taken into account when considering whether enforcement action is required in the public interest:

### **4.1. Outcome Focus**

The objective of all enforcement action will be to achieve a defined and measurable outcome.

### **4.2. Proportionality**

Enforcement action should balance the seriousness of the offence against the other criteria for enforcement referred to in Section 5.

#### **4.3. *Responsiveness and flexibility***

Decisions on enforcement action will be responsive to the situation in both timing and extent with flexibility retained to respond to additional information or change in circumstances.

#### **4.4. *Transparency and clarity***

All non-trivial breaches will be subject to enforcement consideration and this will be communicated to the alleged offender. A transparent process will determine the type of enforcement measure to be taken, so that any disagreement can be based upon fact. The enforcement action will be clear to enable all parties to understand what constitutes compliance.

#### **4.5. *Equity, fairness and consistency***

Respect for the law requires that it be administered in a way that is fair and consistent.

#### **4.6. *Due process***

Enforcement action must be carried out within the limitations of the powers conferred under the Act and the processes provided under the Act.

#### **4.7. *Cost-effectiveness***

As part of a continuum of administrative measures, enforcement powers are to be exercised when they are appropriate to produce the desired outcome in a cost-effective manner. The desired outcome includes meeting the other principles in this policy and the implications for the administration of the Act more generally (including consideration of deterrence) as well as the water management and environmental outcomes in a particular case.

#### **4.8. *Compatibility with other policy***

Water resource management is carried out within the context of wider Government policy and other statutory requirements (both internal and external). In particular enforcement should be carried out in a seamless manner in conjunction with policies on environmental management, natural resource management and sustainable development.

### **5. General Criteria for Enforcement**

The need and type of enforcement action will be considered on the basis of the following general criteria and applying the aforementioned principles.

- The significance of an incident needs to be considered in terms of whether it has significant impact and what action is deemed appropriate. A significant impact is considered to include the following circumstances:

- A dam safety issue;
  - An environmental impact has been determined;
  - Environmental harm or nuisance as defined under the Act has occurred;
  - Relevant statutory approvals have not been obtained.
  - An action has a significant impact on another person or entity.
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- The seriousness of the incident having regard to the damage to the environment caused or likely to be caused, impact on people and the implications for the administration of the Act more generally. For example, seriousness would include severity, extent, duration and location of that damage or potential for damage to the water resource or the undermining of an administrative process designed to prevent environmental harm.
  - Whether there has been a clearly identified prima facie breach of the Act.
  - Whether there has been failure to comply with any formal request, lawful direction or notice given by an authorised officer or delegate of the Minister.
  - The culpability of the person, whether it be a corporation or employee or individual person, including any mitigating or aggravating circumstances.
  - The previous history of the person, with particular regard to water use and management, including the frequency of the offence.
  - The level of public concern.
  - The prevalence of the alleged offence and the need for deterrence of the offence.
  - The precedent which may be set by any failure to take enforcement action.
  - Due diligence procedures already in place and used by the person.
  - Voluntary actions by the person to mitigate any adverse effects on the water resource, other users or the environment and put in place mechanisms to prevent any recurrence.
  - The measures necessary to ensure compliance with the Act and those most likely to achieve the best water management outcome.
  - Failure to notify or delayed notification of the incident by the person to the DPIWE (Water Resources Division). Note that there is a statutory requirement under the Act to notify the Secretary.
  - The co-operation given to DPIWE by the person and willingness to commit to appropriate remedial action.

- The length of time since the incident.
- Where more than one party has been involved, whether enforcement measures have been taken or are intended against others in relation to the same incident.
- The enforcement approach adopted in relation to similar incidents in the past taking into account the specific circumstances;
- The age, intelligence, antecedents, background, physical or mental health of the offenders and witnesses; and
- Whether there were any aggravating or mitigating circumstances.

## **6. Enforcement Measures**

The decision as to whether to take enforcement action and which enforcement measure is the most appropriate will be based upon the general criteria listed in section 5 as well as the specific criteria listed under each of the following enforcement measures. The process of selecting the enforcement measure(s) should follow the systematic process outlined in the Department's internal guidelines and the reasons for the choice of enforcement measures should be clearly documented. While the criteria for enforcement will vary on a case-by-case basis, the primary aim for taking enforcement action is to achieve the desired resource management outcome.

If an investigation finds that an offence under the Act or its subordinate legislation may have occurred and either negotiation has failed or is deemed inappropriate, then enforcement action will be considered in the form of one or more of the following measures:

### **6.1. Warnings**

A warning is not a sanction in itself, but will convey to the recipient that they have done something wrong and put them on notice that a sanction may be applied in the future. A warning may be an appropriate response where:

- the environmental damage or potential damage is minimal;
- the breach of an administrative instrument or legislative provision is of a minor or technical nature;
- a warning is fair and appropriate having regard to the history of the offender and nature of the breach;
- environmental harm may occur if action is not taken;
- the matter is one which can quickly and simply be put right; or
- the actions have an impact on the water rights of other water users that is minimal.

In deciding whether a warning is an adequate response the general criteria for enforcement will be considered and, in particular the compliance history of the

person, and the steps taken to ameliorate the damage and prevent any recurrence.

While a warning may be issued orally, it will be followed up in writing to ensure that a person clearly understands what actions they are required to undertake to fulfil their obligations under the Act. Written warnings reiterate and reinforce an oral warning while formally documenting the incident and the subsequent direction(s) for cessation of an activity and/or actions for remediation or repair.

Where a warning is not complied within specified period, further enforcement measures may be pursued.

### **6.2. Notices and Directions under the Act**

Notices and directions issued under the Act impose requirements for the protection of the environment and dam safety on a person responsible for an activity that may cause an adverse effect on water resources, other water users or the environment in two ways:

1. To assist with compliance of the Act by dictating steps to prevent, control and reduce adverse impacts within a specified time period. This may involve working collaboratively with the person(s) responsible for the activity to minimise the risk of an incident occurring. This is the compliance role of a notice under this Act and is NOT part of this Policy.
2. To require the responsible person to cease an activity causing potential or actual adverse impacts on water resources, other water users or the environment and to take remedial action within a specified period. This is the enforcement role of a notice under the Act and relevant to this Policy.

Examples of Notices issued under the Act include:

- Section 147 – provides for the Minister to serve a notice on the owner of a dam, the occupier of land or the person who constructed a dam directing them to take such action as specified in the notice
- Section 165H – provides for a notice to be issued to the owner of a dam to provide information to ensure a dam is in a safe condition.

Examples of Directions issued under the Act include:

- Section 165L – provides for the Minister to give an owner of a dam a written direction relating to works, investigations and reporting to be undertaken in relation to the maintenance, surveillance or decommissioning of a dam. The owner of a dam may also be directed to provide a plan of action in case of a dam safety incident.
- Section 246 – provides the power for authorised officers to direct the owner or occupier of the land to undertake such actions as warranted (for example installing a meter, direct them to not undertake the activity again).

Applying the general criteria in section 5 with respect to enforcement action, a notice under the Act could be served on persons responsible for an incident by the an authorised officer or delegate of the Minister if any of the following specific criteria have been met:

- action is necessary to preserve the water rights of others; or
- environmental harm is being or likely to be caused; or
- the risk of an incident arising from the dam works has eventuated or is likely to eventuate; or
- to require the person responsible for the activity that may have an adverse effect on the water resource, other water users or the environment to cease an activity and to take remedial action within a specified time period.

Section 304(1)(e) provides for regulations to be made to recover the costs associated with issuing a notice or direction under the Act. This fee is not a fine or a penalty but a means of recovering costs.

Failure to comply with a Notice or Direction under the Act is an offence for which, as for other offences against the Act, a Water Infringement Notice can be issued requiring payment of the relevant prescribed penalty. Failure to comply with a Notice or Direction under Part 8A would normally lead to a prosecution without the issuing of an Infringement Notice. It should also be noted that acceptance of a Notice or Direction under the Act does not, except in the case of a Water Infringement Notice, preclude a prosecution or civil proceedings from being pursued in relation to the subject matter of the Notice or Direction. Section 253 of the Act precludes the bringing of proceedings for an offence in respect of which a Water Infringement Notice has been issued, accepted, and not withdrawn.

### **6.3. Civil Enforcement**

Civil enforcement proceedings may (with leave) be taken before the Resource Management and Planning Appeal Tribunal under section 264(1) of the Act where a person:

- has engaged, is engaging, or is proposing to engage in conduct in contravention of the Act; or
- has refused or failed, is refusing or failing, or is proposing to refuse or fail to take action required under the Act.

The Tribunal is the principal forum for enforcing planning and environmental controls in Tasmania. Leave to proceed may be sought by and given to the Secretary, a water entity or anyone who in the opinion of the Tribunal has “a proper interest” in the matter.

The orders available to the Tribunal in such proceedings include orders in the nature of injunctive relief, under which the respondent can be ordered, either temporarily or permanently, to refrain from the act or course of action that

constitutes a contravention or potential contravention of the Act. They also include the power to order compliance with a Notice or Direction issued under the Act, or to make good a contravention of or failure to comply with the Act. The range of orders available to the Tribunal is set out in sections 264(6) and 266.

Civil enforcement proceedings should be considered where –

- swift or urgent action is needed to prevent significant adverse impacts on a water resource(s), other water user(s) or the environment or dam safety risk, and other potential responses are not considered adequate to deal with the threat; or
- other types of enforcement action have been taken, without success; or
- other types of enforcement action are seen as providing an insufficient or insufficiently timely response; or
- the proceedings give access to relief which is not be available as an adjunct to prosecution, or by other means.

#### **6.4. Prosecution by Water Infringement Notices (WIN)**

The Act provides for certain offences to be dealt with by way of a WIN, demerit points against a licence and the payment of a fine. A WIN can be issued only for offences for which a penalty is prescribed by the *Water Management Regulations 1999*.

The recipient of a WIN has the option of paying the fine or, by not paying the fine, electing to have the matter dealt with by a court. A prosecution can be initiated if a WIN is not paid. There is also the option, provided by Section 255 of the Act to withdraw a WIN and proceed to a prosecution.

After applying the general criteria outlined in section 5, the following specific criteria will be considered when deciding whether a WIN is an appropriate form of enforcement:

- the offence is one for which a penalty is prescribed under the *Water Management Regulations 1999*;
- the facts are apparently indisputable;
- the evidence discloses a prima facie case against the person with reasonable prospects of success should the matter go to court;
- the breach is relatively easily remedied; and
- issuing of a WIN is likely to be a deterrent.

Repetition of behaviour that attracts a WIN penalty may signify the need for tougher enforcement and prosecution may be pursued in these situations.

#### **6.5. Prosecution by Court Action**

Prosecutions will be initiated, consistent with the principles and criteria of this Policy, where there is evidence of prima facie breaches of the Act and on a case-by-case analysis prosecution appears warranted. Prosecution will be

pursued where in the opinion of an authorised officer (S.295), it is the most appropriate response to achieve the best environmental outcome. The Director of Public Prosecutions will advise the Minister's delegate whether the available evidence supports court action.

After applying the general criteria in section 5, the following specific criteria for deciding to initiate a prosecution will be considered:

- whether the issue of court orders are necessary to prevent a recurrence of the offence;
- the availability and effectiveness of any alternatives to prosecution;
- whether there are any counter-productive features to a prosecution;
- whether the consequences of a conviction would be unduly harsh or oppressive.
- the length and expense of a court hearing;
- whether the offender had been dealt with previously by non-prosecutorial means;
- whether the breach is a continuing or second offence;
- whether proceedings are to be instituted against others arising out of the same incident;
- whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- the likely outcome in the event of a finding of guilt; and
- whether a prosecution can be commenced in time (ie within 3 years after the commission of the alleged offence).

Some general considerations in selecting the appropriate defendant for prosecution are:

- who was primarily responsible for the offence – that is, who committed the act, who formed the intention and who created the material circumstances leading to the breach;
- where a person is liable because the law creates strict liability – what was the role of the potential defendant; and
- the likely effectiveness of court orders against the potential defendant.

## **7. Monitoring and Review**

Information about the outcomes of applying this Policy will assist DPIWE with keeping the policy up to date, relevant and effective. The experiences learned in implementing the policy can be used to:

- evaluate the Policy;
- increase the effectiveness of guidelines;
- ensure internal accountability;
- create deterrence; and
- ensure public accountability.

This interim policy will be reviewed once DPIWE has developed a whole-of-Agency approach to enforcement matters.

## **8. Communications**

Details about enforcement activities will be published on the DPIWE's website and in the Department's Annual Report.

## **9. Guidelines and protocols**

Internal guidelines and protocols on the practical implementation of this Policy, including protocols for investigating allegations, enforcement decision-making and prosecution, will be prepared for use by DPIWE officers. These will be continually monitored and reviewed in relation to their effectiveness and relevance.