

Environmental Best Practice Guidelines 1.

Legislative and Policy Requirements for Protecting Waterways and Wetlands when Undertaking Works

There is a raft of legislative and policy instruments which do have, or may have, some bearing upon the regulation of works undertaken within our wetlands and waterways. This document provides a brief outline of these regulatory requirements. Best professional judgement should be used by local government personnel in determining their applicability to individual cases. Where required, further advice on interpretation and implementation is available from the nominated agencies.

1. Legislation and policy

Tasmanian Resource Management and Planning System (RMPS)

Tasmania's RMPS is an integrated planning and environmental management framework to achieve sustainable outcomes from the use or development of the State's natural and physical resources. Sustainable development means

...managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while -

(a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and

(c) avoiding, remedying or mitigating any adverse effects of activities on the environment.
(Clause 2, Schedule 1, Land Use Planning and Approvals Act 1993)

Local government must ensure that planning and environmental decisions within its jurisdiction promote sustainable development of water resources.

Land Use Planning and Approvals Act 1993 (LUPAA 1993)

Local government regulates land use and development through planning schemes and a planning permit system. Planning schemes must seek to further the RMPS objectives and must be prepared in accordance with state policies (the State Policy on Water Quality Management 1997 being the key policy for wetlands & waterways). These requirements are achieved in some recent planning schemes through incorporation of a Wetlands & Waterway Schedule which specifies the objectives and standards for development in, or near, wetlands and waterways. Provisions in older planning schemes that predate, and are inconsistent with, a State Policy are void to the extent of any inconsistency.

Local government must observe, and enforce the observance of, the planning scheme in respect of all use or development undertaken within the area covered by the scheme.

"development" under LUPAA 1993 includes

... (c) the construction or carrying out of works; ...

"works" includes

...any change to the natural or existing condition or topography of land including the removal, destruction or lopping of trees and the removal of vegetation or topsoil, but does not include forest practices, as defined in the Forest Practices Act 1985, carried out in State forests.

where "land" includes

(a) buildings and other structures permanently fixed to land; and

(b) land covered with water; and

(c) water covering land; ...

A planning permit is required before commencement of any use or development which, under the provisions of a planning scheme, requires planning approval. The approvals process must ensure that land-use and environmental effects arising from the use or development do not conflict with planning scheme requirements (including development standards such as those contained within the Wetlands & Waterway Schedule), state policies, or environmental regulations.

Examples of uses and developments that may require a planning permit include works in wetlands and waterways that involve:

- stormwater and erosion control
- clearing of debris and vegetation from streams and stream banks
- development of drainage and riverworks schemes (not routine maintenance)
- stream channel modifications
- roads and pipeline stream crossings
- structures such as pump stations on banks
- off-stream storages of less than 1ML
- works ancillary to dam construction such as access roads (not dams themselves).

Variations exist between individual planning schemes as to what activities are considered to be exempt from the requirement to obtain a planning permit. Some specified activities are exempt in all planning schemes - i.e. most dam construction and routine operational & maintenance works undertaken by water entities - due to the operation of other legislation.

Local Government Act 1993 (LGA 1993)

Works in wetlands and waterways may be subject to council requirements as detailed in council by-laws and/or abatement notices.

A council has a general power under Part 11 of the LGA 1993 to make by-laws in respect of any act, matter or thing for which a council has a legislated function or power. By-laws may include activities such as the execution of works in watercourses and riparian zones, requiring such works to be undertaken by an appropriately qualified person in the manner specified by council.

Abatement notices can also be issued by council where it is satisfied that a nuisance exists. These notices detail actions that need to be taken and the timeframes for implementation. Under section 199 of the Act, a nuisance includes anything that causes, or is likely to cause, danger or harm to the health, safety or welfare of any person; a risk to public health; or an activity that gives rise to unreasonable or excessive levels of pollution in waterways. Penalties exist for non-compliance with by-laws and abatement notices.

Environmental Management & Pollution Control Act 1994 & Regulations 1996

Local government authorities are responsible for any necessary environmental regulation of smaller scale activities and

...must use its best endeavours to prevent or control acts or omissions which cause or are capable of causing pollution (Section 20).

An environmental protection notice can be served on the responsible person where the council officer is satisfied that in relation to an environmentally relevant activity

- (a) *environmental harm is being or is likely to be caused (where environmental harm is any adverse effect on the environment of whatever degree or duration and includes an environmental nuisance); or*
- (b) *environmental harm has occurred and remediation of that harm is required; or*
- (c) *it is necessary to do so in order to give effect to a State Policy or an environment protection policy; or*
- (d) *it is desirable to vary the conditions of a permit; or*
- (e) *it is necessary to secure compliance with the general environmental duty (Section 44)*

The environmental protection notice can require specified measures to be taken (including best practice environmental management) to prevent, control, reduce or remediate environmental harm. In terms of compliance with the general environmental duty, section 23A requires that:

A person must take such steps as are practicable or reasonable to prevent or minimise environmental harm or environmental nuisance caused, or likely to be caused, by an activity conducted by that person.

In determining whether a person has complied with the general environmental duty, regard must be had to all the circumstances of the conduct of the activity, including but not limited to

- (a) the nature of the harm or nuisance or potential harm or nuisance; and*
- (b) the sensitivity of the environment into which a pollutant is discharged, emitted or deposited; and*
- (c) the current state of technical knowledge for the activity; and*
- (d) the likelihood and degree of success in preventing or minimising the harm or nuisance of each of the measures that might be taken; and*
- (e) the financial implications of taking each of those measures.*

While this legislation provides mechanisms for the protection of wetlands and waterways from environmental harm, it is worth noting that environmental impacts may only become evident several years down the track and at locations remote from the original works. There may not always be clear and unambiguous links between the activity and the environmental consequences. In such cases, the issue of an environmental protection notice may not be appropriate. A preferred approach may be the provision of practical advice to those undertaking works and dissemination of best practice guidelines on how to minimise the environmental impacts. For further information contact the Environment Division of DPIWE.

Crown Lands Act 1976 (CLA 1976)

Crown Land Services (CLS) manages crown lands under licence, lease or being held for sale. CLS facilitates the assessment within the State Government of all applications for crown land use, including the private use of reserved lands under both the CLA 1976 and the National Parks and Wildlife Act 1970. This covers new developments such as weirs, channel modification, Telstra services, roads, pump stations or other structures on banks. Such developments are, however, still subject to LUPAA 1993 requirements. No works can commence until all approvals are received from CLS and, depending on the local planning scheme, the relevant council. In some cases riparian reserves may be leased back to local government to manage. Prior to undertaking any activities likely to disturb flora or fauna on crown land, authority is required from the local ranger.

National Parks and Wildlife Act 1970 (NP&WA 1970)

The Parks & Wildlife Service has responsibility for the on-ground management of all public reserves under both the CLA 1976 and the NP&WA 1970. Recent amendments to LUPAA 1993 (to be proclaimed) will require developments and certain activities conducted on lands reserved under the NP&WA 1970 to be subject to local government planning approval. As the local Parks District have the key role in enforcing regulations and in developing and implementing management plans, they are the appropriate first point of contact when planning to undertake works on wetlands or waterways likely to affect public reserves.

Water Management Act 1999 (WMA 1999)

The Assessment Committee for Dam Construction (ACDC) regulates the construction of all on-stream dam construction and all off-stream storages larger than 1 ML. As stated above, a permit granted by the ACDC under this Act negates any need for a permit for the same works under LUPAA 1993. For dam proposals a Regional Water Management Officer completes a dam assessment report based on guidelines for issues such as dam safety, environmental impact, geo-heritage, threatened species, aboriginal and cultural heritage and fish passage. A water licence is also required from DPIWE to store water behind this structure where water usage is not covered under stock or riparian rights. Water diversion works and activities are, in most cases, regulated under the Act.

The creation of water districts and the development of riverworks or drainage schemes for purposes such as channel modification, bank protection or removal of flow obstructions, requires Ministerial approval under the Act. The Minister is required to consult with the Director of Environmental Management. Subject to the requirements of the local planning scheme, development approval may also be required from council. A permit is not required, however, for works undertaken in the normal course of their operation.

A water entity administering a water management plan or a water district is not required to hold a permit for any activities which are -

- (a) necessary for the operation, maintenance, repair, minor modification, upgrading or replacement of existing works managed or owned by that water entity and will not cause environmental nuisance, material environmental harm, serious environmental harm or result in an increased risk to human life; or*
- (b) required urgently to protect persons from injury or those works from damage so long as the activities will not cause serious environmental harm. (Section 185).*

Where these activities have resulted in material environmental harm or serious environmental harm, the Minister under this Act may serve notice on the water entity directing it to rectify the effects of the activity.

The point of contact for activities covered by the WMA 1999 will generally be the Regional Water Management Officer, Water Resources Division DPIWE.

State Policy on Water Quality Management 1997

Local councils are responsible under the RMPS for the prevention or control of pollution in surface water by activities within their jurisdiction which are not level 2 or level 3 activities. The Policy applies to surface waters and groundwaters and details a range of mechanisms for the control of point source and diffuse source pollutants.

The development and implementation of best practice environmental management strategies are seen as the key principle for control of diffuse source pollution. Regulatory authorities should take account of the application of such codes when considering enforcement action under legislation in areas such as agricultural and urban run-off, forestry, road construction and other forms of land disturbance. Section 39.2 of the Policy states

Regulatory authorities shall develop criteria for the approval of stream management works and require that any such works are designed and carried out in accordance with best practice environmental management and so as not to prejudice the achievement of water quality objectives.

All works must comply with the requirements of the State Policy. Further information on implementing the Policy can be obtained from the Environment Division of DPIWE.

Inland Fisheries Act 1995

The focus of this Act is on maintaining fish passage & protection of fish habitat. Section 126 prohibits the flow into inland waters containing fish any "liquid, gaseous or solid matter" likely to harm fish or spawning grounds or food - this would include sediment. Section 139 states that a person must not place or use in any inland waters any equipment, instrument or device likely to hinder or obstruct the free passage of fish in those waters, without the written consent of the Director of Inland Fisheries. Sections 154 & 155 enable the creation of fauna reserves within inland waters and the placement of restrictions upon activities within such reserves. For further information contact the Inland Fisheries Service.

Forest Practices Act 1985 & Forest Practices Regulations 1997

The Forest Practices Act 1985 and Forest Practices Regulations 1997 cover the environmental regulation of forestry operations on public and private land and are administered by the Forest Practices Board. Forestry activities must comply with the requirements of the Forest Practices Code 2000 and may require a Forest Practices Plan. Streamside reserves, drainage lines and swamps are defined as 'vulnerable land' and generally forest clearing is prohibited, even where no commercial wood is produced. Circumstances in which harvesting or clearing is allowed are detailed in *Environmental Best Practice Guidelines 7: Managing Riparian Vegetation*.

Forestry activities within State forests and Private Timber Reserves do not require a permit from local government. However, non-forestry related activities affecting waterways remain subject to planning scheme requirements. The relevant point of contact for further information is the Forest Practices Board.

Threatened Species Protection Act 1995

Section 51 makes it an offence to knowingly take, destroy, injure, trade, keep or disturb listed flora or fauna without a permit. The Act allows the Minister to make an interim protection order to conserve the habitat, or part of the habitat, of a listed or nominated taxon of flora or fauna on either private or crown land. Interim protection orders prevail over planning schemes and can incorporate the prohibition or regulation of any activity likely to affect the habitat adversely.

Threatened species gain this status because their abundance, range or habitat has been reduced or threatening process are occurring likely to result in population reduction. In Tasmania there are 14 species of freshwater plants, over 30 riparian plant species and 76 species of freshwater fauna listed under the Act. The presence of threatened flora or fauna in the vicinity can be determined by contacting the Threatened Species Unit, Parks and Wildlife Service or by electronically accessing GT Spot (www.gisparks.tas.gov.au), which holds the threatened species data base.

Environment Protection and Biodiversity Conservation Act 1999

This commonwealth statute establishes powers over new projects or developments which may have a 'significant impact' on matters of 'national environmental significance' (i.e. listed threatened species and ecological communities; Ramsar wetlands; listed migratory species; and World Heritage properties).

For freshwater ecosystems the Act may encompass irrigation and other consumptive use developments; water infrastructure projects (such as weirs, channels, levee banks or dams); flow altering or pollution causing developments affecting native fish and wetlands; and land clearing activities.

Further details are provided at the Environment Australia website
<http://www.ea.gov.au/epbc/assessapprov/referrals/significanceguide.html>

Aboriginal Relics Act 1975

This Act covers the physical remains of Aboriginal occupation in Tasmania and makes it illegal to interfere, conceal, remove, damage or destroy an Aboriginal relic, such as middens, stone tools and rock shelters, regardless of land tenure (unless a permit has been granted by the Minister on the advice of the Director, National Parks and Wildlife).

River verges and wetlands are likely to have a long history of Aboriginal use. Surveys may be required where works are planned in areas likely to contain Aboriginal relics. Generally these surveys are done by private consultants. The Aboriginal Heritage Section, Tasmanian Heritage Office should be contacted for further information.

Historic Cultural Heritage Act 1995

Restrictions on works may apply where a waterway or a structure on a waterway is deemed to have historic cultural heritage significance to any group or community in relation to the archaeological, architectural, cultural, historical, scientific, social or technical value of the place. Specified works and specified primary production within a heritage area may have Ministerial exemption.

The planning authority (or Heritage Council where local government does not have that delegated power) may only approve a works application in respect of works which are likely to destroy or reduce the historic cultural heritage significance of a registered place or a place within a heritage area if it is satisfied that there is no prudent and feasible alternative to carrying out the works.

The Tasmanian Heritage Register is accessible at www.tasheritage.tas.gov.au or contact the Cultural Heritage Unit of the Tasmanian Heritage Office.

The Register of the National Estate which is maintained by the (Commonwealth) Australian Heritage Commission under the Australian Heritage Commission Act 1975 may also impact where works and activities require government approval.

Agricultural and Veterinary Chemicals (Control of Use) Act 1995

A person proposing to use chemicals to control pests (including weeds) in streams or along river banks must use non chemical means of control wherever practical. Where it can be demonstrated that chemical control poses less net environmental risk, chemicals must be used in accordance with this Act. An operator providing a commercial spraying service must hold a Commercial Operator Licence and a Certificate of Competency relevant to the type of work undertaken.

A Code of Practice for Ground Spraying has been developed for ground spraying which prescribes responsibilities and minimum standards. No spraying should take place on waterways or waterbodies or waterlogged areas unless the product is approved for such use. When spraying, chemical is not to move off-target to extent it may adversely affect waterways or waterbodies or waterlogged areas. The Code can be accessed via the internet - www.dpiwe.tas.gov.au. Contact the Chemical Management Unit, DPIWE for further details on legislative requirements.

Weed Management Act 1999

This is the principal legislation concerned with the management of declared weeds in Tasmania and is an important component in delivering the State Weed Management Strategy (WeedPlan). A plant considered a serious economic, environmental and/or social risk, is declared under the Act, allowing legally enforceable actions to be undertaken to control it. Examples of declared riparian weeds are willows and blackberries.

Weed Management Plans are developed for each weed species. These contain information relevant to the legally enforceable management of that weed and includes measures to control, eradicate or restrict the spread of the weed, and establishes the law in relation to its importation, distribution and sale.

Many councils have a gazetted weed management officer. This allows councils to strategically manage weeds in their municipality and help fulfil any obligations they have under the Act. For more information on weed control and the Act, contact a DPIWE Regional Weed Management Officer or access the DPIWE website.

Mineral Resources Development Act 1995

In rare cases, where there is a benefit to the waterway and surrounding environment, sand and gravel extraction from a waterway may be acceptable. Where more than 100 tonne per annum of any rock, stone, sand, gravel and clay is to be extracted, the Mineral Resources Development Act 1995 requires a mining lease to be issued by Mineral Resources Tasmania and compliance with the requirements of the 1999 Tasmanian Quarry Code of Practice. Quantities less than this extracted from crown land will require a licence from Crown Land Services. Operators of new extractive pits, with the exception of forestry quarries, will also be required to hold a permit issued by a planning authority under LUPAA 1993. Most permits will be discretionary and will require public advertisement of the application. Further information is available from Mineral Resources Tasmania.

Public Health Act 1997

Works on wetlands and waterways may impact upon water quality through re-suspension of sediments and erosion impacts. Increasing turbidity levels will generally increase the cost of drinking water disinfection.

Section 128 of the Act requires that any agency, public authority or person managing or in control of water must manage the water in a manner that does not pose a threat to public health; and on becoming aware that the quality of the water is, or is likely to become, a threat to public health, notify the Director of Public Health in accordance with any relevant guidelines.

If a council receives a report from an environmental health officer that the quality of water is, or is likely to become, a threat to public health, the council must take any necessary and practicable action in accordance with any relevant guidelines to prevent the threat by

- (a) restricting or preventing the use of the water; or*
- (b) restricting or preventing the use of any food product in which the water has been used; or*
- (c) rendering the water safe; or*
- (d) giving warnings and information to the public about the safe use of the water or risk of using the water. (Section 128.3)*

Where further information is required contact the Director of Public Health.

2. Complementary resource management tools

A strategic approach to natural resource management is essential for positive environmental outcomes. The following publications and programs should be considered where appropriate. Access to funding support for on-ground activities may require compliance with the objectives or recommendations of one or more of the following programs.

Tasmanian Natural Resource Management (NRM) Framework

The Natural Resource Management Bill 2002 provides the statutory basis for the implementation of the Tasmanian NRM framework. Resource management priorities determined by state and regional committees will have implications for the management of wetlands and waterways in areas such as the protection of biodiversity, water quality and soil values.

Rivercare Plans

For works funded under the Natural Heritage Trust, development of Rivercare Plans incorporating professional advice is required before works are undertaken. Such plans provide an assessment of community and environmental values associated with these ecosystems and a plan for implementation and on-going maintenance of works. *Environmental Best Practice Guidelines 8: Guiding Community Involvement in Works on Waterways & Wetlands* describes the process for plan development.

Other resources

- State Wetlands Strategy (under development)
- Directory of Important Wetlands in Australia
- Tasmanian Nature Conservation Strategy (under development)
- Threatened Species Strategy
- Tasmanian Geo-conservation Database
- Integrated Catchment Management Plans
- Landcare/community based plans
- Planning by Water Authorities (e.g. Hobart Water, Esk Water)
- National Action Plan for Salinity and Water Quality
- National Local Government Biodiversity Strategy

3. CHECKLIST

Legislative and Policy Requirements for Protecting Waterways & Wetlands when Undertaking Works

Given the range of legislation and policy which may be triggered by works in wetlands and waterways, decisions on the application and interpretation of legislation and policy are not always clear-cut. Typically such decisions are aided by the collection of adequate information about the impacts, or potential impacts, of a development.

Outlined below are examples of the type of questions to be asked about proposed works when determining whether a specific piece of legislation or policy is applicable. These are examples only. Other information may also be required to allow a considered decision to be made.

When in doubt about the application or interpretation of legislation or policy, contact the relevant government agency for advice.

- Approval of landowner / land manager (Appendix 1)

Has the property title for the wetland or waterway been checked? Has permission been obtained from the landowner and/or land manager to undertake works?

- Tasmanian Resource Management and Planning System (Page 1)

Is the activity compatible with the sustainable development of water resources? Will the activity adversely affect the life-supporting capacity of aquatic ecosystems?

- Land Use Planning and Approvals Act 1993 (Page 1)

Does the planning scheme further the objectives of sustainable development? Is the planning scheme prepared in accordance with the State Policy on Water Quality Management 1997? Is a planning permit required for the proposed activity? Do land-use & environmental effects arising from use or development comply with planning scheme requirements?

- Local Government Act 1993 (Page 2)

Are there by-laws relating to the execution of works in wetlands and waterways? Is the activity likely to cause danger or harm to the health, safety or welfare of any person? Is the activity likely to cause a risk to public health? Does it give rise to unreasonable or excessive levels of pollution in waterways?

- Environmental Management & Pollution Control Act 1994 (Page 2)

Is environmental harm being or likely to be caused? Has environmental harm already occurred and remediation of that harm is required? Is the activity consistent with State Policy or an environment protection policy? Is there compliance with the general environmental duty?

- Crown Lands Act 1976 (Page 3)

Does the development involve the private use of crown lands? Are approvals required from Crown Land Services? Are development approvals required from council?

- National Parks and Wildlife Act 1970 (Page 3)

Is the activity on a riparian public reserve or within a national park? Does the development require approval from the Parks & Wildlife Service? Is development approval required from council?

- Water Management Act 1999 (Page 3)

Does the proposal involve dam construction? Does it require consideration by the Assessment Committee for Dam Construction (i.e. all on-stream dam construction and all off-stream storages larger than 1 ML)? Has a Regional Water Management Officer completed a dam assessment report? Has a water licence to store water been obtained from DPIWE? Are there works associated with the creation of water districts requiring a development approval from council?

- State Policy on Water Quality Management 1997 (Page 4)
Do all works comply with the requirements of the State Policy? Have best practice environmental management strategies been adopted? Are water quality objectives being protected?
- Inland Fisheries Act 1995 (Page 4)
Is fish passage being maintained? Is fish habitat protected?
- Forest Practices Act 1985 (Page 4)
Do forestry activities affecting waterways & wetlands require a permit from local government? Will works comply with riparian clearance restrictions enforced by the Forest Practices Board?
- Threatened Species Protection Act 1995 (Page 5)
Are threatened flora or fauna likely to be affected by the works? Has there been investigations into the presence of threatened flora or fauna in the vicinity?
- Environment Protection & Biodiversity Conservation Act 1999 (Page 5)
Does the project or development have a 'significant impact' on matters of 'national environmental significance' - e.g. Ramsar wetland site?
- Aboriginal Relics Act 1975 (Page 5)
Is there likely to be some evidence of Aboriginal occupation in the vicinity of works site? Will works interfere, conceal, remove, damage or destroy an Aboriginal relic?
- Historic Cultural Heritage Act 1995 (Page 5)
Will works affect a site on the Tasmanian Heritage Register or Register of National Estate? Has the planning authority or Heritage Council approved a works application?
- Agricultural & Veterinary Chemicals (Control of Use) Act 1995 (Page 6)
Is the herbicide to be used approved for use near waterways? Are the requirements within the Code of Practice for Ground Spraying being met?
- Weed Management Act 2000 (Page 6)
Is the weed targeted for removal declared under the Act? Has a Weed Management Plan been developed for the target weed?
- Mineral Resources Development Act 1995 (Page 6)
Is a planning permit held where extraction is taking place within a waterway? Does the amount extracted require a mining lease to be issued?
- Public Health Act 1997 (Page 6)
Will water quality impacts of the activity likely to be a threat to public health?
- Complementary Resource Management Tools (Page 7)
Are Rivercare Plans, Natural Resource Management Plans or other resource management tools available to enable a strategic approach to on-ground works?

Appendix 1: Determining ownership of riparian areas

Legislative changes over the years has meant that determining ownership of riparian areas is not always clear cut and may require some research. The Land Information System Tasmania (LIST) is available to local government for checking land titles (<http://www.thelist.tas.gov.au/index.html>). The most likely scenario is that a piece of land will either be private land or crown land.

Option 1: Private land (freehold title)

Private land is subject to riparian rights exercised by landowner. These are natural rights arising from ownership of the land. Adjoining landowners generally own to middle of the streambed unless the title says otherwise (i.e. may be a riverside reserve, see below). Many wetlands are also under private ownership.

Option 2: Crown land reserved under different Acts

Riparian land and wetlands may be 'public reserves' as declared by ministerial order under section 8 of the Crown Lands Act 1976 (CLA 1976). These are declared for a variety of public purposes as set out in schedule 5 (conservation, public recreation, cultural values etc.). The origins of some public reserves on major streams and rivers may predate the CLA 1976. A consequence of this is the possibility of different width buffer zones - 15 metre, 20.1m (one chain) or 30.5 metre (100 feet) - between the streambank and adjoining private land. The presence or absence of fences is not always a reliable method for determining tenure.

Riparian land and wetlands are also found within the more extensive areas covered by the National Parks and Wildlife Act 1970 (declared reserves: National Park, State Reserve etc.) and the Forestry Act 1920 (State Forest and Forest Reserves).

These guidelines should be used in conjunction with the appropriate technical advice and literature.

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