



Government of **Western Australia**
Department of **Water and Environmental Regulation**

Compliance and Enforcement Policy: draft for public comment

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Department of Water and Environmental Regulation

May 2019

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Call for submissions

The Department of Water and Environmental Regulation (DWER) is seeking submissions from its stakeholders and the general public on the Compliance and Enforcement Policy. Submissions will help us finalise the policy.

Policy for consultation

The draft Compliance and Enforcement Policy can be accessed here <https://www.dwer.wa.gov.au/consultation>

Consultation duration

The consultation period will begin on 27 May 2019 and run for 12 weeks, concluding on 16 August 2019. (Note: Consultation period extended until 20 September 2019)

All submissions must be received by 5pm (WST) on 20 September 2019.

How to lodge a submission

A written submission can be lodged by email (preferred) to: compliancepolicy@dwer.wa.gov.au

Hard copies can be mailed to:

Compliance and Enforcement Policy Consultation
Department of Water and Environmental Regulation
Locked Bag 10
JOONDALUP DC WA 6919

About making a submission

By making a submission, you are consenting to the submission being treated as a public document and being published on the department's website. Your name will be included but your contact details will be withheld for privacy.

If you do not consent to your submission being treated as a public document, you should mark it confidential, specifically identify those parts which you feel need to be kept private, and include an explanation. The department may request that a non-confidential summary of material is also given. It is important to note that even if your submission is treated as confidential by the department, it may still be disclosed under the *Freedom of Information Act 1992* or any other applicable written law.

The department reserves the right before publishing a submission to delete any content that could be regarded as racially vilifying, derogatory or defamatory to an individual or an organisation.

Please take careful note of the deadline for comment, as no late submissions will be accepted.

Introduction

The Department of Water and Environmental Regulation (DWER) aims to lead and excel in the sustainable management and protection of Western Australia's water and environment.

As the public sector agency responsible for assisting the Ministers for Environment and Water to administer a range of legislation pertaining to the state's water and environment, DWER has wide-ranging statutory and regulatory responsibilities directed at achieving improved outcomes for public health, the environment and our water resources.

DWER is committed to ensuring compliance with the legislation it administers. Compliance with the law is not a matter of choice and DWER has a range of regulatory tools to promote, monitor and enforce compliance.

This Compliance and Enforcement Policy details the department's approach to ensuring compliance with the legislation it administers, and responding to breaches of the law to deter and punish offenders and rehabilitate damage caused to the environment.

1 Scope of policy

This Compliance and Enforcement Policy is applicable to all legislation for which DWER principally assists the Ministers for Environment and Water to administer, and includes any legislation administered by other Ministers for which departmental officers are authorised or have statutory responsibilities.

It is relevant to all sectors of the Western Australian community, and in particular applies to:

- industry and commercial enterprises
- members of the public
- federal, state and local government agencies
- legal practitioners
- DWER staff.

It details how DWER undertakes its compliance and enforcement functions; however, it is general in nature and does not confine, restrain or limit the discretion of the department.

2 Context

The Western Australian community has an expectation that the State's laws will be applied and their application enforced.

DWER uses a range of tools to monitor compliance with the legislation it administers and to prevent breaches. DWER will focus its resources on those matters that pose the greatest risk to public health, the environment and water resources.

Breaches of legislation have consequences and DWER will actively seek to identify breaches, rectify non-compliance and take appropriate enforcement action against those who breach the legislation.

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3 Legislation

The state legislation to which the Compliance and Enforcement Policy is applicable includes the following:

- *Contaminated Sites Act 2003*
- *Country Areas Water Supply Act 1947*
- *Environmental Protection Act 1986*
- *Litter Act 1979*
- *Metropolitan Water Supply, Sewage, and Drainage Act 1909*
- *Rights in Water and Irrigation Act 1914*
- *Waste Avoidance and Resource Recovery Act 2007*
- *Waste Avoidance and Resource Recovery Levy Act 2007*
- *Water Agencies (Powers) Act 1984*
- *Waterways Conservation Act 1976*
- *Water Services Act 2012*

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4 Regulatory approach

DWER's *Strategic Plan 2018–2021* states that one of the department's five strategic directions is to be a responsive and credible regulator by:

- providing consistency and certainty for stakeholders through a streamlined approach to regulatory assessment and advice
- applying regulatory best practice principles and ensuring effective internal practices, online systems and resources to deliver good customer service
- undertaking appropriate compliance and enforcement and ensuring regulated stakeholders meet their commitments

DWER uses a cyclic approach to its regulatory responsibilities – driving continual improvement through a feedback loop.

Compliance is a vital input into the regulatory cycle, providing valuable information to encourage continual improvement and enhance public health, environmental and water resource outcomes.

Information from compliance monitoring may be used to improve statutory instruments, drive decisions on new or amended applications and guide development and modification of policies, guidelines and regulations.

Where a breach of the law is identified, there is a requirement for enforcement to act as a deterrence against future breaches of law by the offender and others within the community.

Enforcement responds to alleged breaches of the law and may involve a range of actions depending on the context of the breach. Information from the enforcement action may be used to improve future regulation of that entity or industry sector.

3.1 Regulatory best practice principles

In accordance with being a responsive and credible regulator, DWER has developed six best practice regulatory principles. These principles form the foundation of the department's regulatory approach and are embedded into its compliance and enforcement actions.

DWER regulatory best practice principles

Risk based

DWER will regulate to protect public health, the environment or water resources from unacceptable risk. It will make compliance and enforcement decisions proportionate to the level of risk posed to public health, the environment and water resources with consideration of cumulative impacts. Compliance and enforcement resources will be targeted to the greatest risks to public health, the environment and water resources.

Evidence based

DWER will use an evidence-based approach based on the best available information, including sound science, to inform compliance and enforcement decision-making.

Transparent

Compliance obligations will be clearly communicated to industry, the community and government. The principles of procedural fairness will be applied during compliance monitoring and enforcement responses. DWER will be informed by the public and consider the public interest in regulatory decision-making.

Collaborative

DWER will work collaboratively with other regulators to share information where possible and avoid unnecessary regulatory duplication and support whole-of-government outcomes.

Compliance monitoring and enforcement action will be taken based on DWER's statutory powers and obligations and with regard to other regulatory agencies' roles and responsibilities. Enforcement action will be taken to achieve the best environmental and community outcomes and be based on whether or not it is in the public interest to take certain actions.

Consistent

Compliance monitoring and enforcement action will be applied consistently across all sectors of industry, the community and government.

Responsive and effective

DWER will make regulatory decisions, including those pertaining to enforcement action, in an effective and timely manner.

5 Compliance

Compliance with the law is not a matter of choice, it is a requirement. Compliance refers to adhering to and fulfilling legislative and regulatory requirements. As a regulator, a fundamental role of the department is to monitor compliance with the legislation it administers.

5.1 Establishing compliance priorities

DWER will establish compliance priorities to achieve the best outcomes for public health, the environment and water resources, while making the most beneficial use of available resources. In line with the department's regulatory principles, this will be accomplished using a risk-based methodology.

To ensure there is not an unacceptable risk to public health, the environment or water resources, DWER will prioritise events or activities that represent the greatest level of risk.

Risk will be calculated using a combination of the consequence of an event or activity on public health, the environment or water resources, and the likelihood of the event or activity occurring.

To inform and provide context for risk, DWER will use the best available intelligence including the following:

- the industry type, nature, scale, complexity and history of the premises, activity or event
- compliance history of the business or person associated with the premises, activity or event
- controls and measures a person or business has in place to mitigate impacts on public health, the environment or water resources
- the location of water resources and the environment, including people, and their susceptibility to impacts to their value, beneficial use, quality, vulnerability or rarity
- any suspected impact to public health, the environment and water resources, with consideration of cumulative impacts.

5.2 Compliance promotion

DWER is committed to providing information and support to promote understanding and encourage compliance.

Being clear about expected public health, environmental and water resource outcomes helps remove barriers to compliance and overcome factors that may encourage unlawful conduct. It also raises awareness about the benefits of complying with legislation, as well as the potential consequences of failing to do so.

Compliance assistance materials are available on DWER's website.

5.3 Compliance monitoring

Compliance monitoring is a fundamental role of the department and a variety of methods may be used to monitor and determine levels of compliance with the requirements of legislation, licences and other statutory instruments. These include:

1 Inspections, reviews and audits

Through an annual compliance program, DWER undertakes field and desktop assessments to gather and assess information on potential risks.

The compliance program allows for both a proactive and reactive component. The proactive approach targets specific industries and licensed premises based on a risk assessment. The reactive component enables resources to be dedicated to unexpected events and emergent issues to enable effective risk and evidence-based regulation.

2 Industry reporting – statutory and self reporting

Under some of the legislation administered by the department, certain instrument holders are required to report on compliance with their statutory instrument. Other legislation requires the reporting of discharges to the environment that have, or are likely to have, caused pollution or material harm.

3 Information from other regulatory authorities

Unlawful conduct may be detected by officers from other regulatory authorities, such as local government or other state government departments, during their own compliance activities or as part of joint activities with DWER. DWER will consider this information as part of its compliance monitoring.

4 Community reports and complaints

Members of the public are encouraged to report pollution incidents or other environmental issues to DWER's Pollution Watch hotline on 1300 784 782. This hotline is available 24 hours a day.

Public reports play a vital role in assisting to identify potential breaches and DWER will receive and consider all reports and complaints. However, in line with its compliance priorities, not all complaints and reports will be pursued as resources are allocated according to risk.

DWER's compliance activities are aimed at improving public health, environmental and water resource outcomes. Compliance information will be monitored, analysed and reported on. Where appropriate, it will drive regulatory changes such as licence amendments and improvements to policies and plans.

DWER will continually evaluate the effectiveness of its compliance approach and instigate change as required.

6 Enforcement

Enforcement is a response to identified breaches of the law and involves a range of different actions to deter and punish offenders, and rehabilitate damage to the environment.

In this context enforcement has two key elements:

- Remedy: fixing the problem or 'making good', and
- Sanction: enforcement action undertaken to punish, deter and change behaviour.

6.1 Enforcement principles

DWER will undertake enforcement actions, as outlined in Section 6.2, in accordance with the following principles:

- Enforcement action will be in proportion to the magnitude or seriousness of the alleged offence and/or the impact to public health, the environment and water resources, taking into account the conduct of the parties and implications for the administration of the legislation.
- Prosecution is a type of enforcement tool to be employed where it is the appropriate response to a particular circumstance (i.e. not a last resort).
- Decisions regarding enforcement action will be made in a timely manner.
- Enforcement action will be taken where legislative objectives require enforcement action.
- Enforcement action will only be taken when the statutory prerequisites for that action are satisfied.
- In every case where a breach of the legislation is established, some form of written enforcement action will result.
- Departmental officers will not condone or authorise the continuation of an offence once detected.
- In undertaking enforcement actions DWER will consider the likelihood that the desired outcome will be achieved. Desired outcomes include the environmental outcome in a particular case, compliance with other principles of this policy and implications for the administration of the legislation.
- Enforcement requirements will be stated in unambiguous terms aimed at facilitating a clear understanding by all parties of what constitutes compliance or a legislative breach.
- Enforcement actions will be applied consistently across all sectors of the community, industry and government and will embrace impartiality, objectivity and adherence to due process.
- Enforcement action will be carried out consistent with the legislative powers and responsibilities conferred on the department.

6.2 Types of enforcement action

Breaches of law carry consequences. Following identification of a breach of legislation, some form of written enforcement action will result.

The types of enforcement actions the department may employ are outlined below. For most enforcement actions, the alleged offender has a right to challenge or appeal the department's decision.

Types of enforcement actions

<p>Non-statutory notice</p>
<p>DWER may issue a variety of non-statutory notices including environmental field notices, caution notices, letters of education, management letters or non-compliance notices, which may require certain actions to be undertaken. Failure to act in accordance with a non-statutory notice may result in further enforcement action.</p> <p>The legislative breach, although rectified, may also result in further enforcement action; for example, the issue of a written warning, infringement notice, modified penalty or commencement of prosecution.</p>
<p>Written warning</p>
<p>A written warning is a notice issued by the department where it believes an offence has been committed. A written warning may be given when an administrative, technical or minor breach has occurred, or the impact or potential impact is minor or trivial in nature.</p> <p>A written warning may be provided in the form of a field-issued notice or a formal letter of warning.</p>
<p>Statutory notice or direction</p>
<p>A statutory notice or direction is a written notice that requires certain actions to be taken, or to be ceased, within a specified time.</p> <p>Legislation authorising the giving of a statutory notice or direction identifies criteria which must be satisfied before issuing of the notice. It is an offence to fail to comply with a statutory notice or direction.</p> <p>Further enforcement action may be taken if the offender does not comply with a statutory notice or direction within the specified time.</p> <p>The following are examples of statutory notices and directions: environmental protection notice, vegetation conservation notice, noise</p>

control notice, investigation notice, clean-up notice and hazard abatement notice.

Modified penalty notice

A modified penalty notice is a written notice of an alleged Tier 2 offence under the *Environmental Protection Act 1986*. It requires the payment of a penalty or the election of court action.

A modified penalty notice may be issued when the legislative criteria has been met. Payment of the penalty is not regarded as an admission for the purposes of any proceedings, whether civil or criminal. If the recipient of a modified penalty notice elects to have the matter heard in court, proceedings will occur in the Magistrates Court. Prosecution will be initiated by the department if a modified penalty notice is not paid within the specified time.

Physical intervention

DWER may take physical action itself to remedy unlawful conduct including non-compliance, rehabilitate an area or clean up pollution. If this occurs, the offender may be pursued for the cost of the action taken.

The department will only take such action when authorised by legislation and in accordance with that legislation.

Suspension or revocation of instrument

DWER may, by written notice, suspend or cancel a works approval, licence or permit. This may result in the closure of the premises or cessation of the activity.

Subject to relevant legislation, revocation or suspension of a works approval, licence or permit may be used when:

- there has been contravention of a licence condition
- false or misleading information has been provided in or supporting the application to obtain an approval, licence or permit
- the person's offence history indicates that the licensee is not a fit and proper person
- the current business address of the holder of the approval, licence or permit is unknown
- there is a detrimental effect of actions authorised by the licence on another person
- to protect the water resource to which the licence relates from unacceptable damage
- to protect the associated environment from unacceptable damage.

When considering the exercise of this power, DWER will give the alleged offender a reasonable opportunity, as specified by the appropriate legislation, to show cause in writing why the power should not be used.

The department will only suspend or revoke a works approval, licence or permit where such action is authorised under relevant legislation.

Infringement notice

An infringement notice is a written allegation that a person has committed an offence. It requires the payment of a fine or election to have the matter heard in court. If the fine is paid, no conviction is recorded. If the alleged offender elects to have the matter heard in court, prosecution action will commence. If an infringement notice is not paid, and the alleged offender has not elected to have the matter heard in court, DWER may refer the matter to the Fines Enforcement Registry for collection or action. The department also retains the right to initiate prosecution if an infringement notice is not paid within the specified time.

An infringement notice may be issued when:

- the offence is one that may be dealt with by issue of an infringement notice under the legislation
- there is prima facie evidence of a legislative breach
- the offence is of minor impact and can be easily remedied
- the offence is the result of failure to comply with normal operating procedures or requirements which would have prevented the breach
- it is likely to be a sufficient deterrent.

An infringement notice will generally not be issued when:

- the offence has significant impact upon other persons or property
- the offence is continuing and not able to be rectified quickly
- multiple related offences have occurred, and/or
- another government department has issued a notice for the same or similar offence in the same period.

Prosecution

DWER will employ prosecution where it is the appropriate response to a particular circumstance. It will not be applied only as a last resort.

Specific information about prosecution as an enforcement action is provided in DWER's Prosecution Guideline (to be finalised).

6.3 Selecting the appropriate enforcement action

There is no 'one size fits all' response to addressing breaches of law. Likewise, not all breaches of law are of equal significance. The choice of enforcement action will depend upon the context of the issue.

DWER has discretion in selecting the most appropriate enforcement action to use. However, in accordance with the department's regulatory principles, decisions regarding enforcement action will be consistent, transparent and proportionate to the seriousness of the offence.

Any enforcement action taken by DWER aims to ensure that the sanction applied reflects the seriousness of the offence and acts as a deterrent to reoffending.

DWER considers three main factors in selecting the most appropriate enforcement action: the seriousness of the alleged offence, behaviour of the alleged offender and the alleged offender's previous history:

1 Seriousness of alleged offence

DWER will determine the seriousness of the alleged offence having regard to:

- location, severity, quantity, extent and duration of the impact, or potential impact, of the alleged offence
- costs avoided or profits realised by the alleged offence
- the degree of culpability of the alleged offender
- issues of public concern, including the need for specific and general deterrence.

2 Behaviour of alleged offender

DWER will consider the behaviour of the alleged offender when determining appropriate enforcement action having regard to:

- the alleged offender's attitude to alleged offence including whether the unlawful conduct was intentional, or opportunistic
- any voluntary action by the alleged offender to mitigate harm to public health, the environment and/or water resources, and any mechanisms implemented to prevent any recurrence
- compliance, or failure to comply, with requests, lawful directions or notices given by the department in relation to the alleged offence
- cooperation with the department and willingness to commit to appropriate remedial actions
- any false or misleading statements made by the alleged offender
- timeliness of notification of alleged offence to the department and the quality and quantity of information provided. (Note that some legislation requires mandatory notification to the department as soon as the party becomes aware of a non-compliance. In these cases where timely notification does not occur, an offence is committed.)

3 Previous history

DWER will consider the previous history of the alleged offender with regard to compliance with legislation and frequency and seriousness of any past offences.

6.4 Selecting the appropriate party for enforcement action

A wide range of people may have participated in, or contributed to, the commission of an offence. It is not always appropriate to take enforcement action against every person who may be liable for an offence. However, in some cases where more than one person or company combine to commit an offence, it may be appropriate to prosecute all of the relevant offenders.

In selecting the appropriate party for enforcement action, DWER will generally consider the following:

- who was primarily responsible; that is, who formed the intent, who committed the act, and who created the material circumstances leading to the alleged offence
- in the case of strict liability, the role of the alleged offender
- potential liability of the corporation, body corporate, directors and executive officers, including vicarious liability
- potential liability of employees and/or contractors
- potential liability of lending institutions, in particular, the categories of 'legal owners and occupiers'
- potential liability of public authorities.