

Clean-up program for aquaculture leases and cost recovery

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Policy statement:

This policy defines under what circumstances NSW Department of Primary Industries and Regional Development (DPIRD) will undertake clean-up work on an aquaculture lease or permit area when the relevant lessee or permit holder has failed to comply with a notice issued under section 162, 170, or 171 of the *Fisheries Management Act 1994* (the Act).

Scope:

DPIRD may undertake clean-up work on a lease or permit area in circumstances where the lessee or permit holder have failed to comply with a notice issued under:

- Section 162 of the Act – relates to the tidiness of a permit area (current lease). Notice is issued to the current permit holder.
- Section 170 of the Act – relates to the removal of an unauthorised fence on a current lease. Notice is issued to the lessee.
- Section 171 of the Act – relates to the removal of all improvements from a terminated lease. Notice is issued to the former lessee.

Following the completion of any clean-up work, the department may recover the costs associated with the work in line with sections 162(6), 170 (5) and 171(5) of the Act.

In line with the Fisheries Management (Aquaculture) Regulation 2024 (the Regulation), the department may apply administrative sanctions against a lessee, which would prevent them from transacting on any lease they hold, if they are the lessee or former lessee of a lease area in the clean-up program.

The policy applies to all current and former aquaculture leases, as well as current aquaculture permits in NSW.

Requirements:

Initial assessment

1. If a lessee or permit holder fails to comply with a notice under section 162, 170 and 171 of the Act, Fisheries Compliance will refer the matter to the Program Leader, Aquaculture for further action via a brief. This is in line with the Fisheries Officers work instructions (oyster aquaculture).
2. The Program Leader will assess all referred leases and recommend the following:

- a. For a lease or permit area where there is a reasonable prospect of the work being completed and costs being recovered, the lease will be added to the clean-up program – lessee.
 - b. For a lease or permit area where the department is statute barred from pursuing the lessee or permit holder, or where there is little prospect of recovering clean-up costs from the lessee or permit holder, the lease will be added to the clean-up program – state.
3. When an expired or terminated lease is added to the clean-up program, the department will assess its suitability for aquaculture under the NSW Oyster Industry Sustainable Aquaculture Strategy (OISAS). If the former lease is suitable for aquaculture, it will be offered via a competitive allocation process (lease tender) before the department commences the contractor engagement process.
4. If a clean-up program lease is re-leased via a competitive allocation process, the new permit holder will be responsible for any required clean-up work through the issuance of a notice under section 162 of the Act.
5. Following the expiry of a section 171 notice, the former lessee is not permitted to enter the area of the terminated lease and remove any improvements from that area.

Clean-up program for current leases

6. If a permit holder fails to comply with a notice issued under section 162 of the Act, the lease will be added to the clean-up program, which allows the department to initiate contractor engagement and cost recovery action against the permit holder.
7. If a lessee fails to comply with a notice issued under section 170 of the Act, the lease will be added to the clean-up program, which allows the department to initiate contractor engagement and cost recovery action against the current lessee.
8. If the permit holder pays the default financial arrangement for lease security, the department must issue the permit holder a performance notice under section 32 of the Regulation, requiring the permit holder to meet their compliance obligations. This notice must be issued before contractor engagement if the department may, in the future, use the default arrangement trust account for the reimbursement of clean-up costs. The notice must give the permit holder a period of not less than 14 days to meet the compliance obligations. In most cases, 30 days will be reasonable.
9. If a current lease is added to the clean-up program (lessee or state), any lease applications submitted by the lessee may be refused in line with sections 39(d) (new lease), 49(3)(d) (lease renewal), 54(3)(d) (lease sublet), 55(3)(d) (lease transfer), 57(5)(d) (lease surrender), 58(2)(b) (lease consolidation) and 59(2)(b) (lease subdivision) of the Regulation.

Clean-up program for expired and terminated leases

10. If a former lessee fails to comply with a notice issued under section 171 of the Act, the former lease will be added to the clean-up program. The department will initiate contractor engagement and cost recovery action against the former lessee, unless the former lease is successfully re-leased via a competitive allocation process.
11. If the permit holder pays the default financial arrangement for lease security, the department must issue the permit holder a performance notice under section 32 of the Regulation, requiring the permit holder to meet their compliance obligations. This notice must be issued before contractor engagement if the department may, in the future, use the default arrangement trust account for the reimbursement of clean-up costs. The notice must give the permit holder a period of not less than 14 days to meet the compliance obligations. In most cases, 30 days will be reasonable.

12. If a former lease that is listed as clean-up program – state cannot be re-leased, the lease area may be rehabilitated under a derelict aquaculture lease clean-up program. If applicable, cost recovery will occur under this policy.
13. If an expired or terminated lease is added to the clean-up program (lessee or state), any lease applications submitted by the former lessee may be refused in line with sections 39(d) (new lease), 49(3)(d) (lease renewal), 54(3)(d) (lease sublet), 55(3)(d) (lease transfer), 57(5)(d) (lease surrender), 58(2)(b) (lease consolidation) and 59(2)(b) (lease subdivision) of the Regulation.
14. If a former lessee would like to complete the clean-up work on an expired or terminated lease that has been added to the clean-up program (for example, so that administrative sanctions may be lifted), they will need to do so as per clause 30 of this policy.

Contractor engagement

15. DPIRD will maintain a register of current class A permit holders and lessees who have expressed an interest in lease clean-up work within their estuary or area. Each year, the department will review and if necessary, update this register by:
 - a. removing any permit holders or lessees who have left the industry, and
 - b. calling for new expressions of interest from new permit holders and lessees.
16. For contractor engagement, the department will follow the department's procurement framework and relevant policies. This includes registering the procurement if the clean-up costs will likely exceed \$30,000.
17. The department will write to all permit holders and lessees listed on the contractor register for the specified estuary or area, and request a quote for the proposed lease clean-up work. The department's request for quote (procurement template) will be used.
18. If there is more than one lease to be cleaned up, the contractors will be advised to provide a quote for each lease, as submitted quotes will be assessed per lease.
19. If there are a limited number of eligible contractors on the register for the specified estuary or area, the department may invite all current class A permit holders and lessees within that estuary or area to submit a quote for the proposed lease clean-up work.
20. The department will only seek quotes from external contractors (outside the aquaculture industry) in cases where a suitable quote has not been received by a permit holder or lessee.
21. A contractor will be selected to complete the proposed lease clean-up work in line with the department's procurement policies and taking into consideration:
 - a. the requirements outlined in this policy and the request for quote document.
 - b. the cost effectiveness of the quote submitted by the contractor.
22. Before a contractor is selected, they will need to confirm that they have:
 - a. a knowledge of waste disposal issues associated with the disposal of aquaculture cultivation materials.
 - b. access to a suitable land base area authorised for the landing and storage of waste aquaculture lease materials prior to disposal, or a suitable strategy for the landing and disposal of waste aquaculture lease materials.
 - c. access to suitable vessels to undertake the work.
 - d. necessary approvals to operate all equipment necessary to undertake the work.
 - e. public liability insurance to the value of \$10 million, and any other insurance sufficient to cover all foreseeable risks arising in relation to the work.
23. Once a quote has been selected, a services contract will be sent to the contractor for review and signature. At this time, the contractor will be required to provide copies of the relevant

documentation, as per the requirements outlined in the request for quote document.

24. The contractor will undertake the required lease clean-up work to achieve compliance in line with sections 162(4), 170(4) or 171(4) of the Act.
25. The contractor may, on behalf of the department, sell or dispose of anything removed from the lease area in line with sections 162(5), 170(5) or 171(5) of the Act.
26. The contractor will not be paid for the clean-up work until a Fisheries Compliance officer has confirmed that the work has been completed in line with the services contract, unless otherwise approved by the Program Leader, Aquaculture.
27. If the contractor is cleaning up multiple leases, the department may pay them when each lease has been completed, if this has been agreed to in the services contract.
28. If the lease clean-up work is significant, the contractor may be required to liaise with the local Fisheries Compliance officers and organise for the lease area to be inspected as the clean-up work progresses. Any such requirements, if needed, will be specified in the services contract.
29. A permit holder or lessee listed on the clean-up contractor register will not be engaged to undertake lease clean-up work if, at the time of assessing quotes, they have:
 - a. Debt on their aquaculture account that is more than 90 days overdue.
 - b. Outstanding clean-up work on a lease that is listed as clean-up program, which has resulted in administrative sanctions being placed on them.
30. If a former lessee intends to complete the clean-up work on a terminated lease in the clean-up program, they may be engaged as a contractor (without payment) in accordance with section 171(4) of the Act. This will only occur if they meet all contractor requirements outlined in this policy.

Cost recovery under the clean-up program

31. On completion of lease clean-up work, the department will pay the contractor the agreed amount, as outlined in the services contract, then seek to recover the associated costs as a debt from the relevant lessee or permit holder, in line with sections 162(6), 170(5) and 171(5) of the Act.
32. An invoice will be raised against the customer account and standard debt recovery action will be undertaken if required, in line with the department's Aquaculture account billing and debt recovery policy (RDOC24/169870).
33. If debt recovery action is unsuccessful, the department may recover the debt from the relevant permit holder's lease security financial arrangement:
 - a. In the case where the permit holder has an elective financial arrangement, the department will issue the permit holder a recovery notice requiring them to pay the debt within a period of not less than 14 days, under section 26(1) of the Regulation. If the permit holder fails to comply with the notice, the recoverable costs may be forfeited from the permit holder's elective financial arrangement.
 - b. In the case where the permit holder has a default financial arrangement, and the permit holder has previously been issued a performance notice under section 32 of the Regulation, the department may proceed to withdraw from the default arrangement trust account an amount equal to the recoverable costs.
 - c. In the case where the debt cannot be recovered via the permit holder's financial arrangement, the debt will be written off as irrecoverable.
34. Cost recovery will only be taken for leases listed as clean-up program – state where it is applicable. In most cases, cost recovery will not be possible (for example, the department is statute barred from taking action under section 162, 170 or 171 of the Act) and any clean-up debt will need to be written off as irrecoverable.

Roles and responsibilities:

- Program Leader, Aquaculture: has delegation to add leases to the clean-up program, to engage contractors, and to approve expenditure from the lease security trust accounts.
- Senior Fisheries Manager, Aquaculture: manages the aquaculture administration team who is responsible for administering the lease clean-up program.
- Fisheries Manager, Aquaculture: team leader for the aquaculture administration team.

Legislation

- *Fisheries Management Act 1994*
- Fisheries Management (Aquaculture) Regulation 2024

Delegations:

- Fisheries Management Instrument of Delegation (Minister) 2024
- Fisheries Management Instrument of Delegation (Secretary) (No 2) 2024

Definitions:

- **Bank guarantee:** an elective financial arrangement where a guarantee is issued by an authorised guarantor (deposit taking institute or corporation authorised to undertake insurance business) that indemnifies the Crown to the extent of the required amount to secure the permit holder's compliance obligations.
- **Cash deposit:** an elective financial arrangement where the permit holder deposits the requirement amount with the department to guarantee the permit holder's compliance obligations.
- **Compliance obligations:** the permit holder's (current or former) or the lessee's (current or former) obligations under section 162, 170 or 171 of the Act.
- **Default financial arrangement:** the arrangement available to class A permit holders with class 1 leases, under which they are required to pay the annual contribution for lease security to guarantee the permit holder's compliance obligations.
- **Elective financial arrangement:** a bank guarantee or cash deposit financial arrangement, or a combination of these, for the required amount to guarantee the permit holder's compliance obligations.
- **Performance notice:** a written notice issued to the permit holder (current or former) under section 32 of the Regulation, requiring them to perform the compliance obligations that have risen due to the failure of the permit holder or lessee to comply with a section 162, 170 or 171 notice. The notice must be issued before the department can withdraw the recoverable costs from the default arrangement trust account.
- **Recoverable costs:** the costs and expenses relating to any work undertaken under sections 162, 170 or 171 of the Act.
- **Recovery notice:** a written notice issued to the permit holder (current or former) under section 26 of the Regulation, requiring them to pay the amount of the recoverable costs within a specified period. The notice must be issued before the department can forfeit the recoverable costs under an elective financial arrangement.
- **Statute barred:** any outstanding legislative requirements cannot be pursued due to the provisions of the Limitation Act 1969, or where the department has not acted in a reasonable time to ensure compliance with the provisions of the Act. Under section 278 of the Act, proceedings for an offence may be commenced not later than 2 years after the date of the alleged offence.

Related policies:

- NSW Oyster Industry Aquaculture Sustainable Aquaculture Strategy (OISAS)
 - Aquaculture lease allocation policy
 - Aquaculture account billing and debt recovery policy
 - DPIRD Fisheries Officers work instructions (oyster aquaculture)
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Revision history:

This policy replaces the O-041 Clean-up works on aquaculture lease areas and recovering costs v 8.0 (RDOC22/3358).

Version	Revised date	Details
9.0	30/10/2024	<ul style="list-style-type: none">• All references to the aquaculture regulation updated to reflect the new 2024 Regulation.• All terms and processes around reimbursement of costs via the lease security arrangements updated to reflect changes in the new regulation.• Changes made to how the contractor register will be maintained. Focus on permit holders and lessees. External contractors will be used as a last resort.• Added references to the procurement framework and policies.• Added clause regarding payment of contractor after work has been completed.• Added clause to cover when a contractor is working on more than one lease.