

## Undertaking works on oyster aquaculture lease areas and permit areas and recovering costs

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| POLICY NUMBER: O-041  | VERSION: 7                  |
| AUTHORISED BY: Group Director, Commercial Fisheries & Aquaculture | AUTHORISED DATE: 01/08/2018 |
| ISSUED BY: Fisheries Branch                                       | EFFECTIVE DATE: 01/08/2018  |
| CATEGORY: Operations and Industry                                 | REVIEW DATE: 01/08/2021     |

### Policy Statement

This policy defines under what circumstances NSW Department of Primary Industries (NSW DPI) will undertake works on an area subject to an aquaculture permit or lease where the permit holder or lessee fails to comply with s.162, s.170, or s.171 of the *Fisheries Management Act 1994* (the Act) and recover the costs associated with these works.

### Scope

This policy defines under what circumstances NSW DPI will:

1. Undertake works on an area subject to an aquaculture permit or lease where the permit holder or lessee fails to comply with:
  - a. s.162 of the Act - Permit area to be maintained in a tidy condition and the removal from land anything that has been left by the permit holder;
  - b. s.170 of the Act - Lessee may only fence a leased area if authorised by the Minister in certain cases;
  - c. s.171 of the Act – Minister may require the former lessee to remove improvements on an expired or otherwise terminated lease; and
2. Recover the costs associated with these works pursuant to s.162 (5) and (6), s.170 (5) and s.171 (5) of the Act.

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

Action under this Policy commences when the Fisheries Compliance Unit refers unresolved compliance matters under s.162, s.170 and s.171 of the Act to the Aquaculture Unit in accordance with the NSW DPI Fisheries Officers Work Instructions (Oyster Aquaculture).

### Requirements

1. *Initial assessment*
  - a. NSW DPI will assess all referred leases and recommend:
    - i) For a lease area or permit area where there is a reasonable prospect of either the relevant lessee or permit holder completing the work or NSW DPI recovering costs from the relevant lessee or permit holder, action will proceed as per Clean-up Program – Lessee;
    - ii) For a lease area or permit area where NSW DPI is statute barred from pursuing the relevant lessee OR there is little prospect of recovering costs from the relevant lessee, action will proceed as per Clean-up Program – State.

## 2. *Clean-up Program Lessee*

- a. For an expired or otherwise terminated lease area or permit area categorised as "Clean-up Program – Lessee", NSW DPI will initiate clean up and cost recovery action against the relevant lessee or permit holder as per Clauses 5 and 6 of this policy, unless the area is re-leased to another lessee via a competitive tender process prior to commencement of this action. In these cases, the new lessee will be required to sign a NSW DPI approved work plan prior to the granting of the lease.
- b. For an expired or otherwise terminated lease area or permit area categorised as "Clean-up Program – Lessee" any future lease applications/transfers/renewals and other lease transactions of the relevant lessee may be refused in accordance with Clauses 31(2)(e), 39(3)(d), 44(2)(d), 45(3)(e) and 47(4)(e) of the Fisheries Management (Aquaculture) Regulation 2017.
- c. The relevant lessee will not be able to reapply (either by application or competitive tender) for the terminated lease area categorised as "Clean-up Program - Lessee", until the required works on the terminated lease area has been completed as per Clause 5(j) of this policy.
- d. Following the expiry of a s.171 notice, a former lessee is not permitted to enter the area of the terminated lease and remove any improvements from that area.

## 3. *Clean-up Program State*

- a. For an expired or otherwise terminated lease area or permit area categorised as "Clean-up Program – State", NSW DPI will endeavour to make the area available for leasing by way of a competitive tender under the condition that the required works be undertaken by the new lessee under an approved NSW DPI work plan signed by the new lessee.
- b. Clean-up Program – State areas that cannot be re-leased, or are not re-leased following a competitive tender process, will be targeted for rehabilitation under a derelict oyster lease clean-up program. If applicable, cost recovery will be as per Clause 6 of this policy.
- c. For an expired or otherwise terminated lease area or permit area categorised as "Clean-up Program – State", any future lease applications/transfers/renewals and other lease transactions of the relevant lessee may be refused in accordance with Clauses 31(2)(e), 39(3)(d), 44(2)(d), 45(3)(e) and 47(4)(e) of the Fisheries Management (Aquaculture) Regulation 2017.
- d. The former lessee will not be able to reapply (either by application or competitive tender) for a terminated lease area categorised as "Clean-up Program - State", until the required works on the terminated lease area has been completed as per Clause 5(j) of this policy.
- e. Following the expiry of a s.171 notice, a former lessee is not permitted to enter the area of the terminated lease and remove any improvements from that area.

## 4. *Current lease area*

- a. For a current lease area or permit area, NSW DPI will initiate clean up (i.e. removal of unauthorised fence) and cost recovery action against the relevant lessee or permit holder as per Clauses 5 and 6 of this policy.
- b. At the discretion of the Group Director Commercial Fisheries & Aquaculture and in consultation with the relevant Fisheries Officer, the relevant lessee or permit holder may be offered the option of submitting a work plan to NSW DPI for approval with respect to completing the required works on a current lease. This option is not available for expired or otherwise terminated leases.
- c. If the work plan is approved and the relevant lessee or permit holder fails to comply with the work plan then clean up and cost recovery action against the relevant lessee or permit holder as per Clauses 5 and 6 of this policy will be initiated.
- d. If the work plan is not submitted, or is not approved by NSW DPI, clean up and cost recovery action against the relevant lessee or permit holder as per Clauses 5 and 6 of this policy will be initiated.
- e. Before a contractor is engaged to clean up an current oyster lease under S.162 of the Act, the permit holder will be issued with a S.162 notice, providing them with a specified period to carry out the necessary clean-up work on the lease area.

## 5. *Contractor engagement*

- a. NSW DPI will maintain a Clean-up Contractor Register, which will be updated regularly by way of an Expressions of Interest (EOI) process, where all current Class A permit holders and lessees will be invited to submit an EOI to be included on the Register. Interested parties may also submit an EOI to be included on the Register at any time.
- b. To be eligible to be included on the Clean-up Contractor Register, an oyster farmer or other interested party must be able to demonstrate:
  - i) a knowledge of waste disposal issues associated with the disposal of oyster cultivation materials;
  - ii) access to a suitable land base area authorised for the landing and storage of waste oyster lease materials prior to disposal, or a suitable strategy for the landing and disposal of waste oyster lease materials;
  - iii) access to suitable vessels to undertake the work;
  - iv) necessary approvals to operate all equipment necessary to undertake the work; and
  - v) evidence of 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.
- c. When the Fisheries Compliance Unit refers unresolved compliance matters under s.162, s.170 and s.171 of the Act to the Aquaculture Unit, NSW DPI will seek to engage a contractor by way of requesting quotes from interested parties who are on the Clean-up Contractor Register under s.162(4), s.170(4) and s.171(4) of the Act.
- d. If there are a limited number of eligible contractors on the Clean-up Contractor Register for a particular estuary where clean-up work is required, NSW DPI may invite all current Class A permit holders and lessees within that estuary to submit a quote for the proposed clean-up work.
- e. A contractor will be selected to complete the proposed clean-up work in accordance with the departments Procurement Manual, Procurement Policy (TI-A-169), and taking into consideration:
  - i) the requirements outlined in Clause 5(b) of this policy; and
  - ii) the cost effectiveness of the quote submitted by the contractor.
- f. The contractor will undertake the required works to achieve compliance in accordance with s.162(4), s.170(4) or s.171(4) of the Act.
- g. The contractor will, on behalf of NSW DPI, sell and/or dispose of anything removed from the area in accordance with s.162(5), s.170(5) or s.171(5) of the Act.
- h. The contractor will be required to liaise with the local Fisheries Officers as the clean-up work commences, provide feedback to the Fisheries Officers as the work progresses, and organise for a joint inspection of the area to be undertaken both midway through the clean-up work and once the work has been completed.
- i. A person listed on the Clean-up Contractor Register will not be contracted to undertake clean-up work on behalf of NSW DPI if at the time of engagement, they have:
  - i) Overdue debt relating to lease and/or permit fees on their aquaculture account; or
  - ii) Outstanding clean-up work on an expired or otherwise terminated lease area held either in their name or under the authority of their aquaculture permit.
- j. If a former lessee of a terminated lease area categorised as “Clean-up Program” intends to undertake the clean-up work on that lease area after the expiry of the s.171 notice, they will be engaged as a contractor (without payment) in accordance with s.171(5) of the Act.

## 6. *Recovering the debt:*

- a. For a “Clean-up Program Lessee” area:
  - i) On completion of the work NSW DPI will notify the relevant lessee or permit holder of any outstanding debt and seek to settle the debt in accordance with Treasurer’s Directions (TD93/4 450.01 to 450.02).

- ii) Where any debt has not been settled following standard debt recovery procedures, NSW DPI will:
    - (1) In the case where the relevant lease security arrangement is of a type referred to in Clause 21(1) of the Regulation (deposit, guarantee or financial arrangement), the amount deposited or secured will be forfeited to the Crown to the extent of the debt owed according to Clause 22 of the Regulation. Any residual debt will be referred to the NSW DPI Financial Administration Unit for action which may include recovering the debt by proceedings brought in a court of competent jurisdiction in accordance with s.162(6), 170(5) or s.171(5) of the Act. This action will be undertaken in consultation with the Commercial Fisheries & Aquaculture Unit.
    - (2) In the case where the relevant lease security arrangement is of a type referred to in Clause 25 of the Regulation (annual contribution), the debt will be referred to the NSW DPI Financial Administration Unit for action which may include recovering the debt by proceedings brought in a court of competent jurisdiction in accordance with s.162(6), 170(5) or s.171(5) of the Act. This action will be undertaken in consultation with the Commercial Fisheries & Aquaculture Unit.
  - iii) Following completion of action by the Financial Administration Unit a recommendation may be made to the Minister to withdraw from the trust account an amount equal to any residual debt, according to Clause 27 of the Regulation.
- b. For “Clean-up Program State” areas:
- i) If cost recovery is applicable, on completion of the work, NSW DPI will:
    - (1) In the case where the relevant lease security arrangement is of a type referred to in Clause 21(1) of the Regulation (deposit, guarantee or financial arrangement), the amount deposited or secured will be forfeited to the Crown to the extent of the debt owed according to Clause 22 of the Regulation.
    - (2) In the case where the relevant lease security arrangement is of a type referred to in Clause 25 of the Regulation (annual contribution), a recommendation will be made to the Minister to withdraw from the trust account an amount equal to the cost of the clean-up work in accordance with Clause 27 of the Regulation.

## Procedures

- Oyster Lease Clean up – Procedures (INT16/75532).

## Roles and responsibilities

- *Fisheries Management Officer Aquaculture*: undertake procedures set out in this policy.
- *Policy Officer Aquaculture*: undertake procedures set out in this policy.
- *Senior Fisheries Manager Aquaculture*: undertake procedures set out in this policy.

## Delegations

- See relevant Delegation Manual.

## Definitions

- **Exceptional circumstances**: means rare or severe events that are outside those that a farmer could normally be expected to anticipate or manage under responsible farm management strategies. Consideration to exceptional circumstances will be given under relevant government guidelines (e.g. *Public Finance and Audit Act 1983* - Treasurer's Directions TD93/4).
- **Referred lease**: means an existing aquaculture lease or former aquaculture lease, referred from the Fisheries Compliance Unit to the Aquaculture Unit for unresolved non-compliance in accordance with the NSW DPI Fisheries Officers Work Instructions (Oyster Aquaculture).
- **Referred permit**: means an existing aquaculture permit or former aquaculture permit, referred from the Fisheries Compliance Unit to the Aquaculture Unit for unresolved non-compliance in accordance with the NSW DPI Fisheries Officers Work Instructions (Oyster Aquaculture).
- **Relevant lessee or permit holder** means, for unresolved non-compliance under:
  - s.162 of the Act, the holder of the aquaculture permit that authorises aquaculture on the referred lease;
  - s.170 of the Act, the lessee; and
  - s.171 of the Act, the former lessee.

- Required works: means those works on a referred lease or referred permit that are required to resolve non-compliance matters that led to the referral of the matter from the Fisheries Compliance Unit to the Aquaculture Unit.
- Statute barred: means any outstanding debt where repayment of the debt cannot be pursued due to the provisions of the *Limitation Act 1969* or where NSW DPI has not acted in a reasonable time to bring the lease area into compliance with the provisions of the Act.

### Legislation

- *Fisheries Management Act 1994*
- Fisheries Management (Aquaculture) Regulation 2017
- *Public Finance and Audit Act 1983* – Treasurers Directions

### Related policies

- NSW Procurement Policy Framework for NSW Government Agencies (Version 4)
- DoI Procurement Manual Version 2.2
- TI-A-169 Procurement Policy
- IND-O-232 Aquaculture Account Billing & Debt Recovery Policy
- AQP001 Aquaculture Debt & Fee Waiver Policy
- O-071 Aquaculture Lease Allocation Policy

### Other related documents

- NSW Oyster Industry Sustainable Aquaculture Strategy
- NSW DPI Fisheries Officers Work Instructions (Oyster Aquaculture)
- Contractor Management Procedure (INT17/60005)

### Revision history

| Version | Date issued | Notes   | By                                |
|---------|-------------|---|-----------------------------------|
| 1       | 20/09/2007  |   | Senior Policy Officer Aquaculture |
| 2       | 10/12/2008  | Updated following legal advice.   | Senior Policy Officer Aquaculture |
| 3       | 19/08/2010  | Updated to define financial hardship provisions.  | Senior Policy Officer Aquaculture |
| 4       | 07/11/2011  | Updated to include cost recovery associated with Clean-up Program - State leases; and department name change.                     | Senior Policy Officer Aquaculture |
| 5       | 30/07/2012  | Updated to include reduction in final warning period if in public interest.   | Senior Policy Officer Aquaculture |
| 5.1     | 05/09/2012  | Replacement of references to 2007 Regulation with references to 2012 Regulation.  | Senior Policy Officer Aquaculture |
| 6       | 17/02/2014  | Removal of reference to financial hardship provisions and Policy No. O-090 Waiver of Aquaculture Lease Clean up Responsibilities. | Senior Policy Officer Aquaculture |

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| 7 | 30/07/2018 | <p>Removal of reference to a final warning being issued before clean-up action proceeds under S.171 of the Act.</p> <p>Updated to include a clause prohibiting a former lessee to apply for a terminated lease area before the required work has been completed.</p> <p>Updated to include a clause stating that a work plan is not an option for a terminated lease area with outstanding clean-up work.</p> <p>Updated to include a section detailing how NSW DPI undertakes contractor engagement.</p> <p>Updated to include a clause requiring contractors to liaise with local Fisheries Officers while the clean-up work is being undertaken, and to organise for joint inspections to be completed.</p> | Senior Fisheries Manager, Aquaculture |
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