

Session 1

The Regulatory Environment

Due Diligence and Responsibility

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POEO Act

- Protection of the Environment Operations (POEO) Act 1997
- EPA regulates works associated with:
 - Scheduled Activities
 - State and public authorities (including Councils)
 - Other licensed activities relating to water pollution
- Local Councils are the Appropriate Regulatory Authority (ARA) under the POEO Act for all other activities

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Environmental Protection

- One of the main potential adverse impacts identified during construction is associated with soil and water due to erosion and sedimentation
- Such impacts are to be minimised by mitigating measures
- May be required to prepare a Construction Environmental Management Plan (CEMP) before construction commences

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Environmental Protection


- Erosion and Sediment Control Plan (ESCP) or a Soil and Water Management Plan (SWMP) sets out specific conditions to be met to achieve environmental outcomes
- Key objectives of an ESCP or a SWMP are to:
 - Minimise risk of erosion and sediment deposition
 - Prevent surface water degradation
 - Ensure compliance with all legislative water quality requirements

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How are E&SC rules applied?

- Two approaches to implementation:
 - “performance based”, e.g. 50 mg/L discharge limit for suspended solids
 - “good practice”, e.g. “Blue Book” approach
- What does 50mg/L look like?





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50mg/L

- How much dirt is 50mg?
- This is 500mg
- The dustpan contains 1kg
- So 1kg mixed with 20,000L of water = 50mg/L



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Who is Responsible?

- Responsibility
 - Organisations, and
 - Individuals
 - Both are responsible for any actions reasonably or legally within their control
 - “Due Diligence”

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Due Diligence

- In simple terms – due diligence means “take care” and also to “be proactive”
- No strict legal definition in NSW environmental legislation – must be proven
- Generally, “taking every reasonable precaution in the circumstances to prevent harm”
- Can be used as a valid “defence” against prosecution

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What is Harm?

- In the context of “harm” to the environment, the POEO Act defines as:
“... any direct or indirect alteration of the environment but has the effect of degrading the environment and, without limiting the generality of the above, includes any act or omission that results in pollution.”

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Negligence

- Accidental or intentional – doesn't matter
- Actions (e.g. unlicensed discharge of dirty water)
- Omissions (e.g. didn't maintain sediment controls)
- Ignorance and mistakes are no excuse

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Liability

- Project Principals cannot transfer their obligations or responsibility to a sub-contractor
- Project Principal needs to ensure compliance of all subordinates, including employees, subcontractors and even visitors

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Duty to Notify

Part 5.7 (§148) POEO Act

- A person who, while carrying out an activity becomes aware that material harm to the environment is caused or threatened by the person's or someone else's activity must, as soon as practicable:
 - Notify the EPA (proponent or employer) 131 555
 - Advise their employer (employee) of the event, and the employer must then advise the EPA in writing
 - Notify EPA or ARA (occupant)

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Relevant Matters

- **Section 120: Water Pollution**
 - In terms of dangerous liquids storage and handling, care must be taken to ensure that spills or leaks do not result in contaminated water entering the stormwater system
 - Determining whether liquids storage or handling poses a risk of pollution and taking measures to reduce that risk such as storing liquids within a covered secondary containment area, having spill kits readily available and ensuring staff know how to use them
- **Section 142A: Land Pollution**
 - On the spot fine up to \$1,500 for an individual, \$5,000 for a corporation

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POEO Act Offences

Three tiers of offences:

- Tier 1: Most serious, wilful or negligent, actual or likely harm to the environment
- Tier 2: Non-intentional, water or land pollution, failure to comply with duty to notify a pollution incident
- Tier 3: More minor Tier 2 offences dealt with by penalty infringement notices

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Tier 1 - Defence

General Defence for Tier 1 offences include the person establishing that:

- The commission of the offence was due to causes over which the person had no control, and
- That the person took reasonable precautions and exercised **due diligence** to prevent the commission of the offence.

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Penalties

- Tier 1: Up to \$5 million for a corporation and \$1 million and/or up to 7 years gaol for an individual
- Tier 2: Up to \$1 million for a corporation and \$250,000 for an individual
- These can be doubled for "failure to notify" offences

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Penalties

- Tier 3: Tier 2 offences dealt with by Penalty Infringement Notices (PINs), \$15,000 for a corporation and \$7,500 for an individual when issued by EPA, or Clean-up and Prevention Notices which carry a \$433 administration fee
- The "no knowledge" defence available to directors and managers has been removed

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Tier 1 Penalty - example

- Warringah Golf Club pesticide spill from maintenance area via stormwater drain, killing 10,000 fish in Manly Lagoon
- Club fined \$250,000, Head Greenkeeper sentenced to 250 hours community service and ordered to pay \$50,000 EPA costs

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Manly Lagoon



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Tier 1 Penalty - example

- “The primary offence was caused by either the wilful or negligent act of Mr in hosing the poisonous substance off the concrete slab under conditions where there were no adequate measures in place to prevent a discharge to the creek”.
- The conditions that gave rise to the commission of the offence by Mr There was no bunding or other protective devices around the concrete slab or the stormwater pits”.


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Tier 2 Penalty - example

- Snowy Hydro Contractor allowed sediment laden water discharge to Snowy River by poorly timed removal of coffer dam
- Contractor fined \$100,000 plus EPA costs of ~\$86,000
- Snowy Hydro also identically fined

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Jindabyne Dam



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Tier 2 Penalty - example

- “The offence relates to a series of related incidents which occurred during the final stages of a major construction project being carried out in, and immediately downstream of, the Jindabyne Dam ... The pollutant was sediment laden waters containing soil, earth, clay or similar inorganic matter. The polluted waters ... were a stretch of the Snowy River approximately 15 kilometres downstream of a permeable silt curtain, which was the sole sediment control”

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Tier 2 Penalty - example

- Large contractor ordered to pay DPI (fisheries) \$20,000 for rehabilitation works as compensation for discharge of sediment laden water to SEPP14 wetland at Brunswick Heads resulting from failure to install sediment basin.
- Also to pay costs of \$30,000 and advertise responsibility in local and national newspapers.

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Tier 3 Penalties - typical

- Typical erosion and sediment control scenario where sediment enters a gutter, drain or waterway
- Fines for individuals typically up to \$750 plus \$433 administration fee where a Clean-up Notice or Prevention Notice has been issued as well
- Employer cannot pay fine for an individual

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Other Relevant Legislation

- Fisheries Management Act (1994)
 - seagrass, saltmarsh, wetlands
- Threatened Species Conservation Act (1995)
 - endangered species or habitats
- Water Management Act (2000)
 - “controlled activities” i.e. works within 40m of waterway
- National Parks and Wildlife Act (1974)
 - protected areas, aboriginal heritage

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The Blue Book Volume 1

- Managing Urban Stormwater: Soils and Construction – Vol. 1. (“The Blue Book”), Landcom (2004)
- Printed manual no longer available, but pdf can be downloaded at:
- <http://www.environment.nsw.gov.au/resources/water/BlueBookVol1.pdf>



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The Blue Book Volume 1

- Applies to construction sites in NSW
- Outlines best practice requirements for soil and water management and design criteria for Erosion and Sediment Control
- Relevant for:
 - Designers and Plan Preparers
 - Project and Site Managers
 - Site Supervisors and Foremen
 - Regulatory Staff in Planning and Assessment

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Volume 1 Contents

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 Chapter 3. Assessment of Constraint and Opportunities
 Chapter 4. Erosion Control: Management of Soils
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Volume 1 Appendices

Appendix A – Revised Universal Soil Loss Equation
 Appendix B – R-Factor Maps
 Appendix C – Constraints to Development
 Appendix D – Use of Erosion Control Products
 Appendix E – Settlement of Dispersed Fines
 Appendix F – Runoff Coefficients
 Appendix G – Rehabilitation Recommendations
 Appendix H – Vegetation Management Plan
 Appendix I – Management of Waterfront Land
 Appendix J – Worksheets
 Appendix K – Relevant NSW Legislation
 Appendix L – (on CD) Graphs and Spreadsheets
 Appendix M – Model Code of Practice
 Appendix N – Glossary


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Questions the Blue Book Answers



- What sort of plan do I need, an Erosion and Sediment Control Plan (ESCP) or a Soil and Water Management Plan (SWMP)?
- What is the difference between an ESCP and a SWMP?
- What should go in my plan?
- How do I assess my site for constraints, opportunities and erosion risk?
- What is RUSLE and how do I calculate Soil Loss Class?
- Where do I find the data I require?
- What erosion controls should I use?
- What sediment controls should I use?
- How do I stabilise and maintain my site?

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The Blue Book Volume 2



- Managing Urban Stormwater: Soils and Construction – Vol. 2. DECC (2008):
 - 2A Installation of Services
 - 2B Waste Landfills
 - 2C Unsealed Roads
 - 2D Main Road Construction
 - 2E Mines and Quarries

http://www.environment.nsw.gov.au/resources/stormwater/0801soil_sconstorm2a.pdf etc.

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