

33. Drainage on agricultural land

The rise in the water table as a result of large scale clearing of native vegetation has led to major salinity problems in Western Australia's agricultural areas. It is estimated that almost 30% of the Wheatbelt will be affected by salinity in the next 50 to 100 years. One mechanism used to address rising water tables is drainage, where water is drawn away through channels and deposited downstream or in collection basins.

This fact sheet examines the laws applying to drainage. It is intended to assist people seeking to construct environmentally sensitive drainage works and those people concerned about the possible adverse environmental consequences of discharging salty and often highly acid water into sensitive areas. See also **Fact Sheet 32: Land degradation**, **Fact Sheet 21: Rivers and watercourses** and **Fact Sheet: 23: Wetlands**.



What is "drainage"?

For the purpose of this fact sheet, drainage is defined as *"the act of transferring water and its solutes from one area to another"*. Drainage works range from small local earthworks to sophisticated and extensive pumping systems.



Who regulates drainage?

There are a number of government agencies which have the power regulate drainage. A person proposing to undertake drainage works has the responsibility to determine which agency or agencies need to give approval in a particular case. Approval from only one of the relevant agencies does not necessarily mean that proposed drainage works are lawful.

The main mechanisms regulating drainage are:

- Land degradation controls (Commissioner of Soil and Land Conservation);
- Planning and development controls (local government);
- Restrictions on interfering with watercourses (Water and Rivers Commission); and
- Special controls on protected wetlands (Environmental Protection Authority and Environment Australia).



Land degradation controls

The major controls on drainage works in agricultural areas are found in the *Soil and Land Conservation Act 1945*. This Act is enforced by the Commissioner of Soil and Land Conservation (within the Department of Agriculture).

There are two mechanisms under the Act for regulating drainage: notices of intent to drain, and soil conservation notices.

Notice of intent to drain

When is a notice of intent to drain required?

If an owner or occupier of land proposes:

- to drain or pump water;
- from under the land surface;
- because of the salinity of the land or water; and
- to discharge that water onto other land, into other water or into a watercourse or wetland,

he or she is required to lodge a notice of intent to drain (NOID) with the Commissioner 90 days before draining commences.

Important disclaimer:

This Fact Sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this Fact Sheet.

It is likely that draining “water from under the land surface” includes deepening an existing watercourse or constructing channels to drain groundwater.

How are proposals involving a number of parties dealt with?

The *Soil and Land Conservation Regulations 1992* require each owner or occupier to lodge a separate NOID. The Department of Agriculture has developed a policy on the notification process for multi-landowner proposals. This policy is available from the [Commissioner of Soil and Land Conservation](#).

How is a notice of intent to drain lodged?

The NOID must be lodged in writing with the Commissioner at least 90 days before the draining or pumping commences.

The NOID must follow a form in the *Soil and Land Conservation Regulations*, which can be obtained from the Department of Agriculture. There are two different forms – one is for the Peel-Harvey catchment, and the other is for all other areas of the State.

In addition to the completed form, the Commissioner requires the written endorsement of the proposal from any downstream landowners who might be affected by the proposal. The application must also include a plan which shows the land to be drained, the title description of the land and adjoining locations, any adjacent public roads and where the water is to be discharged.

What happens after a Notice of Intent is lodged?

After the NOID is lodged, the Commissioner will invite comment from any public authority or land conservation district committee that may have an interest in the proposal. If the proposal is likely to have a significant impact on the environment, the Commissioner is required to refer it to the Environmental Protection Authority for an environmental impact assessment (see [Fact Sheet 5: Environmental impact assessment in Western Australia](#)).

In assessing the proposal, the Commissioner takes into account the possible implications for land degradation if it is allowed to proceed. If the Commissioner believes the proposal is likely to exacerbate land degradation, he or she can issue a soil conservation notice (see below). If the Commissioner does not object to the proposal, the proponent may commence discharging water once the 90 day notice period has ended. If the Commissioner does not object to the NOID, the NOID process must be repeated if drainage has not commenced within two years of the lodgment of the original NOID.

It is an offence not to notify the Commissioner?

It is an offence for an owner or occupier of land to fail to notify the Commissioner of an intent to drain when required to do so. The penalty is a maximum fine of \$2,000.



Soil conservation notices

When can the Commissioner issue a Soil Conservation Notice?

The Commissioner may prevent a drainage proposal being implemented by issuing a soil conservation notice (“Notice”). The Notice will make it an offence for the proposal to be implemented.

The Commissioner may issue a Notice when he or she is of the opinion that the proposal will (or is likely to) cause land degradation. “Land degradation” is defined in the Act to include:

- soil erosion, salinity, eutrophication and flooding; and
- removal or deterioration of natural or introduced vegetation,

that may be detrimental to the present or future use of the land.

Who can be issued with a soil conservation notice?

A Notice can be served on the owner or occupier of land, or any other person the Commissioner believes is taking action that might lead to land degradation. This may include an earth moving contractor undertaking earthworks associated with a drain.

What can a soil conservation notice require?

A Notice can require that a person:

- adopt or refrain from a particular agricultural or pastoral method;
- take a specific action to prevent movement of water on or from land;
- refrain from destroying, cutting down or injuring any tree, shrub, grass or other plant on any land;
- take action specified in notice to prevent erosion, drift or movement of sand, soil, dust or water on or from any land; or
- anything else incidental to the above.

Who is bound by a soil conservation notice?

A Notice is binding on anyone on whom it was served, and any subsequent owner or occupier of the relevant land where the Commissioner has registered a copy of the Notice on the title of that land.

What happens to a person who fails comply with a soil conservation notice?

It is an offence not to comply with a Notice, the maximum penalty for which is a fine of \$3,000. In addition, where a person fails to do something a Notice requires them to do, the Commissioner may authorise some other person to do that thing, and recover the cost of doing so from the person who has breached the Notice.

Where damage has been caused to land by the failure of a person to comply with a Notice, the owner or occupier of the damaged land may claim compensation in a civil court.

Can a person object to a soil conservation notice?

A person served with a Notice can lodge a written appeal with the Minister for Agriculture within 30 days of service. They must comply with the Notice pending the determination of the appeal except where the Notice requires the person served to take positive action, in which case the person does not have to comply with that condition.

A person may also request the Commissioner discharge a Notice at any time where the Notice has been fully complied with or is no longer necessary, or there is other just cause. An appeal can be made to the Minister for Agriculture against the refusal by the Commissioner to discharge a Notice.

The Minister is required to refer appeals to a committee for examination and advice before making a decision.



Planning and development controls

Local governments have a range of functions. One of those functions is to ensure that development on land under its control complies with its Town Planning Scheme (“TPS”). Each TPS is different as to the requirement for assessing environmental impacts of developments. Despite its name, a TPS can apply to rural land.

It is possible that a drainage proposal (which often involve extensive excavation works and may cross many property boundaries) will require development approval from some local governments. The planning officer of the local government in question should be able to advise whether development approval is required. For more information on planning controls, refer to [Fact Sheet 3: Planning laws](#) and [Fact Sheet 4: Development controls](#).



Interferences with watercourses

There are a number of controls on interfering with certain watercourses, including interfering with the banks or discharging drainage water into watercourses.

Full details of these controls can be found in [Fact Sheet 21: Rivers and watercourses](#).



Protected wetlands

Wetlands can be given special protection under a number of laws. This includes wetlands that are internationally significant under the Ramsar convention, of which there are 12 in Western Australia. Drainage activities which impact on these areas are subject to special control. These controls are fully described in [Fact Sheet 23: Wetlands](#).



Other controls

Clearing native vegetation

If the construction of a drain requires the removal of native vegetation, or is likely to damage native vegetation at the point of discharge or downstream, approval may be required under proposed changes to the *Environmental Protection Act*. Pending those changes becoming law, a notice of intent to clear may need to be lodged with the Commissioner of Soil and Land Conservation. For more information, refer to [Fact Sheet 7: Clearing native vegetation](#).

Environmental impact assessment

Where a drainage proposal is likely to have a significant effect on the environment, any person may refer the proposal to the Environmental Protection Authority for an environmental impact assessment. This option may be particularly relevant for large scale proposals that are being contemplated in the Wheatbelt. For more information, see [Fact Sheet 5: Environmental impact assessment in WA](#).

Environmental harm and pollution

Drainage activities which cause environmental harm or which pollute other areas (for example, through salinity or acidic discharges) may be subject to penalties under proposed changes to the *Environmental Protection Act 1986*. See [Fact Sheet 27: Pollution and environmental harm](#) for further information.

National parks and nature reserves

The Department of Conservation and Land Management (“CALM”) is responsible for the management of conservation reserves including national parks and nature reserves. Where drainage could impact on national parks and nature reserves, CALM’s consent for the drainage should be obtained. For more information, refer to [Fact Sheet 11: Conservation reserves](#).

Water Corporation drains

The Water Corporation is responsible for the administration of the *Land Drainage Act 1925*. This Act authorises the Water Corporation to undertake public drainage works. These are generally drains on the Swan Coastal Plain designed to reduce waterlogging in populated areas. The Act makes it an offence to interfere with, damage or connect to a Water Corporation drain without the written authority of the Minister for Water Resources.

Aboriginal sites of significance

The Minister for Aboriginal Affairs is responsible for aboriginal sites. If drainage works are likely to interfere with an aboriginal site, the Minister’s permission must be sought. Furthermore, land damaged by drainage may generate a successful compensation claim if the land becomes the subject of a successful native title claim. For more information, refer to [Fact Sheet 13: Protecting heritage](#).

Roads or railways

Where drainage works or the flow of water from the works could impact on a road, road reserve or railway, permission from the relevant authority should be obtained. Failure to do so could result in significant penalties and damages, particularly where the works lead to damage to the road or railway causing loss of life or property.

Interfering with public services

Anyone contemplating drainage works should telephone 1100 to check where underground infrastructure is situated, such as electricity, gas, water, sewerage and particularly fibre optic cables. Damage to these services can be dangerous and costly.

Common law remedies

The rules of negligence, nuisance and trespass are relevant to the impact of drainage works. These rules are complex, and the individual circumstances of each case need to be looked at. A person may have a case to seek compensation from a neighbour where that person has suffered loss as a result of drainage works and those works were carried out without his or her consent. For this reason, it is prudent for any person undertaking drainage works that may affect another person’s land to seek the written approval of that person before the works proceed. For more information on these common law rules, refer to [Fact Sheet 2: Common law](#).

How can you become involved?

There are limited opportunities for public involvement in the administration of drainage laws. However, if you become aware of a drainage activity that is causing or is likely to cause land degradation, you should report the matter to the [Commissioner of Soil and Land Conservation](#) and your relevant local government. If the drainage works appear to be interfering with a watercourse or a protected wetland, you may also refer it to the [Environmental Protection Authority](#), [Water and Rivers Commission](#) and (in the case of Ramsar wetlands) to [Environment Australia](#).

Other things you can do include:

- join a local landcare group to find out more about land conservation activities and how you can help;
- monitor local government agendas for development proposals that could cause land degradation, and make submissions through the planning process (see [Fact Sheet 3: Planning laws](#));
- report pollution or environmental harm to the Department of Environmental Protection (see [Fact Sheet 27: Pollution and environmental harm](#));
- report possible illegal land clearing to the Commissioner of Soil and Land Conservation and the Department of Environmental Protection (see [Fact Sheet 7: Clearing native vegetation](#));
- refer proposals likely to impact on a conservation reserve to the Department of Conservation and Land Management (see [Fact Sheet 11: Conservation reserves](#)); and
- refer development proposals likely to lead to significant environmental harm to the Environmental Protection Authority for assessment (see [Fact Sheet 5: Environmental impact assessment in WA](#)).

Contacts and further information

[Commissioner of Soil and Land Conservation](#), South Perth

Tel: (08) 9368 3282

Local government

Refer to White Pages for listings

[Environmental Protection Authority](#), Perth

Tel: (08) 9222 7000

[Water and Rivers Commission](#), East Perth

Tel: (08) 9278 0300

[Environment Australia](#), Canberra

Tel: (02) 6274 1111

[Department of Conservation and Land Management](#), Crawley

Tel: (08) 9442 0300

[State Law Publisher](#), William Street Perth (for copies of WA legislation)

Tel: (08) 9321 7688

The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- ◆ to provide community groups and individuals with legal advice and representation to help protect the environment;
- ◆ to promote law reform that improves environmental protection; and
- ◆ to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal Attorney-General's Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

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