Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024

Submission No:	14
Submitted by:	Queensland Water Directorate
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Attachments:	See attachment
Submitter Comments:	

SUBMISSION

Health, Environment and Agriculture Committee
Queensland Parliament
2A George Street
Brisbane City QLD 4000

To the Committee Secretary

Re: Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill 2024

The Queensland Water Directorate ***(qldwater)*** is the central advisory and advocacy body within Queensland's urban water industry. qldwater works with its members to provide critical public water and wastewater services which are safe, secure and sustainable.

In providing these essential services, the urban water sector owns and operates sewer lines, water and wastewater treatment plants, pumping stations, reservoirs (water towers), and a range of other critical water technologies/infrastructure in accordance with their statutory functions and strict regulatory framework. There are currently 370 water supply schemes and 265 sewage schemes across Queensland.

Of the 75 publicly owned water service providers, 66 are local councils outside of SEQ, 15 of these are Aboriginal councils and two are Torres Strait Island councils. ***qldwater*** members include all council water service providers, the council owned statutory authorities in south-east Queensland and the two state-government owned statutory authorities. We note the unsustainable financial position of most Queensland councils.

Our members currently service 1,916,519 sewerage connections and 2,117,663 drinking water connections. These numbers are set to substantially increase with the current and projected population growth.

Our members, though the sewerage systems receive a range of containments of concern, for which they have no control.

On 9 November 2023 ***qldwater*** made submissions on the consultation paper - *Improving the powers and penalties provisions of the Environmental Protection Act 1994*. However, it is apparent that most of our submissions were not incorporated into the text of the *Environmental Protection (Powers and Penalties) and Other Legislation Amendment Bill* 2024 (the **Bill**). Accordingly, ***qldwater*** members remain seriously concerned about unintended and perverse outcomes that may arise from some of the proposed amendments primarily relating to:

(a) the lack of an adequate descriptor of who a 'polluter' is, against the background that water and wastewater service providers do not import, design, produce, use or otherwise control in any real sense, emerging contaminants that are discharged into water or wastewater;

(b) the uncertainty and lack of utility in the proposed duty to restore the environment absent direction about how contamination that has migrated off-site can be remedied; and

(c) the stealthy mechanism for amending an environmental authority condition, resulting in lack of business and operational certainty.

qldwater wishes to restate in full the submissions it made to the Department and dated 9 November 2023. For convenience, the submission is **attached**.

qldwater's specific comments are set out in the table below and we trust that the content of these submissions will be considered favourably.

Please do not hesitate to contact if you have any questions.

Yours sincerely

[redacted]

Dr Georgina Davis
Chief Executive Officer
Email: [redacted]

No.	Department Proposal	Comments	Proposed changes in red
Clause 6A – Principles of environmental protection			
1.	(1) This Act is to be administered having regard to— (a) the following principles of environmental policy as set out in the Intergovernmental Agreement on the Environment— i. the precautionary principle; ii. intergenerational equity; iii. conservation of biological diversity and ecological integrity; iv. improved valuation, pricing and incentive mechanisms (which <u>includes the principle known as the principle of polluter pays</u>); [our emphasis].	qldwater generally supports the inclusion of principles extracted from the Intergovernmental Agreement on the Environment (**IGAE**). However, 'polluter' is not defined in the *Environmental Protection Act 1994* (Qld) (**EP Act**) although we acknowledge that for chapter 7, 'prescribed responsible person' is defined. However, the definition of 'prescribed responsible person' is not sufficient for this purpose. The 'polluter' should be defined in the EP Act and the definition should make it clear that end of line entities that have little control in the products inputted in upstream materials and processes will not be considered a 'polluter', so long as reasonably practicable controls are implemented. Wastewater treatment plants are unable to, in a practical sense, control much of the pollutants entering their systems. Trade waste approvals allow a wastewater service provider to gauge the nature, and to a limited extent, control the quantity, of the liquid waste being discharged to sewer. However, practically, a wastewater service provider has little choice but to accept the waste and to treat it at the end point. This means that those benefiting from the use of, for example, emerging contaminants or microplastics, do not have to account for the pollution but the end-of-line entity must manage and/or treat the pollutant. This is an onerous burden and manifestly unjust. Without clarification, the 'polluter pays' principle may render water and wastewater essential services, vital to the community, to be incapable of operation.	Schedule 4 Dictionary should be amended, consistent with the Intergovernmental Agreement on the Environment, as follows: **Polluter** means as an entity who generates pollution, contamination or waste. An entity does not generate pollution, contamination or waste if – (a) it is an end of line user providing essential community services, acting in accordance with best practice; or (b) the pollution, contamination or waste is identified on its premises but there is evidence that the pollution, contamination or waste migrated onto its premises. Alternatively, or in addition to the above definition: **Polluter pays** means the principle that those who generate pollution, contamination, and waste, not

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			merely having received it as an end of line user, should bear the cost of containment, avoidance, or abatement. Note - **End of line user** provides essential community services, acting in accordance with best practice, and may include water and wastewater service providers and waste and recycling facilities.
Insertion of new ch7, pt 1, div 1A, s319C Duty to Restore the Environment			
2.	(1) This section applies to a person causing or permitting, or who caused or permitted, an incident involving contamination of the environment to happen that results in unlawful environmental harm. (2) The person must, as soon as reasonably practicable after the incident happens, take measures, as far as reasonably practicable, to rehabilitate or restore the environment to its condition before the harm (the duty to restore the environment). (3) A person commits an offence if— (a) the person contravenes the duty to restore the environment; and (b) the contravention relates to harm that is serious or material environmental harm.	In the absence of a right to reasonable entry and informal dispute resolution mechanism, this amendment is confusing and lacks utility. On the one hand, the proposed amendment seeks to impose a duty on operators to take immediate action in the event of a contamination incident. However, on the other hand, the means in which to take this urgent (and presumably, important) remediation is not provided. Accordingly, this amendment, as currently drafted, is ineffective. It may increase litigation between the parties affected. The words, 'reasonably practicable' are capable of flexible use depending on the circumstances but does not lend itself to circumstances where contamination has migrated off-site. We note that the Department has acknowledged in its Consultation Report the feedback about:	Chapter 7, pt 1, div 1A would benefit from amendment such as: (1) This section applies if rehabilitation or restoration of the environment is required under s319C and the person required to take action on the premises does not own or control the premises. (2) The person undertaking the rehabilitation or restoration may enter the premises to take the action only— (a) with the consent of the owner or occupier of the premises; or

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	Maximum penalty— (a) if the offence is committed wilfully—4,500 penalty units or 2 years imprisonment; or (b) otherwise—1,655 penalty units. (4) In deciding the measures required to be taken under subsection (2), regard must be had to, for example— (a) the nature and extent of the environmental harm caused by the contamination; and (b) the sensitivity of the receiving environment to remedial measures that might be taken in relation to the environmental harm; and (c) the current state of technical knowledge for remedial measures that might be taken in relation to the environmental harm; and (d) the likelihood of successful application of the different measures that might be taken in relation to the environmental harm; and (e) the financial implications of the different measures that might be taken in relation to the environmental harm.	• the need for reasonable rights of entry to allow polluters access to third party land, particularly state land, to restore the environment where harm has occurred; and • the need for a dispute resolution process in cases where parties cannot agree was also raised, as well as the need to clarify operative impacts and legal requirements for local government. However, the Bill does not adequately, or at all, address these concerns. The Government Response that *"there is likely to be continued need in practice to utilise statutory notices to ensure harm from contamination is restored if a circumstance arises where there are persons or circumstances not covered by the duty"* undermines the purpose for this duty. The use of word 'permitted' should be reconsidered in the context of an entity that has been subject to contamination that has accumulated on the entity's site (e.g. in a detention pond that has captured contaminated stormwater run-off from upstream properties, or a pond that has been impacted by contaminated groundwater which then discharges [as designed] in wet weather to adjacent waters).	(b) at any time without the permission of the owner or occupier of the premises, to take urgent action to prevent or minimise the migration of contamination that if unrestrained would cause, or would likely cause: i. serious environmental harm; or ii. significant damage to infrastructure; or (c) if the person has given at least 5 business days written notice to the owner and occupier in accordance with subsection (3). (3) The notice under subsection (2)(c) must inform the owner and occupier of— (a) the intention to enter the land; (b) the purpose of the entry; and (c) the days and times when the entry is to be made. (4) In taking the action, the person must take all reasonable steps to ensure the person causes as little inconvenience, including business disruption, and does as

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			little damage, as is practicable in the circumstances. (5) Nothing in this section authorises the person to enter a building used for residential purposes. (6) If the owner or occupier of the premises incurs loss or damage, including damages associated with business disruption, devaluation of land and costs associated with ongoing monitoring and management of the now impacted premises, because of action taken by the person, the owner or occupier is entitled to be paid by the person reasonable compensation because of the loss or damage that is agreed between the person and the owner or occupier of the premises or, failing agreement, decided by a court having jurisdiction for the recovery of amounts up to the amount of compensation claimed. (7) The person required to act under s319C must pay the owner or occupier of the premises reasonable compensation for any

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			legal or expert contamination advice provided about the proposed rehabilitation or remediation. (8) The court may make an order about costs it considers just.
Environmental enforcement orders ss362 and 364			
6.	**When an environmental enforcement order may be issued** (1) The administering authority may issue an order (an ***environmental enforcement order***) to a person if the authority believes an enforcement ground exists for the person. (2) Also, the administering authority may issue an environmental enforcement order to a person— (a) whom the authority believes to be a prescribed person for a contamination incident; or (b) in the circumstances stated in division 4. (3) To remove any doubt, it is declared that the administering authority may issue an environmental enforcement order to a person in relation to an activity even if the person is the holder of an environmental authority that authorises, or purportedly authorises, the activity.	Certainty in business is required to ensure economic viability. An environmental authority is given based on detailed expert advice. The regulator can approve the environmentally relevant activity subject to conditions. Those conditions regularly require monitoring and require compliance with the general environmental duty. The latter means there is continual improvement. qldwater is concerned that the ability of the regulator to issue an environmental enforcement order to an entity complying with its environmental authority will have Statewide and specific unintended and perverse consequences. Financial institutions may be reluctant to finance projects and site upgrades. Insurance companies are likely to increase premiums. If the provision allowing environmental enforcement orders to be given to operators, qldwater requests the exercise of such a power: • only be exercisable for the actual causing of serious environmental harm; or • only be exercisable where there is a significant, and previously unknown, threat of serious environmental harm; • only be exercisable after the operator has made submissions; • be given only by the chief executive and not be delegable; • automatically stayed, if the decision to amend is appealed.	

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		If exercising powers under the EP Act to give an environmental enforcement order and ultimately to use that order as a basis to amend an environmental authority, the decision maker should be required to specifically consider, under the proposed section 364, the broader environment as well as: • exclusion of the application of the precautionary principle; • any applicable scientific evidence or technology that may be reasonably employed and whether the benefits are scientifically assured and significant; and • adverse impacts on the wider industry particularly in terms of business certainty and confidence.	

SUBMISSION

9 November 2023

Dr Jamie Merrick
Director-General
Department of Environment and Science
GPO Box 2454
Brisbane
Queensland 4001

Via EPAct.Policy@des.qld.gov.au

Dear Dr Merrick

Re: Consultation paper - *Improving the powers and penalties provisions of the Environmental Protection Act 1994*

The Queensland Water Directorate (***qldwater***) is the central advisory and advocacy body within Queensland's urban water industry, working with our members to provide safe, secure and sustainable urban water services (drinking water, sewerage and wastewater treatment) to Queensland communities.

In providing these essential services, the urban water sector own and operate sewer lines, water and wastewater treatment plants, pumping stations, reservoirs, and a range of other critical water technologies/ infrastructure.

There are currently 370 water supply schemes and 265 sewage schemes ranging from large-scale infrastructure in South-East Queensland (SEQ), to facilities in regional and remote Queensland (including those servicing island communities). The Queensland sector is comprised of 75 service providers directly employing nearly 7,000 people. Of the 75 publicly owned water service providers, 66 are local councils outside of SEQ, 15 of these are Aboriginal councils and two are Torres Strait Island councils.

qldwater members include councils, the council owned statutory authorities in south-east Queensland (Urban Utilities and Unitywater) and the two state-government owned statutory authorities (Gladstone and Mt. Isa Water Boards).

qldwater welcomes the opportunity to provide a submission on the consultation paper - *Improving the powers and penalties provisions of the Environmental Protection Act 1994*. ***qldwater*** provides this submission without prejudice to any additional submission from our individual members.

While ***qldwater*** recognises that many of the proposed changes are positive and are intended to ensure the broader environment is sustainable against the needs of industry, our members are concerned that several of the proposed amendments are an over-reach, are unnecessary, and/or may have unintended consequences resulting in business and operational uncertainty.

Our members are therefore, keen to better understand the implications of the proposed amendments particularly as they relate to the ability to unilaterally change conditions of environmental authorities. We note that our members provide a vital service, operating critical infrastructure, but these services are operated on public monies and so fiscal responsibility is a must.

We respectfully request that the urban water sector is recognised as a critical stakeholder in the development of future tools and Guidelines as they are developed during this review and subsequent regulatory amendments and consulted as such.

Matters for Further Consideration

qldwater asks the Department to consider as a matter of urgency, the current fees relating to major amendments of Environmental Authorities for the local government sector. Most Environmentally Relevant Activities (ERA) undertaken by local councils are conditioned through Amalgamated Environmental Authorities (under Section 244 (b) of the *Environmental Protection Act 1994*).

In addition to an application fee to amend an Environmental Authority, if the amendment is considered 'major', 30% of the annual fee is also payable presumably to cover the administrative work required by the Department in assessing and making the required changes. For an Amalgamated Environmental Authority, this is 30% of the annual fee for the highest fee ERA on the Authority (regardless of the ERA being amended).

qldwater is seeking an immediate exclusion from the 30% fee for local councils seeking major amendments to their Environmental Authorities (Amalgamated or not). Local Councils are providing public services to their communities, they are not profiteering from the operation of their Environmentally Relevant Activities. In the case of urban water and wastewater services, these services are a financial loss to councils, they are simply *the provider of last resort*. The Queensland Audit Office has recognised this, and also highlighted the financial unsustainability of local councils, particularly acknowledging the financial challenges of rural and regional councils.

With climate change, emerging contaminants and an infrastructure cliff impacting local council urban water businesses, there will be new infrastructure and processes required. Recognising these risks, the Department of Regional Development Manufacturing and Water has commenced the Urban Water Risk Assessment Program (the Department of Environment and Science is a critical stakeholder and is participating in several of the workstreams and investigations).

It is anticipated that the Urban Water Risk Assessment will result in significant infrastructure and process upgrades in the near future to address both environmental and community risk. These upgrades will require amendments to Environmental Authorities.

While the fee structure for amending Environmental Authorities is outside the scope of the Powers and Penalties review and the Consultation Paper, we ask the Department to consider this request as part of other regulatory amendments going forward and include it into the pending Bill.

qldwater's specific comments on the Consultation Paper are set out in the following table. Please do not hesitate to contact me if you have any questions.

Yours faithfully

Dr Georgina Davis
Chief Executive Officer

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Institute of Public Works Engineering Australasia, Queensland
Local Government Association of Queensland
Local Government Managers Australia
Australian Water Association

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Principles			
1.	The principles underpinning the *Environmental Protection Act 1994* (Qld) (**EP Act**) should be amended to include: (a) The principle of polluter pays; (b) The proportionality principle; (c) The principle of primacy of prevention; (d) The precautionary principle; (e) The principle of intergenerational equity; (f) The principle of conservation of biological diversity and ecological integrity; and (g) The principle of improved valuation, pricing and incentive mechanisms.	**Support in principle, provided clarification is provided and flexibility is given to entities providing critical public services.** **The improved valuation, pricing and incentive mechanisms principle should be omitted from the proposed amendments but incorporated into State government practice.**	qldwater supports the inclusion of these explicit principles in the objects of EP Act, providing greater clarity and direction. However, greater guidance as to their interpretation should be provided in the EP Act, as well as in guidance materials. For example, when applying the precautionary principle, an assessment of the risk-weighted consequences of various options may include the balancing of ecological, economic and social issues. From qldwater's perspective, having its members include most local governments, and other local and state government-owned water and sewerage service providers and affiliates, it is important to acknowledge that the provision of safe, secure and sustainable urban water services is a critical public service provided to benefit Queensland communities. In such circumstances, is it vital to recognise that qldwater's members operate under financial constraints and limited resources. The duty to restore environmental harm and/or to provide for a system of civil remedies and compensation (particularly where non-polluting entities have taken action to stop the migration of, or prevent or minimise the damage caused by, contaminants) would complement the polluter pays principle. However, a broader understanding of who actually is the polluter should be incorporated into the EP Act. Often, the end-of-line entity did not produce or benefit from particular pollutants, but is tasked with the onerous job of dealing with them. This is most obviously seen in the waste treatment and wastewater treatment industries who must manage a range of pollutants including emerging contaminants such as per-and polyfluorinated substances (**PFAS**). Sewerage treatment plants are unable to, in a practical sense, control much of the pollutants entering their systems. Trade waste approvals allow a wastewater service provider to gauge the nature, and to a limited extent, control the quantity, of the liquid waste being discharged to sewer. However, practically, a wastewater service provider has little choice but to accept the waste and to treat it at the end point. This means that those benefiting from the use of, for example, emerging contaminants or microplastics,

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			do not have to account for the pollution but the end-of-line entity must manage and/or treat the pollutant. This is an onerous burden and manifestly unjust. When providing a crucial public service, so long as the general environmental duty (**GED**) is complied with, economic matters and reliability of service should be given priority over the ecological limb particularly where a discharge containing a contaminant is equal to or less than the ambient environmental concentration. Again, further clarification is required as to what the principle of conservation of biological diversity and ecological integrity means in the wastewater treatment sphere. For example, wet and dry weather overflows will occur from time to time; usually in a non-pristine environment. How will this principle be applied to wastewater service provider's environmental applications for environmentally relevant activities and/or clean-up requirements needs to be clarified. Clarification about the application of the principle of improved valuation, pricing and incentive mechanisms (**IVPIC Principle**) would be beneficial, as mixed interpretation is likely. On its face, the IVPIC Principle appears to concern what, if anything, is being done by those undertaking activities to ensure that the cost of protecting social and natural capital, both now and in the future, is fully factored into approvals and/or rehabilitation. This principle could be dealt with more appropriately in other legislation and/or practically implemented by the State in other ways. For example: • taxes, duties, licences and charges are applied to emissions of pollutants and disposal of wastes; • subsidies, reduced land valuations/land taxes, rate discounts and decreased licence fees are applied to entities that have a good environmental compliance history or can demonstrate significant environmental improvement and/or resilience to climate change impacts;

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			• payments are made for access to natural resources such as water and including biosolids.
Definitions			
2.	Sections 8 and 9 of the EPA (Qld) be amended to include the concept of "human health, safety and wellbeing" in the definitions of environment and environmental value.	**Neutral**	The *Environmental Protection (Noise) Policy 2019* provides that environmental values to be enhanced or protected are qualities of the acoustic environment that are conducive to human health and wellbeing by ensuring individuals can sleep, study or learn or be involved in recreation including relaxation and conversation. Further understanding is required of what the intended implications from this proposed change would be. Similarly, the *Environmental Protection (Air) Policy 2019* provides that environmental values to be enhanced or protected are qualities of the air environment that are conducive to human health and wellbeing. Further understanding is required of what the intended implications from this proposed change would be. Human health and safety are dealt with in other legislation including the *Public Health Act 2005*. If this proposed amendment is intended to deal with, say, PFAS, microplastics and microbeads, or endocrine disruptors, then regulations dealing with product stewardship (including the prohibition on the use of some products) is more appropriate. Furthermore, amendments to the *Public Health Act* may be appropriate. Further understanding is required of what the relationship between these proposed amendments and the *Human Rights Act 2019* would be.
3.	Section 15 or sections 16 and 17 of the EP Act be amended to make clear that environmental harm that may constitute a nuisance at low levels, may also constitute material and serious environmental harm if it meets the definitions of those terms.	**Not supported**	Sections 15 to 17 relate to the definitions of environmental nuisance and material and serious environmental harm. The current delineation between the types of environmental harm is adequate and serves their purpose. The proposed changes will create significant uncertainty between what constitutes environmental nuisance and other forms of harm. The proposal is not supported.

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			Because it is often difficult to *qualify* material or serious environmental harm, the current definitions contain a monetary threshold to *quantify* the harm. Given the nature of the environmental nuisance, assessing when a 'nuisance' triggers these monetary thresholds may be, in practice, extremely difficult. These changes may also negatively impact Local Councils as a co-regulator under the EP Act and their ability to utilise enforcement tools. Further, Schedule 1 of the EP Act excludes particular noise and nuisance from the operation of ss440 and 440Q. Item 2 provides, for example, that environmental nuisance caused in the course of maintaining public infrastructure for a water or sewerage service is excluded from those environmental nuisance provisions. Exclusions for certain forms of environmental nuisance are precise, known and readily ascertainable by both the operator and the community. The proposed changes would introduce significant uncertainty in circumstances where subjective considerations would infect the primary way of assessing the consequences of taking particular action. Any legislative exclusion should be designed to provide operational certainty in the intended circumstances. These exclusions should be precise and allow business and entities carrying out public sector functions to continue their operations without concerns relating to the minutia of the impacts and whether those impacts are nearing or are in the ambiguous 'in-between' area of environmental nuisance and material or serious environmental harm. It is vital for government and entities providing critical public infrastructure to be certain about the activities it can carry out, when, and how. If the State does move forward with this proposal: • a formula for determining when the release of aerosols, fumes, light, noise, odour or smoke amounts to a material or serious environmental harm (other than the current definitional elements) is needed; • it must be clearly articulated who the administering authority will be; and

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			• Schedule 1 of the EP Act should be amended to give certainty to operators of infrastructure for water or sewerage services. It is also important to identify a threshold for the duty to notify provisions. It is unrealistic to assume a nuisance will be easily qualified. As to quantifying nuisance, the likelihood is that property damage and actual environmental harm will not be tangible, so using these assessment measures simply will not apply. qldwater seeks confirmation that the State will not amend the special evidentiary provisions about the making of an emission-causing environmental nuisance to enlarge the scope that an authorised person may give, namely, to give evidence that the level, nature or extent of the emission is so unreasonable that it constitutes either material or serious environmental harm.
4.	The threshold amounts for material and serious environmental harm should be reviewed and increased.	**Delivered by EPOLA Act**	No comment as no further proposals for recommendation are being considered.
5.	Section 319 of the EPA (Qld) be amended by omitting the words "reasonable and practicable" and inserting in lieu thereof "reasonably practicable".	**Neutral**	The current wording is well understood. This amendment may have unintended consequences. qldwater is not persuaded by the reasons given for the proposed amendment.
Statutory notices			
6.	**Rationalising notices** Sections 358 – 363, ss 363A – 363E and ss 363F - 363L of the EP Act will be repealed, or alternatively the existing EPO provisions will be amended, to establish a new tool known as an Environmental Enforcement Order (EEO). Creating a new tool will, in effect, combine the existing powers and scope	**Support**	qldwater generally supports the concept of simplifying the enforcement tools by replacing several statutory notices with one notice. qldwater takes no issue with the proposed particulars of the notice and the content. qldwater seeks further clarification about the issuing of an EEO for nuisance that is considered to constitute material or serious environmental harm.

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	available under EPOs, DNs and CNs. It is proposed that new sections providing for the EEO will have the features set out in Table 2		

	Duty to restore
	A stand-alone duty to restore environmental harm will be introduced and will apply regardless of whether a person has breached the GED or another provision of the EP Act.
	
	This duty would require that, if a person permits or causes contamination that results in environmental harm they must, as far as reasonably practicable, restore the environment to the condition it was in before the incident occurred. The duty to restore will not apply to persons who have caused environmental harm authorised by an environmental requirement as defined in Schedule 4 of the EP Act (e.g. harm authorised by an EA) which is already subject to a rehabilitation requirement in an EA or a progressive rehabilitation and closure plan or a prescribed condition for a small scale mining activity. As such, the duty will apply to any harm caused that was not authorised by an environmental requirement. The proposed amendment will include a non-exhaustive list of factors a
		Qualified support	The EP Act imposes a GED (section 319) under which a person must take measures to prevent or minimise environmental harm.
			
			However, the EP Act is generally silent on duties to restore the environmental harm other than by way of directions in a statutory notice. An ongoing duty to restore would support the GED and would likely result in a proactive and quicker response to harm.
			
			Uncertainty may arise how an entity is to actively restore the environment in several circumstances including:
			• the harm is to a non-pristine environment;
			• restoration attempts are likely to result in further environmental harm and/or is prohibitively expensive where the net environmental beneficial outcome is limited e.g. where a sewerage overflow occurs in a degraded environment and attempts to remove waste water would cause more harm; or where restoration may be achieved but is resource intensive and expensive in circumstances where the environmental benefit is limited;
			• the environmental harm occurs (or is migrating) on a third party's land –
			  ○ the polluter cannot obtain consent to enter (including from the State);
			  ○ and the parties cannot agree as to the appropriate remediation action (including work, health and safety measures for the third party's employees);
			  ○ the restoration would cause business or operations disruption;
			  ○ ongoing costs incurred by the third party associated with monitoring and assessment of the harm and of any monitoring and analysis reports produced by the polluter;

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	person must have regard to in deciding the measures that are 'reasonably practicable' to fulfil their duty to restore. This will largely be modelled on the factors under section 319(2) for the GED. Failure to comply with the duty to restore environmental harm will be an offence where the environmental harm that occurred was material or serious. Creating an offence will result in better environmental outcomes by deterring persons from walking away from environmental harm they caused. Consistent with other offences in the EP Act, there will be a distinction between a contravention and a wilful contravention. A penalty within the existing penalty range in the EP Act should attach, having regard to penalties prescribed for other offences involving actual or potential environmental harm (i.e. ss 437, 438, 440, 443 and 443A). The offence can be complemented by existing regulatory tools, particularly statutory notices, to ensure that enforcement of the duty to restore can be dealt with proportionate to the environmental harm. This may necessitate other amendments, for example, to the State Penalties Enforcement Regulation 2014 for the purposes of allowing for infringement notices to be issued.		○ multiple unrelated parties could reasonably be identified as having been involved in the cause of harm (particularly as related to the apportionment of liability); ○ the premises is listed on either the environmental management register or contaminated land register. It would be constructive if the EP Act: • allowed the polluter to take restorative action on unallocated State land (which waterways often are) without being burdened by the administrative process of obtaining consent from the State; • provided that the costs of any preventative or clean-up costs incurred by a third party (for a variety of reasons, including minimising the harm or not knowing who the polluter was until a later time) are reimbursable by the polluter; • provided a dispute resolution mechanism where third parties could mediate outside the Planning & Environment Court and without the need for legal proceedings and associated court documents; • provided the Department with the ability to create 'model' consent to enter, access agreements for sampling and modelling, as well as access agreements for restoration (including provisions about reasonable compensation for future monitoring and management of the contamination if it cannot be remediated in its entirety) to facilitate and streamline rehabilitation. • powers of entry similar to those triggered under a clean-up notice.
7.	Replace EPOs, DNs and CNs with a single statutory notice, the EEO. The new	**Qualified Support**	The application of the standard criteria has little utility in the giving of an EPO and its removal will simplify the process.

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	provisions for the EEO will reflect the recommendation such that consideration of the standard criteria will not be required in certain circumstances.		An environmental authority (**EA**) is required to lawfully undertake an environmentally relevant activity (**ERA**). An EA is often described as a licence to pollute in certain circumstances, particularly during significant wet weather events. The proposal to amalgamate the notices suggests that a notice can be given if environmental harm occurs or is threatened notwithstanding an EA allows for the emission and sets constraints around it. Greater clarity is needed about how specific a condition must be to safeguard against allegations that emissions are not authorised by it.
8.	The EEO provision will align offences between a person and a related person.	**Support in principle**	No comment.
9.	Amendments for the EEO will include provision for the notice to stipulate requirements that are aligned with the existing section 360(2) to enable improved environmental outcomes following contamination incidents, such as an express power to stop or restrict any activity that is the cause of a contamination incident.	**Support in principle**	While qldwater is accepting of the current ability under an Environmental Protection Order (**EPO**) to require a recipient to not start, or stop, a stated activity indefinitely, for a stated period or until further notice or require the recipient to carry out a stated activity during stated times, the extent of the proposed amendment is not justified. It is important that business and operator of public infrastructure can continue their operations as a whole, notwithstanding some components may need to be limited or stopped.
10.	The power to amend a Transitional Environmental Program (TEP) be expanded to: (a) allow the administering authority to intiate and decide amendments to TEPs having regard to any submission by the existing holder; (b) allow the administering authority to refuse an amendment of a TEP if it is not also satisfied that the amendment would be likely to achieve	**The recommendation has been partly delivered by EPOLA Act**	No further proposals for this recommendation are being made.

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	advancement of compliance with the Act. This approach would ensure any use of the power by the administering authority to make amendments to TEPs is exercised in the same way as the power to make the instrument. For example, the administering authority must have regard to the decision-making criteria in s 338, and the decision to amend the TEP is reviewable and subject to appeal.		
Restraint orders			
11.	No proposal to give effect to recommendation 11 - In the event that a general environmental duty (GED) offence was not preferred, consideration might be given to including the general environmental duty within the scope of operation of section 505 of the EPA (Qld), by way of example, by introducing the words "a contravention of the general environmental duty or..." after the words "or restrain" and "or anticipated" and before the word "offence" in section 505(1).	**Not supported**	It is noted that there is no proposal made to give effect to recommendation 11. qldwater agrees that this mechanism is unsuitable and not practical. Accordingly, this recommendation is not supported.
Environmental authority conditions			
12.	**Proposal 1:** Amend the provisions relating to issuing an environmental protection order or an environmental evaluation requirement to clarify that a notice may be issued to address concerns of environmental harm	**More information is required but should the proposal**	Certainty in any activity or project is required to ensure stable management and economic viability. Accordingly, the exercise of such a power must: • only be exercisable for actual causing (not threatened) of serious environmental harm; or

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	even if there is a condition of an EA appearing to authorise the relevant harm. However, a relevant ground or grounds under the EPO or environmental evaluation provisions for issuing the notice would still have to be otherwise satisfied (e.g. to secure compliance with the general environmental duty). Note: the EPO will be replaced under the proposal to rationalise notices and therefore section 215(2)(j) will be consequentially amended to refer to the Environmental Enforcement Order. This proposal will allow for swift action to be taken in relation to an environmental harm that is occurring. Then, if necessary, the existing provisions under section 215(2)(i) and (j) provide the grounds for amending an EA to address the potential for any future reoccurrence of the harm. This process allows time to ensure the conditions are adequately and appropriately drafted, whilst also ensuring a timely response to community concerns. As such, the proposal does not change the existing grounds for issuing EPOs, requiring environmental evaluations, or for amending EA conditions. For example, if the release of water from a site was causing fish to die in a stream, the administering authority should not be prevented from taking action to stop this just because there was an EA condition	**proceed, the unilateral amendment should rest solely with the chief executive and not be otherwise delegated**	• only be exercisable where there is a significant, and previously unknown, threat of serious environmental harm; • be specified, including, for example, the giving of a show cause notice and reasonable consideration of submissions; • be given only by the chief executive and not otherwise delegable; • automatically stayed, if the decision to amend is appealed. If exercising powers under the EP Act to amend an environmental authority, the decision maker should be required to specifically consider the broader environment as well as: • the order of occupation; • exclusion of the application of the precautionary principle; • any applicable scientific evidence or technology that may be reasonably employed and whether the benefits are scientifically assured and significant; and • adverse impacts on the wider industry particularly in terms of business certainty and confidence. It is noted that support for the proposed amendment, in part, is on that basis that *"(t)his proposal will allow for swift action to be taken in relation to an environmental harm that is occurring"* and "*that there will be limited impact on holders of EAs that are acting responsibly and are not causing environmental harm"*. Such a basis is, however, internally inconsistent. If no harm is being caused, there would be no reason for an amendment. In the circumstances, considerations should also be given to provisions relating to the stay of decisions to amend, particularly where "*holders of EAs that are acting responsibly and are not causing environmental harm"*. If the State accepts this proposal, the State should also invest in staff with a deeper technical expertise so that amendments are practical as well as the creation of more

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	allowing the releases that are causing the problem. The death of the fish could have resulted from a change to the quality of the water due to a change in the process or materials processed that had not been expected when the approval was given. The community would expect the Government to act in relation to the environmental impact. The proposed amendment provides certainty for the administering authority to take swift action by using an EPO. The administering authority could then decide whether an amendment to the EA conditions should be proposed. By enlivening existing provisions for proposing an amendment to the EA conditions, the provisions would also enliven existing procedures for amending EA conditions under Chapter 5 Division 2 of the EP Act. This will ensure the EA holder is afforded an appropriate process, including natural justice considerations. This will also maintain current approach with the decision to propose an amendment being with the administering authority and not extended to the Minister. This approach will mean that there will be limited impact on holders of EAs that are acting responsibly and are not causing environmental harm. The amendments will however counter the use of legal proceedings to delay or avoid action		guidance material on advancements in scientific knowledge and management of contaminants.

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	being taken to address environmental harm solely on the basis of an existing condition of an EA. This is intended to allay fears that the community may hold about continued exposure to harm while legal proceedings play out.		
	Proposal 2: Amend section 219, or insert further provisions into Division 2 of Chapter 5A, Part 6 to allow the administering authority to, upon considering written submissions from the EA holder pursuant to section 218, make revisions to the proposed amendment in response to the EA holder's submissions. Presently, 'the proposed amendment' is a defined term which refers to the amendment the administering authority has given notice to the EA holder that they propose to make. This includes specifying how the amendment would be drafted in a marked-up copy of the EA. Section 218 requires the administering authority to consider submissions on the proposal made by the EA holder. Section 219 holds that if the administering authority still believes a ground exists to make the proposed amendment, it may make the amendment. It is arguable that the administering authority can only decide to either make the amendment in line with its original proposal or abandon the process, despite a	**Support**	Clarifying that there is flexibility in the process to make limited modifications to the amendment proposal in response to the EA holder's submissions prior to making a final decision on whether to proceed with the amendment is sensible.

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	willingness to modify the original proposal in response to the EA holder's submission. This may result in a need for the administering authority to start the notice of proposed amendment process from the beginning. Clarifying that there is flexibility in the process to make limited modifications to the amendment proposal in response to the EA holder's submissions prior to making a final decision on whether to proceed with the amendment, would provide for a swifter process for making an amendment to an EA that continues to be necessary and desirable. This will create efficiencies for both the administering authority and the EA holder.		
13.	The provisions regarding continuing obligations under cancelled or suspended environmental authorities be clarified to ensure that an operator must continue to comply with conditions regarding management of the site to reduce environmental risk and rehabilitation.	**The recommendation has been delivered by EPOLA Act**	These amendments have been made by EPOLA Act and the Department has no further proposal for this recommendation.
Registered suitable operators			
14.	The definition of 'environmental offence' in Schedule 4 is proposed to be amended to include the contraventions under sections 357I and 363E so they may be regarded as disqualifying events. However, given the proposal to rationalise certain statutory notices the amendment will be made to	**Neutral**	No comment

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	include contravention of the new notice provision as a relevant environmental offence, rather than section 363E as that section is proposed to be repealed. The proposed amendment to the definition of 'environmental offence' is not proposed to be limited such that the additional offences can only be considered for the purposes of disqualifying events under section 318K. This is because the sections which use the term 'environmental offence' throughout the EP Act are few – it is otherwise used in sections 215(2)(a), 278(2)(d), 318R and 318V only – and there is relatively limited effect in broadening the definition for these sections. For example, section 215(2)(a) states a trigger for amending EA conditions as 'a contravention of this Act or an environmental offence committed by the holder'. As such, even without amending the definition of environmental offence to include additional offences, any offence under the EP Act would still be available for the purposes of section 215(2)(a) as a contravention. Further, where the offences are included in the definition for the purposes of section 318K, a consistent definition would need to apply to sections 318R and 318V for the provisions to be workable as the provisions relate to the same matters under Chapter 5A, Part 4.		

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Offences			
15.	An offence for breaching the general environmental duty will be introduced. The offence will not apply to an aspect of minimising environmental harm that is currently addressed through an environmental requirement, for example, an EA. A provision will also make clear that where the person has complied with a Code of Practice, the person is taken to have complied with the GED. Unlike the duty itself under section 319(1), the GED offence should apply only to persons doing an activity in the course of conducting business or an undertaking. A definition of 'business or undertaking' should cover persons conducting private businesses for profit or gain, persons conducting not-for-profit activities, and government or public activities. But is not intended to extend to person conducting activities in the domestic sphere. The GED offence will be complemented by the existing range of regulatory tools and penalties to ensure that enforcement of the GED can be dealt with proportionate to the environmental harm being managed and/or the risk of harm. This may necessitate other	**Qualified support, provided:** • **'undertaking' is defined to exclude those operating critical public infrastructure such as water and sewerage services;** • **adequate consultation occurs with industry when creating codes of practice and other guidance materials**	If failure to comply with the GED becomes an offence it will place greater emphasis on preventing environmental harm rather than reacting to incidents. It will also require those carrying out activities that may cause environmental harm to be flexible and innovative. However, complying with the GED is not always obvious particularly when dealing with emerging contaminants. The Department should produce greater documentary guidance on what would be considered compliance with the GED in particular circumstances. qldwater does not support the offence being applied to those conducting an undertaking that constitutes critical public infrastructure or service such as water and sewerage services. It would be beneficial if the Department clarified who the administering authority would be for breach of GED if associated with a 'nuisance'. The EP Act should specify that: • in keeping with general criminal principles, the onus of proof rests with the prosecutor; and • the prosecutor will bear the onus of proof in terms of demonstrating whether environmental management measures are reasonably practicable given their cost. Codes of practice or other statutory or non-statutory guidance materials ought to have input from the relevant industries (similar to the creation of codes of waste); given the practical experiences in dealing with the challenges involved in their operations and restraints of site as well as the development of emerging technologies locally and globally that may have broader positive application to local industries.

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	amendments, for example, to the State Penalties Enforcement Regulation 2014 for the purposes of allowing for infringement notices to be issued. Existing offences applicable to actual, and unlawful, environmental harm (e.g. causing serious environmental under section 437) will remain available and separate to the GED offence in the event of environmental harm actualising. This reflects that the GED offence is a tool for reducing the probability of material or serious environmental harm, but that harm will not always be eliminated, and proportionate penalties should flow from the conduct in question. Whether harm actually occurs is not an element of the GED offence; the relevant act is the failure to take all reasonably practicable measures to prevent or minimise harm that will or is likely to occur. In this way, the GED offence relates to the act or omission of failing to manage an activity by providing equipment and systems to prevent or minimise material or serious harm. It is recognised that, in some instances, the same or similar conduct failure potentially could result in a breach of both the GED offence and an environmental harm offence. In such cases, it is not intended for both charges to be brought against an alleged offender. Rather, in accordance with DES's existing		

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	enforcement guidance, the most appropriate charge reflecting the person's culpability should be chosen to prosecute. This approach also intends to avoid a conflict with section 493A whereby a person can defend against a charge of material or serious environmental harm if they prove they complied with their GED. The GED offence provisions will signify types of actions, where, if a person conducting a business or undertaking were to fail to do one or more of them, would be taken to have failed in their duty such that it amounts to an offence. The list of actions should include the following: • install and maintain plant, equipment, processes and systems in a manner that minimises risks of environmental harm; • maintain systems for identification, assessment and control of risks of environmental harm that may arise in connection with the activity, and for the evaluation of the effectiveness of controls; • maintain processes for the handling, storage, use and transport of substances that minimises risks of harm;		

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	• have systems in place to ensure information, instruction, supervision and training to any person engaging in the activity that minimises risks of environmental harm. However, such a provision is not intended to set requirements for a person to comply with their GED or limit the duty; only stipulate when it will be taken that there is a failure of the duty. DES may provide further guidance on how to meet the GED. Guidance may be provided through existing statutory instruments such as EPPs, codes of practice or statutory and non-statutory guidance.		

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16.	Section 320A is proposed to be amended such that the duty of a person to notify of actual or threatened serious or material environmental harm includes circumstances where the person 'reasonably believes' or 'should in the circumstances reasonably believe' that a notifiable event under section 320A has occurred.	**Not supported**	The circumstances in which notification must be provided to the administering authority are well understood and broadly acted upon. *Awareness* is a well-known and recognised concept in the duty to notify. In short, *awareness* means 'cognisant or conscious of' meaning *awareness* is encompassed by actual knowledge. *Belief* is an inclination of the mind towards assenting to, rather than rejecting, a proposition, based on facts that are sufficient to create that inclination of the mind in a reasonable person. *Belief* may be something less than knowledge, as a person can hold a belief while having a degree of doubt about the matter: *R v Road* [1983] 3 NSWLR 344. This proposed change will introduce a new layer of evidentiary burden in circumstances where the operator should have made further investigations before notifying the administering authority and is obliged under the GED to take action to prevent or minimise and harm it sees. This will result in both Departmental and operator burden.
Civil matters			
18.	Sections 491(1) and 491A(1) will be amended to specify the sections also apply to 'a proceeding in relation to' the relevant offences to which the provisions apply (sections 430, 440 and 440Q). This will make clear those evidentiary provisions are available in civil proceedings. Section 490(8) will be amended to remove the words 'by	**Neutral**	

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	the prosecutor' to make the provision available in civil proceedings		