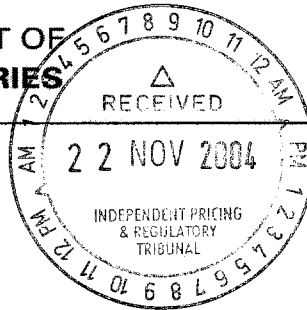




NSW DEPARTMENT OF
PRIMARY INDUSTRIES



Now incorporating **NSW Fisheries**
ABN 51 734 124 190-002

Ref: FM04/147

Review of Operating Licence for State Water Corporation
Independent Pricing and Regulatory Tribunal
PO Box Q290
QVB POST OFFICE NSW 1230

18 November 2004

Attention: Lil Cullen

**Re: IPART INQUIRY: REVIEW OF THE OPERATING LICENCE FOR STATE
WATER CORPORATION.
SUBMISSION FROM THE DEPARTMENT OF PRIMARY INDUSTRIES**

I refer to the recent Issues Paper in relation to the review of the Operating Licence for State Water Corporation and State Water Corporation's submission in response to the Issues Paper. This submission summarises the Department's views and recommendations in relation to the Tribunal's considerations for the Initial Operating Licence for State Water Corporation.

Background

From the 1 July 2004 the Department of Primary Industries was formed to oversee the delivery of sustainable primary industries. The Department of Primary Industries brings together the former departments of NSW Agriculture, NSW Fisheries, Department of Mineral Resources and the Public Trading Enterprise responsible for sustainably managing public native forests and plantations, formerly known as State Forests of NSW. The Government's priorities for the new Department are to:

- Foster profitable and sustainable primary industries in NSW;
- Support NSW primary industries in maintaining their international competitive position;
- Increase collaboration with industry and other research bodies to convert research findings into innovative technologies and practices for NSW primary industry operations;
- Assist primary industries to wisely manage natural resources;
- Promote a safe working environment within NSW primary industries from a human, mine safety and biosecurity perspective; and
- Improve service delivery to the community, stakeholders, farmers, fishers and industry by providing responsive, value for money and efficient government services.

As part of its role, the Department is responsible for regulating the operations of State Water Corporation under the *Fisheries Management Act 1994* (FM Act), particularly in relation to the construction of new assets or works and the maintenance and upgrading of existing assets and works in accordance with State Water's Total Asset Management Program (TAMP) and capital works programs.

Such works can trigger legislative requirements for concurrence under Parts 7 and 7A of the FM Act for the protection of aquatic habitats, restoration and/or maintenance of fish passage and management of listed threatened fish species, populations, ecological communities or critical habitat respectively.

The "installation and operation of in-stream structures and other mechanisms that alter the natural flow regime of rivers and streams" has also been listed as a "key threatening process" under the FM Act as the impacts of river regulation has been identified as a major threat to aquatic biodiversity and the survival and recovery of several listed threatened species, populations and ecological communities under the Act. The Department is responsible for developing a threat abatement plan to target resources and activities to reduce this threat and is also responsible for ensuring that threat abatement is a consideration in developments and activities relating to river regulation in NSW.

It is noted that Section 3 of the Issues Paper does not reflect the regulatory role of the Department in relation to State Water's activities.

Memorandum of Understanding

In relation to Section 9 of the existing Interim Operating Licence, the Department (formerly NSW Fisheries) has had in place a Memorandum of Understanding with State Water since 2002, which extends for a three-year period and is reviewed annually by both parties. The MOU outlines the mutual obligations of both parties in ensuring that State Water's operations and TAMP are conducted in accordance with the requirements of the FM Act. The two parties also work together to achieve broader, strategic and cost-effective environmental outcomes beyond the requirements of the FM Act associated with the implementation of the TAMP, where possible. This has included riparian vegetation rehabilitation works and re-snagging to improve in-stream fish habitat values and willow control programs associated with State Water's asset management program, which have benefited both the community and customers.

A key component of the MOU is ensuring that the Department works closely with State Water to minimise impacts on aquatic habitats and threatened fish species, populations and ecological communities associated with in-stream works and to address fish passage at in-stream dams, weirs and regulators, where triggered as a compliance requirement under s.218 of the FM Act. This section of the Act states that "a public authority that proposes to construct, alter or modify a dam, weir or reservoir on a waterway (or to approve of any such construction, alteration or modification): (a) must notify the Minister of the proposal, and (b) must, if the Minister so requests, include as part of the works for the dam, weir or reservoir, or for its alteration or modification, a suitable fishway or fish by-pass."

As noted on p16 of State Water's submission, "modify" is interpreted by State Water to apply to works which result in the modification of the flow regime (eg height/depth, frequency, duration, velocity, flow path direction), water quality and in-stream or riparian zone habitat values, including fish passage. The Department is currently working with State Water to further define this policy position to remove ambiguity in relation to the application of this section for both major and minor refurbishment works. The aim of the revised policy will be to better target limited resources to achieve the best fish passage outcomes as part of State Water's asset management program.

The Department renewed the MOU with State Water in June 2004 for a further three years and following the recent annual review of the MOU in November 2004, a revised MOU is scheduled to commence on 1 January 2005 which will include, for the first time, performance indicators to monitor State Water's environmental performance in relation to fish passage and other aquatic habitat and riparian rehabilitation activities where related to the implementation of the TAMP and to the requirements of the MOU. These environmental performance indicators are similar to several of those proposed in Table 1 of the Issues Paper.

The MOU includes annual reporting and review requirements relating to the provision of services by the two parties. The annual report is also used as a mechanism to flag further areas for improved operations or partnerships between the two authorities to improve environmental performance.

It is noted in the Issues Paper that the Tribunal is seeking feedback on whether there are aspects of the MOU that need clarification or strengthening or whether and terms or conditions included in the MOU should be included as an obligation within the Initial Operating Licence. The Department's view is that the existing MOU is operating very effectively at present and there have been no issues with non-compliance or failure to meet the obligations within the MOU by either party to date. The MOU is driven by the requirement for State Water to meet the regulatory requirements under the FM Act and, as noted in the terms of reference for the Initial Operating Licence in Appendix 1, these requirements, and the above performance indicators associated with the MOU, should not be duplicated within the operating licence.

To improve the transparency in the delivery of the requirements of the MOU, the Department would support publicly releasing the annual report produced by both parties as a requirement of the MOU, which includes environmental performance monitoring. This report summarises the works undertaken by both parties per State Water region and performance against environmental indicators. It is therefore not necessary to duplicate these indicators in the operating licence.

As noted in State Water's submission, transparency of decision-making in relation to environmental compliance activities and cost-effectiveness under the MOU is also fostered through State Water's consultation with the valley-based Customer Service Committees and the Community Reference Panels for significant capital works programs.

The Department supports these existing community engagement processes as they ensure that customers and the community are engaged in the decision-making processes relating to the MOU.

Fish Passage

The Department of Primary Industries is the lead agency in pursuing improvements to fish passage in NSW and achieves this in partnership with many other stakeholders, including State Water. A key concern identified by both parties under the MOU is ensuring that fish passage works are targeted strategically, rather than driven purely by achieving regulatory requirements at a particular site. The Department and State Water are currently completing a catchment assessment and prioritisation process, building on previous work undertaken by both agencies under the NSW weir review process. The aim of the assessment will be to identify on a State and valley by valley basis those dams and weirs which are of highest priority for remediation of fish passage to improve native fish population and threatened fish species recovery. The outcomes will be used by both parties to determine where regulatory requirements for fish passage, which are triggered under s.218 of the FM Act, can best be targeted to for fish passage outcomes. This may include undertaking fish passage works at a different asset, which is of greater priority, rather than at the asset which triggered the regulatory requirement.

The results of the assessment will be used as the basis for future decision-making on improvements to fish passage and will be included in the environmental performance monitoring and annual reporting process under the MOU.

Cold Water Pollution

Cold water pollution is identified as one component of the key threatening process "installation and operation of in-stream structures and other mechanisms that alter the natural flow regime of rivers and streams", listed under the FM Act. Cold water pollution has been estimated to affect over 3,000 kilometres of NSW regulated waterways and has been shown to inhibit fish breeding cues, reduce growth rates and survivability of juvenile fish and has resulted in the loss of native fish populations below several key storages in NSW.

As noted in State Water's submission, the NSW Government is proposing to make minor amendments to the Water Management Act 2000 to allow the Department of Infrastructure, Planning and Natural Resources (DIPNR) to regulate cold water pollution at priority dams via a Water Supply Works Approval. A recent study conducted by DIPNR and the Department of Primary Industries identified 26 priority dams where cold water pollution is a significant issue out of over 3,000 dams and weirs assessed statewide. Of these 12 are State Water assets with seven identified as high priority and a further five as medium priority for action. The NSW Government is currently preparing a long-term management program to address the State's priority dams which will be progressively implemented. As each dam is different, the solution required to address cold water pollution will need to be tailored to each site. The water quality performance indicators are also likely to differ at each site due to the type of technology used and the operating requirements for the delivery of water at the dam.

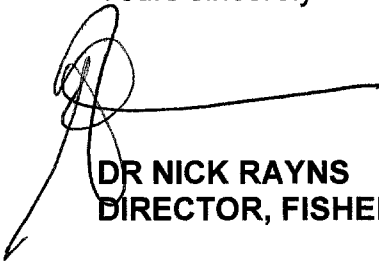
Flexibility to define the performance indicators for each dam on a case-by-case and dam-by-dam basis through the Water Supply Works Approval, rather than through the operating licence, is required. Inclusion of environmental performance indicators associated with addressing cold water pollution at State Water's dams in the Initial Operating Licence for State Water will result in duplication of regulatory requirements under the Water Management Act 2000, which is contrary to the terms of reference for the initial licence.

Environmental Management Plan

The Department recommends that State Water be required to consult with other state agencies to ensure that the Environmental Management Plan (EMP) integrates the regulatory and environmental performance requirements into a holistic environmental management framework, including, but not limited to, those outlined above for fish passage and cold water pollution. The EMP should be used as the tool to draw together and cross-reference reporting requirements under other regulatory mechanisms, such as the MOU with the Department of Primary Industries and the Water Supply Works Approval issued by DIPNR. It should add value to, rather than duplicate, existing reporting arrangements under the MOU. The EMP should focus on improving the environmental performance of State Water's operations over which it has direct control and influence.

If you have any further inquiries please contact Sarah Fairfull, Principal Manager, Aquatic Rehabilitation on (02) 6686-2018.

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized 'N' followed by a horizontal line extending to the right.

**DR NICK RAYNS
DIRECTOR, FISHERIES MANAGEMENT**