



NSW MARINE PARKS AUTHORITY

PERMITS POLICY & PROCEDURES

PURSUANT TO LEGISLATION IN FORCE AS AT 1 JANUARY 2006

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## **1 INTRODUCTION**

The purpose of this policy is to ensure that the regulation of activities in marine parks through the permit process is fair, consistent and clear to all those involved. The policy aims also to ensure that the regulation of activities in marine parks is consistent with the objects of the *Marine Parks Act 1997* (“**the Act**”) and the *Marine Parks Regulation 1999* (“**MPR**”).

### **a) The Act and Regulation**

The Marine Parks Authority (the Authority) manages NSW marine parks in accordance with the following legislative instruments:

- i. **The Act.** The objects of the Act are
  - (a) to conserve marine biological diversity and marine habitats by declaring and providing for the management of a comprehensive system of marine parks
  - (b) to maintain ecological processes in marine parks
  - (c) where consistent with the preceding objects:
    - (i) to provide for ecologically sustainable use of fish (including commercial and recreational fishing) and marine vegetation in marine parks, and
    - (ii) to provide opportunities for public appreciation, understanding and enjoyment of marine parks.

All activities in marine parks should be consistent with the objects of the Act. In order to meet the objects of the Act and ensure the protection and visitor enjoyment of marine parks, it is sometimes necessary to limit the number, scale, type and extent of activities under permits.

- ii. **Operational Plans.** The Act provides for operational plans for marine parks. An operational plan a scheme of operations that the Authority proposes to undertake or permit in a marine park. All functions of the Authority must be exercised in accordance with the operational plan for the marine park.
- iii. **The MPR.** The MPR controls the carrying out of certain activities in marine parks. Certain activities cannot be carried out within a particular zone without the consent of the Relevant Ministers (Part 2). Other activities are generally prohibited in marine parks without the consent of the Relevant Ministers (Part 3).
- iv. **Zoning Plans**

The MPR include zoning plans for each marine park, and sets out the objects for each zone, and activities prohibited in each zone without consent.

## **b) Permits.**

The MPR provides that the consent of the Relevant Ministers is required to carry out a variety of activities in marine parks. This consent is provided in the form of a permit (MPR cl 32F).

Under the MPR, consent is required to undertake the following activities in a marine park:

- activities that are inconsistent with a zone (MPR clauses 7(1), 8A(1), 9(1),11(1), 12(1), 13(1),15(1), 16(1), 18A(1), 18B(1), 18C).
- possession of animals or plants taken illegally, or equipment used to take animal or plant in place or time where prohibited (MPR cl. 19(2)(2A))
- interfere with mooring, buoy, sign or facilities owned by the Authority (MPR cl 20)
- bringing any domesticated animal into a marine park (clause 22)
- taking or harming protected species (clause 22A)
- organised research (clause 23)
- commercial activities (clause 24)
- filming activities (clause 24A)
- organised sporting, educational or recreational activities (clause 26)
- use of motorised vessels vehicles, or equipment inconsistent with a zone (clause 27)
- fish feeding (clause 27A)
- camping or residing (clause 28)
- leave floating device or structure unattended (clause 29)
- light fire on reef, beach or emergent land (clause 30).

Under the MPR, a marine park permit:

- must only be granted having regard to principal assessment criteria (with the exception of minimal impact activities (MPR cl. 32C));
- is subject to such conditions as are specified in it (MPR cl. 32G);
- remains in force for such period as is specified in the permit (MPR cl. 32I);
- may be varied, suspended or cancelled at any time by the giving of written notice (MPR cl 32J, 32K & 32L respectively); and
- may authorise others in addition to the person to whom the permit is granted (MPR cl. 32H).

c) **Commercial Fishing**

There is no general prohibition on commercial fishing activities in marine parks (MPR cl.24(2)). However commercial fishing is prohibited or restricted in certain zones without the consent of the Relevant Ministers/delegate.

d) **Administrative Law Principles and Procedural Fairness**

The proper administration of marine parks legislation requires that the principles of procedural fairness be applied in all permit deliberations. The principles of procedural fairness include an obligation to give a fair hearing to a person affected by a decision.

Other administrative law principles apply to decisions in respect of permits. These are:

- Decisions must be made within the scope of power
- All statutory procedural requirements must be followed
- Decision maker must have statutory power or delegated power to make the decision
- Decisions must be made for proper purposes and in good faith
- Decision maker must take into account all relevant considerations and not take into account irrelevant considerations
- Decision must not involve actual or apprehended bias
- Decision must not be so unreasonable that no reasonable person would make that decision.

It is also important for the decision maker to consider each case on its merits, and not inflexibly apply policies or guidelines.

e) **Application of the Environmental Planning and Assessment Act 1979**  
(“EP&A Act”)\_

Activities do not require consent under MPR clauses 19(3), 20, 22, 22A, 23, 24, 24A, 26, 27, 27A, 28, 29, and 30 if they have development consent under Part 3A or Part 4 of the EP&A Act, or have been approved under Part 5 of the EP&A Act.

Activities will still require consent under MPR clauses 7, 8A, 11, 12, 15, 16, 18A and 18B, even if they have development consent under Part 3A or Part 4, or approval under Part 5 of the EP&A Act.

Sections 19 and 20 of the Act provide for the application of the EP& A Act to developments with marine parks, and in the locality of marine parks. These provisions require that the objects and permissible uses of a zone be taken into consideration before

any development application for the carrying out of a development in (or in the locality of) a marine park is determined under Part 4 of the Act, or an activity under Part 5 of the Act is carried out or approved.

Whether development consent is required for an activity in a marine park will depend on the provisions of the local (or regional) environmental plan, and other relevant planning instruments.

If development consent is not required under Part 3A or Part 4 of the EP&A Act, approval may still be required for a proposal under Part 5 of the EP&A Act. In these circumstances Part 5 of the EP&A Act will apply if:

- the proposal is an ‘activity’ within the meaning of Part 5 of the EP&A Act;
- the relevant Ministers or the Authority are determining authorities within the meaning of Part 5 of the EP&A Act; and
- there is no prior approval for the activity.

f) **Other legislation**

Marine park permits required pursuant to the Regulation are in addition to any requirement in another Act or statutory instrument (section 22 Act). Many regulated activities in marine parks will also require permits under other legislation. In particular, activities in marine parks are also subject to the provisions of the *National Parks and Wildlife Act 1974* and regulations, and the *Fisheries Management Act 1994* and regulations.

g) **Delegations**

**Note:** Under the Act and Regulation, powers vested in the relevant Ministers may be delegated to the Authority. The Authority may also delegate powers to its officers, for example, marine park managers. In this policy, references to the consent of the Ministers or the exercise of a power by the Ministers include exercise of that power under delegation. References to the exercise of a power by the Authority, or by marine park managers, include exercise of that power under delegations.

## **2 PERMIT APPLICATIONS**

### **Applications**

Persons seeking consent to carry on a regulated activity in a marine park need to apply to the Authority for the grant of a permit. All applications must be made on the form approved by the relevant Ministers / delegate (MPR cl 32A). Applications not on the approved form should not be processed. The following information should be provided by the applicant:

Name of person or incorporated body

Address, phone and fax number

Marine parks, zones and locations where activity proposed

Details of the activity proposed

Duration of proposed activities

Size, capacity and registration of vessels / vehicles proposed for use in the activity

Certificate of currency of public liability insurance

### **Eligibility**

Only legal entities are eligible for the grant of a permit. Applicants must be either:

- a natural person (i.e. an individual) or
- an incorporated body (i.e. a company, incorporated association).

An application made in a business name only (whether registered or not) will not be processed. The proprietor of the business name may apply in his/her/its own name and include the business name on the application (where provided) for identification purposes.

### **Further Information**

The Relevant Ministers/ delegate may make a written request to an applicant requesting further information in relation to the permit application to assist in consideration of the application (MPR cl 32B(1)). Such a request should be made 21 days of receipt of the deficient application.

The request should afford the applicant 21 days to provide the required information. A longer time period may be specified if appropriate.

If the further information is not provided within the specified time period, the Relevant Ministers / Delegate does not have to consider the application (MPR cl 32B(2)). In these cases, as a matter of policy, the Relevant Ministers / delegate would generally not consider the application.

### **Public liability insurance for commercial activities**

Where an application is received for commercial activities, the application must include a certificate of currency of public liability insurance, covering the proposed activity, to a minimum cover of \$10M. This provision will be enforced for current existing permittees effective from 1 July 2007.

Where a certificate of currency is not provided, then the application will be treated as insufficient, and a request for further information provided to the applicant as above. Where a certificate of currency is not provided, the application will be treated as insufficient, and a request for further information will be provided to the applicant as above.

## **3 ASSESSMENT OF APPLICATIONS**

### **Minimal impact activities**

Assessment of a proposed activity against the principal assessment criteria is not required where the Relevant Ministers / delegate considers that the activity will have minimal impact on biodiversity, enjoyment or use of the marine park (MPR cl. 32C(2)).

Activities with minimal impact may include those with all of the following characteristics:

- non-manipulative (i.e. no physical disturbance caused to the organisms or their habitat) **and**
- do not include the use of structures **and**
- do not exclude or significantly restrict access by other users of the marine park.

Where a proposed activity is determined to have minimal environmental or social impacts, a brief statement of findings justifying the determination will be recorded by the Authority.

Conditions may be placed on a permit to ensure the activity has minimal impact.

### **Activities with greater than minimal impacts**

The Relevant Ministers / delegate must have regard to the Principle Assessment Criteria when determining whether to grant consent to an activity a greater than minimal impact on biodiversity, enjoyment or use of the marine park. The Principle Assessment Criteria is set out in clause 31 of the MPR.

The Relevant Ministers/delegate must also consider any other relevant matters.

### **Other requirements**

The Principal Assessment Criteria include any other requirements that the Relevant Ministers/ delegate consider appropriate to the proposed activity (MPR clause 31(l)). This will depend on the nature of the proposed activity and the zone(s) in which the activity is intended. Other requirements may include, amongst other matters, the following:

- whether the activity could be conducted outside the marine park
- application of the “precautionary principle” (defined in the *Protection of the Environment Administration Act 1991*) where the potential impacts of a proposed activity are unknown
- the likely magnitude and duration of any effects of the proposed activity on existing uses
- the likely effects of the proposed activity on adjoining and adjacent areas
- whether proposed research activities have been endorsed by the Marine Parks Research Committee and have received appropriate research ethics clearance.

### **3.4 Consent must be refused**

Consent must be refused for an activity if:

- the activity is inconsistent with the objects of the Act (MPR cl 32D(1));
- the activity is inconsistent with the objects of a zone except in emergencies (MPR cl 32D(1));
- the activity is inconsistent with a determination under clause 32 restricting the number of permits that may be issued in relation to a marine park or zone (MPR cl 32D(3)).

### **3.5 Consent may be refused**

Consent may be refused for an activity if:

- The application was not made in the approved form;
- The applicant has failed to respond, or has responded unsatisfactorily to a request for further information;
- The applicant has been convicted of an offence under the Act, the Regulation or similar legislation, or been issued with two or more penalty notices (not later dismissed by a court)
- The activity is inconsistent with the principle assessment criteria (to the extent the criteria is relevant) (MPR cl 32E).

As a matter of policy, consent should normally be refused in the above circumstances.

## **Native Title Considerations**

The implications arising from the potential existence of native title rights must be considered with regard to any proposed dealing with marine parks. The impact of native title rights on the grant of permits in relation to marine parks will vary depending on the nature of the permit and the nature of the native title rights.

## **Other approvals required**

Many activities will require approval under other legislation in addition to a marine parks permit. All marine park permits are subject to a standard condition stating that the marine parks permit is only valid while any other required approvals are granted and are current.

Where the application concerns an activity of a type that is principally managed under another jurisdiction for all NSW waters, approval under that jurisdiction may be required prior to processing of the application for a marine parks permit (e.g. Aquatic Licences under maritime legislation).

## **4 REVIEW OF PERMIT DECISIONS**

### **Applicants review, acknowledgement & acceptance of permit conditions**

Where an application is to be approved, the applicant will be provided with a preliminary draft copy of the permit and an “acknowledgement and acceptance” form for signature. The applicant will be invited to provide comment within 21 days of receipt regarding the draft permit and its conditions.

Comments received within 21 days will be considered, and conditions of the permit amended if appropriate. A draft amended permit may be provided to the applicant for further comment if appropriate.

The Relevant Minister/ delegate may issue a final permit:

- Where a signed “acknowledgement and acceptance of the permit conditions” form is received by the Authority;
- Or following receipt of comments by the applicant and consideration of these comments by the Relevant Minister / delegate.

### **Review of refusal**

Where a permit application is refused, the applicant will be notified in writing and advised that they can request a review of the decision by the Authority within 21 days of the date of the notice. The Authority may establish a panel to conduct such reviews, and may issue guidelines to assist the panel in its deliberations.

### **Third party appeal**

The Authority will not consider any appeal by a third party regarding the granting or refusal of permits.

## **5 FORMAT, CONDITIONS, PERIOD OF GRANT, CONTINUATION OF PERMITTED ACTIVITY AND RENEWAL OF PERMITS**

### **Format and content of permits**

The information set out in a permit will include:

- (i) an individual permit identifier
- (ii) the name of the legal entity to whom the permit is granted
- (iii) the address of the legal entity to whom the permit is granted
- (iv) the names or classes of persons to whom the permit extends (for example, the employees of or other persons acting on behalf of or at the direction of the legal entity to which the permit is granted)
- (v) the section(s) of the Act or clause(s) of the Regulation to which the activity the subject of the permit relates
- (vi) the marine park to which the permit applies
- (vii) the zone(s) of the marine park to which the permit applies
- (viii) if the permit grants access only to specific locations, the identity of the locations
- (ix) the activity for which consent is given by the grant of the permit
- (x) the dates that define the period during which the permit is valid
- (xi) conditions or restrictions, consistent with the Act, that apply to conduct of the approved activity
- (xii) mode of transport permitted, passenger capacity, vehicle/vessel registration numbers (where relevant e.g. permits relating to commercial tourist activities)

### **Standard conditions**

Permits will include the following standard conditions:

- non-transferability of the permit
- automatic repeal of the permit upon repeal of the zoning plan, or declaration of a marine park closure (Division 3 of the Act) the provisions of which are incompatible with the continued conduct of the permitted activity
- availability of permit for inspection

- requirement to inform employees, participants, agents and contractors of the conditions
- native title provisions
- provisions for variation, suspension and revocation
- other required approvals have been granted.

### **Specific conditions**

Permits may include the following specific conditions:

- insurance conditions
- reporting conditions
- park, zone and/or site specific conditions

### **Permits issued prior to commencement of a zoning plan**

Where a permit is granted prior to the commencement of a zoning plan for a marine park, the permit will include a warning advising that the permit will be subject to zoning plan requirements and that the permit holder should be aware that once the zoning plan is in place, a new permit may not be granted and/or the permit conditions may be varied to ensure that the approved activity is consistent with the new zoning plan.

### **Period for which permits may be granted**

The maximum period for which any permit may be granted is five years.

### **Continuation of permitted activity**

If, at the date of expiry of a permit, the permit holder has lodged an application on the approved form for the permit to be re-issued, the life of the permit may be extended until such time any of the following events occurs:

- a new permit is granted; or
- the application is refused.

### **Renewal of permits**

A permit to carry on regulated activities in a marine park is not automatically renewable. Permit holders must lodge applications on the approved form, which will be assessed by the Relevant Ministers / delegate in the same manner as an application for a new permit. Where there is no change to any of the previously approved activity; the environment of operations; or relevant law or policy, the original assessment may be considered sufficient for reconsideration of the proposal.

## **6 SURRENDER, TRANSFER, VARIATION, SUSPENSION AND CANCELLATION OF PERMITS**

### **Surrender**

A permit holder may voluntarily surrender a permit by giving notice in writing to the Relevant Ministers / delegate (MPR cl. 32M).

Any obligations (such as reporting requirements) imposed by conditions of the surrendered permit cease to have effect from the date upon which the Relevant Ministers / delegate receives notice of surrender. However, surrender does not provide a defense to prosecution for non-compliance with conditions (including reporting conditions) that were current during the life of the permit.

Upon notice of surrender of a permit, the Authority will provide notice in writing requiring attention to any outstanding requirements within 21 days or such other time as is negotiated between the Authority and the permit holder.

### **Transfer**

Marine park permits are not transferable.

When a commercial activity (the subject of a permit) is to be transferred, the process requires the existing permit to be cancelled and a new permit to be issued. The issue of the new permit is subject to the same application and assessment processes as was the existing permit.

If a permit holder proposes to transfer control or ownership of any commercial activities, for example by selling a business, then:

- the person/s or entity intending to take over the commercial activities (that is, the intended purchaser or transferee of the business) should lodge an application for a permit on the approved form before the business transfer arrangement proceeds; and
- the application is to be signed by both the existing permit holder and the intended purchaser of the business.

The Relevant Ministers/ delegate will assess the application in accordance with this policy (see Part 8.2 of this policy in respect to capped permits).

If the Relevant Ministers / delegate approves the grant of a permit to the transferee, the permit will come into effect from the day the business is transferred. The existing permit will also be cancelled effective from that date.

### **Variation, suspension and cancellation**

The Relevant Ministers/ delegate may vary a permit, including by adding conditions, at any time by notice in writing for the reasons set out in cl 32J of the MPR.

The Relevant Ministers/delegate may suspend a permit, at any time by notice in writing for the reasons set out in cl 32K of the MPR.

The Relevant Ministers/delegate may cancel a permit, at any time by notice in writing for the reasons set out in cl 32L of the MPR.

Prior to any cancellation, suspension or variation of a permit, the Relevant Ministers / delegate should notify the permit holder in writing and invite the permit holder to show cause why the permit should not be varied, suspended or cancelled within 21 days of the date of the notice. Any representations made by the permit holder will be considered by the Relevant Ministers / delegate in determining whether to vary, suspend or cancel a permit.

If there are urgent reasons requiring an immediate suspension of activities pending a review (for example where the activity has resulted in damage or an immanent threat of damage to the physical environment or the living resources of the marine park), the notice period above may be shortened. However the permit holder should be notified and given an opportunity to comment prior to the decision being made wherever possible. A permit should be suspended pending a review of activities rather than cancelled in these circumstances.

## **7 MANAGEMENT OF COMMERCIAL ACTIVITIES WITHIN NEW MARINE PARKS**

Note: This section of the policy applies only in that situation where a new marine park has been declared and a zoning plan has not formally commenced for that park.

### **Exemption for commercial activities prior to Zoning**

Certain commercial activities may be conducted in marine parks prior to final zoning without the consent of the Relevant Minister / delegate (MPR cl 24(3)).

When a new marine park is declared, existing operators of commercial activities in the new marine park will be invited to apply for the grant of a permit for their existing commercial activities in the marine park. Operators will be advised that their commercial activities may be prohibited or subject to conditions when final zoning has been implemented.

Proponents intending to commence commercial activities in a marine park after declaration but prior to zoning will be invited to apply for a permit and advised that their

commercial activities may be prohibited or subject to conditions when zoning has been implemented.

## **8 PERMIT CAPPING**

### **Capped permits**

From time to time the Ministers may determine that:

- the number of permits granted for particular activities in particular marine parks, zones or sites of marine parks should be restricted or “capped” ; and
- priority be given to a particular class of applicants for a capped activity (cl. 32 MPR).

In determining whether to cap the number of permits, and whether to prioritize a class of applicants, the Relevant Ministers / delegate must consider the following:

- any existing use within the marine park or zone at the time the marine park or zone came into question;
- the environmental, cultural or social impacts caused by these existing uses;
- whether the use is consistent with the objects of the Act, , the objects of the zone, or other matters specified in the principal assessment criteria (cl 32 MPR).

### **Allocation of limited access**

Where the number of permits is capped, the Relevant Minister / delegate will determine the allocation of permits according to an equitable process.

Where the control or ownership of commercial activities is transferred, any cap imposed on permits for that activity will not restrict the grant of a new permit to the transferee provided that the number of permits or amount of activities will not increase, and the application is made in accordance with this policy (see section 6.2). This is because the grant of a new permit to the transferee of the business will be nullified by the cancellation of the existing permit held by the transferor of the business. This allows operators of commercial activities to gain access to capped activities through commercial avenues.

Where particular activities in particular parks or zones are capped, any residual capacity at the time of capping, and capacity validly arising as a result of cancelled or expired permits, will be publicly advertised by the Authority through an “expression of interest” process on an annual basis.

The public advertisement will invite applications, detail all assessment criteria, and specify the address and closing date for applications. A minimum of 21 days from the date of the advertisement will be provided for lodgment of applications.

Assessment criteria will include demonstrated capacity to conduct the activities in question at the subject location in accordance with all the laws in force, including compliance with conditions of previous permits.

Eligible applications will be ranked according to an assessment of the specific proposal against the assessment criteria. Consideration will be given to any measures proposed to enhance appreciation, understanding and enjoyment of the marine park and to ameliorate impacts.

A ballot will be conducted by the Relevant Ministers / delegate where applications outnumber capacity, and two or more applications have equal ranking.

Permits will be allocated according to their ranking or results of the ballot as appropriate.