THE NEW LAWFUL POINT OF DISCHARGE TEST IN QUDM 2016. DO YOU NEED IT?

LEGAL ARTICLE

Sarah Hausler
Senior Associate, McCullough Robertson Lawyers
&
Tony Loveday
Principal Engineer, General Manager Surface Water, Hydraulics and Infrastructure, RMA Engineers

Have you ever wondered if a Lawful Point of Discharge (LPOD) is necessary to meet legal requirements? Well, it's now in black and white. QUDM has been updated to reflect the law, remove confusion and avoid the misconception that a LPOD to a road or easement must be provided in every situation.

Background
Since 1992, the QUDM section about off-site water discharge has included a test for "Lawful Point of Discharge (LPOD)". That test required:

(a) the location of the discharge to be under the lawful control of the local government or other statutory authority, from whom permission to discharge has been received; and

(b) in discharging to that location, the discharge will not cause an actionable nuisance, or environmental or property damage.

The interpretation and application of the LPOD test was complicated because the definition of LPOD in the Glossary included a 'no worsening requirement', but the substantive provisions in QUDM about LPOD only included a 'no actionable nuisance requirement'.

The LPOD test was almost universally (mis)interpreted to mean that all development requires a formal LPOD.

For sites that discharge to private property, rather than to a road reserve or similar, that interpretation, in turn, has been taken to mean an easement or discharge agreement.

Easements and discharge agreements are becoming more and more difficult (in many cases, impossible) to obtain. The end result is that developable land is being quarantined for want of an easement/discharge approval.

No nuisance
The situation in law is, and has always been, that discharge to an adjoining property is "lawful" provided that it does not result in nuisance (and provided that all necessary approvals have been obtained and the discharge does not contravene the terms of an easement or other contract between the neighbours).

A private nuisance is a substantial and unreasonable interference with the private right to the use and enjoyment of land. To establish a cause of action in nuisance the plaintiff must demonstrate the interference was both substantial and unreasonable, and caused quantifiable damage to the plaintiff. Mere annoyance is not sufficient. It is not necessary to show that the defendant's actions were intentional or negligent.

Obtaining consent from the affected land owner (through a discharge agreement, drainage easement or drainage reserve) is only necessary where there is a risk the stormwater changes will cause a nuisance i.e. where there is a risk of substantial damage to the third party property.

Consequences of a rigid approach
Applying a rigid "every

development requires a LPOD" or 'no worsening' requirement has positive and negative consequences.

On the positive side, it potentially reduces the number of complaints and Court actions and removes the need for professional judgment and discretion in development assessment.

On the negative side, the quarantining of otherwise developable land results in:

- increased urban sprawl;
- inefficient use of the land bank;
- refusal of otherwise acceptable or desirable development.

There are already some Council areas where development of land that slopes to an adjoining property has been made effectively impossible by rigid LPOD requirements that do not reflect the law.

Application of a rigid approach is also likely to be associated with a community expectation that the Council will be responsible for all neighbourhood disputes about stormwater drainage.

The application of a rigid approach is not necessary for Councils to avoid liability for stormwater drainage changes. Councils' liability in nuisance and other civil actions is limited under the *Civil Liability Act 2003* (Qld). A court is required to consider the Council's functions, financial and other resources, general procedures and standards.

In addition, a Council cannot be liable for a breach of statutory duty (e.g. in development assessment) unless the relevant act or omission was so unreasonable that no Council having the functions of that Council could properly consider the act or omission to be a reasonable exercise of its functions.

This provides significant protection against cases relating to planning and development assessment functions carried out in good faith by Councils.

The application of a rigid approach could also have unintended consequences by, for example, enabling a land owner to argue that Council should be liable because 'Council has a policy of requiring no worsening, and the new development has worsened the water levels on my privately-owned land, even though my land is constrained by creek corridor zoning'.

The 'do you need it' test

QUDM is a manual for uniform and best practice urban drainage practices and engineering. It does not have any legal force in its own right.

QUDM 2016 aligns the LPOD test with the law by inserting a "do you need it" test:

"i. Will the proposed development alter the site's stormwater discharge characteristics in a manner that may substantially damage a third party property?

- If not, then no further steps are required to obtain tenure for a lawful point od discharge . . . "

In simple terms, if discharge from a proposed development does not create a nuisance, then the discharge is, of itself, lawful. No formal LPOD is required.

It is the developer's responsibility to not cause nuisance, rather than the regulator's responsibility to assess and condition works to prevent a nuisance.

Policy choice for Councils

QUDM does not require Councils to provide greater protection to downstream owners than that available by an action in nuisance, nor does it prevent Councils from doing so through their planning schemes. It is not QUDM's role to set the policy position for stormwater management across Queensland. That is a matter for Councils as part of their land use planning policy resulting from weighing up the likely positive and negative consequences of a more rigid approach.

Councils may also elect whether their planning schemes include assessment benchmarks that address the potential stormwater changes that could cause a nuisance, or other impacts that the Council wishes to manage.

Development assessment requires professional skill and judgment

QUDM 2016, section 3.6, outlines the types of changes in discharge behaviour which might create nuisance, but also cautions that *"In most cases it is impractical, if not impossible, for urban development to occur without resulting in some form of change to the stormwater runoff characteristics of the developed land."* In fact, in many situations runoff changes do not cause nuisance. The potential for nuisance is very site specific. The types of changes that developers need to consider in determining whether or not there is a potential for nuisance include:

(a) Diversion
(b) Concentration
(c) Peak discharge
(d) Frequency and duration
(e) Velocity

(f) Volume
(g) Quality
(h) Future use

Typically, only one or two of these might be important on any specific site, and not all can be mitigated. In particular, QUDM notes that *". . . it is generally impractical to significantly mitigate increases in runoff volume caused by urbanisation."*

The application of standard approval conditions that generically require *"No worsening of flow rates, volume, time to peak, volume and frequency . . ."* are at risk of being unlawful under section 65 of the *Planning Act 2016* (Qld) because such conditions:

- may be an unreasonable imposition on development, because the condition relates to some theoretical development impact rather than the development and impacts actually proposed; and
- may not be reasonably required in relation to the development, because the condition is not a reasonable response to the change arising from the development.

In order for conditions to be lawful they must be informed by the particular impacts of the proposed development. The imposition of lawful conditions requires experienced judgment. For example:

- Most urban development increases the impervious surface of the site and the volume of runoff. A requirement not to worsen volume will generally be impossible to achieve. By contrast, a condition that limits the increase in volume or impervious surface in response to a known risk is likely to be lawful.
- A condition that prohibits a worsening in peak flow rates where those flows that will not have any tangible impact on other properties in the catchment is unlikely to be lawful. However, a condition that limits the peak discharge to the capacity of downstream infrastructure is likely to be lawful.

Conclusion

The revised LPOD test is intended to more clearly reflect the general law, and hopefully make the legal content of QUDM more accessible to its users. The LPOD test may assist users to determine whether consent is required for stormwater discharge arising from development.

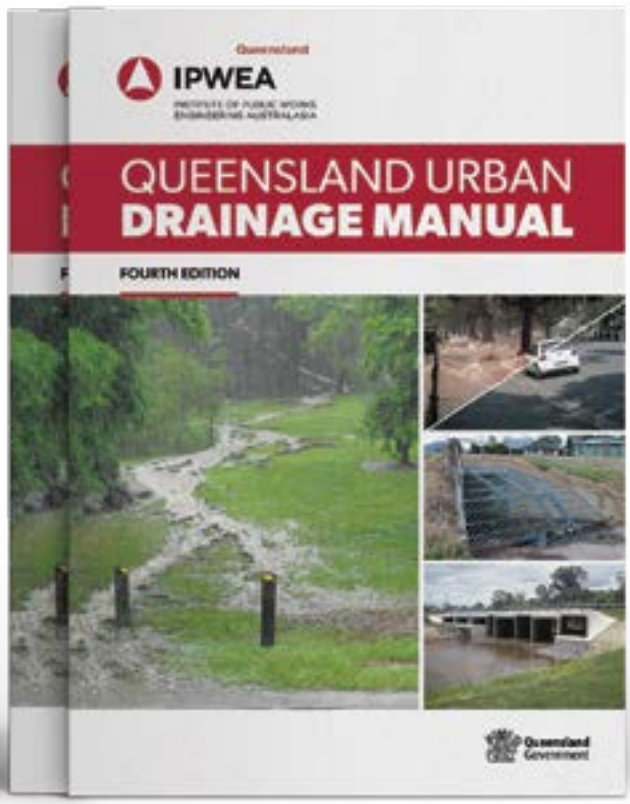
The LPOD test does not pre-determine the policy issue of what standard of drainage outcomes a Council should require in its local government area.

The LPOD test does not promote generic conditions of approval that are not informed by the specific impacts of the development and the application of skilled engineering judgment.

The revisions to QUDM will continue to drive Queensland engineers to achieve best practice outcomes for our communities.

"At TRC, I am the ISG Portfolio Chair, hence I am keenly interested in all the developments occurring across our whole LG industry. The IPWEAQ State Conference enables me to stay up-to-date with contemporary issues happening with public works engineering across the state. Staying knowledgeable on the wide variety of issues that challenge our local government engineering portfolios is a full-time job. The opportunities this conference enables through professional presentation and networking is second to none. I find it very valuable and a rewarding experience."

Cr Carol Taylor, Deputy Mayor,
Toowoomba Regional Council



The Queensland Urban Drainage Manual (QUDM) is an engineering guideline that addresses the technical, legal, regulatory and environmental aspects of effective drainage systems. It provides details of appropriate design methods and computational procedures, and covers both hydrologic and hydraulic procedures

Prices (plus GST)	Members	Non-members
PDF	200	500

QUDM workshops - an overview of the fourth edition (2016) including discussion on each chapter with specific references to updates on the previous edition QUDM (2013)

Queensland Urban Drainage Manual Workshop
Toowoomba - 24 January 2018
Sunshine Coast - 07 February 2018
Gold Coast - 21 February 2018
Townsville - 06 March 2018
Cairns - 07 March 2018
Gladstone - 02 May 2018
Rockhampton - 01 May 2018
Bundaberg - 23 May 2018

Purchase QUDM or Register Online for Workshops https://ipweaq.eventsair.com/MemberPortal/ipweaq-master-contact-store/ipweaq-member-portal/ShoppingCart

Contact Craig Moss
Craig.Moss@ipweaq.com
07 3632 6805

Benn Barr, Deputy Director-General, Water Supply, Department of Energy and Water Supply (DEWS). And Frank Scheele, Senior Engineer, South Burnett Regional Council (912)