Dams Safety NSW

Regulatory policy
(to 1 November 2021)
Table 1. Document change history

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<th>Approved date</th>
<th>Approved by</th>
<th>Notes</th>
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<td>1</td>
<td>March 2020</td>
<td>Chief Executive Officer</td>
<td>Approved for publication at Dams Safety NSW meeting 25 February 2020</td>
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1. Introduction

Dams Safety NSW is an independent regulator established under the Dams Safety Act 2015 (the Act).

Dams Safety NSW ‘declares’ those dams which have a potential to threaten downstream life or cause major property, environmental, or public welfare damage. Once a dam is declared under the Act, the dam owner must comply with the requirements of the Act and the Dams Safety Regulation 2019 (the regulation).

Some new requirements in the regulation do not come into force until November 2021. Until November 2021, Dams Safety NSW will seek to ensure that declared dam owners achieve compliance with those aspects of the legislation that are already in force, and will seek to ensure compliance with the entirety of the legislation after November 2021.

Until November 2021, Dams Safety NSW will conduct site visits to track how dam owners are progressing with implementation of the legislation, to discuss with declared dam owners what they need to do to comply with new requirements, and to monitor how dams safety risks are managed.

In line with its legislative objectives, Dams Safety NSW will:

- seek to ensure that any risks to people and to environmental and economic assets from dams are of a level that is acceptable to the community
- formulate measures to ensure the safety of dams
- promote compliance with the Act and regulation
- take a risk-based and outcome-focused approach to regulation
- guide decision-making and action by officers, through the adoption of a graduated and proportionate response to legislative non-compliance
- promote transparency in regulating dams safety and strive for maximum transparency on enforcement action decisions
- encourage the application of risk management and the principles of cost benefit analysis in relation to dams safety
- encourage proper and efficient management in matters relating to dams safety

Dams Safety NSW seeks to maintain community confidence and trust as an effective, efficient, transparent and ethical regulator. This objective of this policy is to manage Dams Safety NSW’s administration of the dams safety legislation to achieve those aims.

Dams Safety NSW expects declared dam owners to manage dams safety risks and recognises that the majority of declared dam owners will voluntarily meet their safety obligations. Dams Safety NSW will encourage and assist dam owners to manage dams safety risks through appropriate education, guidance and regulatory advice. However, when a dam safety risk is not appropriately addressed, Dams Safety NSW will not hesitate to direct a dam owner to take corrective or preventive action to address the risk.

Application of this policy and its associated strategies will better mitigate dams safety risks and deliver greater certainty for declared dam owners and the wider community.

1.1. Purpose of this document

The Act and regulation commenced on 1 November 2019.

New requirements in the regulations will not come into effect until November 2021, so declared dam owners will have a two-year transition period to implement these new legislative requirements. The Act and regulation provide provisions and powers to allow Dams Safety NSW to monitor and regulate how declared dam owners are managing dam safety risks during this transition period.

This policy sets out how Dams Safety NSW will administer the legislation, educate dam owners on how to comply with new requirements, and monitor dams safety risks during the transition period.
The policy adopts an outcomes-focused and risk-based regulatory approach that aligns with the requirements of the NSW Quality Regulatory Services Initiative (QRSI). It will be reviewed at least annually and will be replaced with a regulatory policy addressing administration of the full legislative requirements at the end of the transition period (November 2021).

Provisions of the legislation that are in force at commencement of the Act and regulation (after 1 November 2019):

Dams Safety NSW may:
- declare a dam and:
  - may direct the owner of a dam or a proposed dam to conduct a preliminary assessment of the dam to determine whether it is of a class that may be a declared dam
  - classify each declared dam in a consequence category
- issue compliance notices
- direct a declared dam owner to address a safety risk if a declared dam is unsafe or is in danger of becoming unsafe
- direct a person to address a safety risk if anything done or proposed to be done by the person in relation to a declared dam may endanger the safety of the dam
- issue a ‘stop work’ direction or an emergency order
- investigate and enforce the Act and regulation
- conduct inquiries
- declare mining notification areas and raise matters regarding mining activities in the vicinity of declared dams
- enter into an arrangement with public authorities.

Declared dam owners must:
- regularly assess the consequence category of their dam
- prepare and implement (by 1 May 2020):
  - an operations and maintenance plan
  - an emergency plan
- report dams safety incidents to Dams Safety NSW
- notify Dams Safety NSW of any significant proposed configuration change to the dam that may affect the safety of the dam (before any change is made)
- ensure that a competent person checks designs for extreme and high consequence dams
- keep records.

Provisions of the legislation that will come into force after the transition period (after 1 November 2021)

Declared dam owners must:
- establish and implement a dam safety management system
- carry out safety reviews
- carry out emergency exercises
- ensure that work involving designing, constructing, commissioning or decommissioning of the dam or a major modification to the dam is only carried out (a) in accordance with the risk management framework forming part of the dam safety management system for the dam, and by a person who is subject to a quality management system
- provide an annual dams safety standards report to Dams Safety NSW.

2. Vision, mission, core purpose statement

Dams Safety NSW has established a vision which recognises the community’s expectation for dam safety.
Dams Safety NSW’s mission is derived from the objects of the Act to complement Dams Safety NSW’s vision.

2.1. Dams Safety NSW’s vision and mission:

Vision: Safe dams for NSW

Mission: To empower, support and regulate dam owners in managing dam safety risks for the NSW community.

2.2. Regulatory core purpose:

The Dams Safety NSW’s core purpose statement amplifies the mission statement, using more specific terms used within the Act, to determine what Dams Safety NSW must achieve to satisfy the objects of the Act. The regulatory core purpose statement forms the basis for Dams Safety NSW’s regulatory outcomes\(^1\) documented in this policy.

Dams Safety NSW regulates effectively, efficiently, transparently and ethically so that dam owners apply proper and efficient risk and asset management principles to manage dam safety risks\(^2\) to a level acceptable to the community.

3. Dams Safety NSW’s regulatory principles

Dams Safety NSW’s regulatory principles support and influence the way we engage with dam owners and the NSW community, perform our functions and exercise our legislative powers.

We apply the following principles which complement the NSW Public Sector’s core values of integrity, trust, service and accountability.

3.1. Committing to excellence and regulatory best practice

We are committed to maintaining the trust of the NSW community and fostering mutual respect between Dams Safety NSW and declared dam owners.

We seek to understand the expectations of the community through engagement on key issues. We strive to meet those expectations through the application of this policy.

We want our stakeholders to appreciate the value we provide to the NSW community.

We aspire to being a leading dam safety regulator so that others seek our contribution to improving their regulatory frameworks.

We want our highly engaged staff to inform and challenge dam owners to implement effective dam safety management systems to prevent dam failure. We will invest in the development of our people so that we have the skills, systems, processes and equipment to implement our regulatory approach efficiently and effectively.

We will periodically review our regulatory approach, systems and activities, based on whether we have achieved our outcomes, feedback from the community, and to reflect advances in regulatory best practice.

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\(^1\) The NSW QRSI assigns specific meanings to ‘core purpose’ and ‘regulatory outcomes’ - refer to ‘Guidance for regulators to implement outcomes and risk-based regulation’ from NSW Finance, Services and Innovation, October 2016

\(^2\) Risks to people, environmental and economic assets
3.2. Taking a risk-based and strategic approach to regulation and decision-making

We will employ a risk-based and intelligence-led approach to regulation to enable us to apply our finite resources to their greatest effect. We will focus proactively where the consequences of dam failure are greatest and where the likelihood of non-compliance is highest.

Taking a risk-based approach to administering the legislation will result in dam owners not being inconvenienced by unnecessary regulatory activities.

3.3. Taking an outcomes-focused approach to regulation

We will clearly define regulatory outcomes to guide the application of regulatory activities to achieve our regulatory core purpose.

We will consider innovative approaches to achieve our regulatory core purpose and to solve regulatory problems.

We will invest in the development of our people so that we have the skills and the knowledge of the desired regulatory outcomes to be able to choose an appropriate and proportionate response to non-compliance.

We will regularly report on progress towards the achievement of regulatory outcomes.

3.4. Accepting accountability

We are accountable for our regulatory activities which means we are answerable for our decisions, including when we act on non-compliance, the type of action we take, or when we decide not to act.

We will take decisions within an effective corporate governance process to maintain objectivity, independence and integrity and will employ processes that provide procedural fairness and natural justice.

We will make decisions based on evidence and will keep appropriate records of our regulatory activities so that decisions can be readily accessed and scrutinised.

We commit to reporting on, and promoting awareness of, our regulatory activities and we will publish our performance results in a timely manner.

3.5. Being transparent

We will publish our policies and priorities and provide information that explains what the community and declared dam owners should expect from a regulatory process.

We will use plain language and be clear and concise in our communications.

When we detect non-compliance we will be clear about what is required to achieve compliance, when it is required and the consequences of continuing non-compliance.

3.6. Providing service

We will listen and be responsive to requests.

We will respond to stakeholder enquiries about the dams safety regulatory regime in a timely and thorough way.

We will conduct our regulatory activities to meet the expectations of the community and our quality objectives. Our professional standards in service delivery will reflect declared dam owners’ expectations. This will mean that declared dam owners should expect that, where possible, we will minimise disruption to their operations and provide certainty about what to expect from us.

We will strive to meet or exceed our stakeholder expectations of professional service when we carry out dam declaration processes and when we provide advice on mining activities near dams.
We commit to timely compliance and enforcement action to maintain the principle of fairness to those involved.

3.7. Fostering respect
We are committed to fostering mutual respect between Dams Safety NSW officers and declared dam owners.
Our communication with dam owners and other stakeholders will reflect that respect.
We understand that respect is earned through consistent application of our regulatory policy, delivered with a high level of expertise.

3.8. Balancing the need for consistency with the need for flexibility
We aim for high levels of consistency in the decision-making process, based on the use of clear policies and processes that consider the specific circumstances of a situation, to produce sensible, predictable and fair results.

3.9. Demonstrating proportionality and exercising discretion in regulatory decision-making
We expect declared dam owners to manage dams safety risks and to comply with legislative requirements. We commit to taking regulatory action that is proportionate to the circumstances of non-compliance with the legislation. The more serious the non-compliance, the more serious should be the response, and we will not hesitate to take strong enforcement action when required.

3.10. Acting within the law
We will consider innovative approaches to achieve our regulatory core purpose and to solve regulatory problems.
However, we will always act within the legal remit of our statutory power when considering enforcement activity and will not require declared dam owners to do things that are not authorised by law.

4. Dams Safety NSW’s risk-based and outcome-focused approach

4.1. Dams Safety NSW is a risk-based regulator
Dams Safety NSW’s risk-based regulatory approach applies risk principles to:

- prioritise regulatory activities and focus Dams Safety NSW’s operational efforts
- guide regulatory decisions (dealing with non-compliance).

A risked-based approach to regulation:

- focuses Dams Safety NSW resources where the consequences of non-compliance are greatest and where the likelihood of non-compliance is highest
- deploys Dams Safety NSW’s finite resources to the greatest effect
- applies the available regulatory tools based on the required outcomes
- promotes flexible and innovative responses to non-compliance
- reduces the compliance burden by tailoring regulatory intervention to match the assessed risks
- results in dam owners not being inconvenienced by unnecessary regulatory activities.
During the transition period, Dams Safety NSW will undertake visits to declared dam owners to explain the new legislative requirements and to determine if dam owners are appropriately managing dam safety risks. Planning for these visits uses a risk-based approach to prioritise higher consequence declared dams and those dams that are assessed as having a higher societal risk.

Dams Safety NSW also takes a risk-based approach when:

- prioritising reports and incidents for audit or investigation, based on the potential impact of the incident
- dealing with non-compliance.

4.2. Dams Safety NSW defines and documents intended regulatory outcomes

The required regulatory outcomes for activities are documented in ‘outcome statements’\(^3\) in section 5 of this policy. These outcome statements relate to Dams Safety NSW’s regulatory core purpose and describe what Dams Safety NSW expects to achieve through a regulatory activity. Section 5 also includes the risk-based prioritisation basis and the rationale\(^4\) for each activity.

Specific regulatory problems may occur during the transition period and these will require a project approach, with the required outcomes for each project documented in regulatory project plans.

4.3. Dams Safety NSW measures and reports on achievement of outcomes

Dams Safety NSW will establish a set of effectiveness and efficiency measures and will regularly report regulatory achievements and progress towards achieving the regulatory outcomes.

4.4. Review

Dams Safety will review the effectiveness of its transition activities in preparation for the implementation of compliance processes within a comprehensive regulatory regime after the transition period.

5. Dams Safety NSW’s regulatory activities in the transition period

During the transition period, Dams Safety NSW will:

- build regulator capability in preparation for the implementation of compliance processes within a comprehensive regulatory regime after the transition period.
- manage entry to the legislative regime
  - declare dams that fit the criteria in the regulation
  - manage mining notification areas in the vicinity of a declared dam
  - raise matters regarding mining in those areas with consent authorities
- educate and inform dam owners
  - educate dam owners on the requirements of the new requirements
  - visit dam owners to explain the new requirements
  - produce guidelines on the new requirements
- monitor compliance and respond to incidents and potential high dams safety risks
  - visit dam owners to determine if they are managing dam safety risks

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3 Refer to ‘Guidance for regulators to implement outcomes and risk-based regulation’ from NSW Finance, Services and Innovation, October 2016
4 The “rationale” describes how Dams Safety NSW activities contribute to the overall outcome. The NSW QRSI calls this a “contribution story”.
monitor dams safety incidents

- investigate and enforce
  - direct a person to address a safety risk if anything done or proposed to be done by
    the person in relation to a declared dam may endanger the safety of the dam.

5.1. Manage entry to the legislative regime

5.1.1. Dam declaration

5.1.1.1. Activity description

During the transition period Dams Safety NSW will declare a dam when the consequences of
failure of the dam (to people and to environmental and economic assets) are sufficiently high.

Dams Safety NSW declares those dams that meet any of the following criteria listed in Section 4 of
the regulation:

- having a wall that is more than 15 metres high
- a dam failure would:
  - endanger the life of a person
  - cause a major or catastrophic level of severity of damage or loss.

During the transition period a declared dam owner must comply with the relevant requirements of
the legislation and work towards implementing the new requirements in the legislation.

5.1.1.2. Regulatory outcome statement – dam declaration

Outcome:

- seek to ensure that dams safety risks are of a level that is acceptable to the community by
  including dams that have a significant consequence of failure (or higher) in the regulatory
  regime.

Prioritisation basis:

- Dams Safety NSW will endeavour to identify those proposed and existing dams that are
  likely to have at least a significant consequence of failure. Dams Safety NSW will require a
  dam owner to assess the severity of dam failure damage or loss (if reasonably satisfied that
  a dam will likely be declared). Priority will be given to dams which are likely to be of a
  relatively higher consequence category.

Rationale:

- an effective process for:
  - identifying proposed dams that have significant failure consequences and
  - declaring those dams

will provide confidence that dam safety risks to the community are identified and dams are
appropriately included in the regulatory regime. Inclusion in the regulatory regime allows
Dams Safety NSW to oversight the dam owners’ systems for managing dams safety risks.
This should lead to better management of dams safety risks for dams that present
significant risk to people, environmental and economic assets.

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5 Any risks to people, environmental and economic assets
6 The Water Management Act 2000 includes provisions for authorities to inform Dams Safety NSW of dams that are in
the works approval process. Dams Safety NSW will also develop additional processes to identify other dams which may
need to be declared
5.1.2. Declaring a dam mining notification area and raising matters regarding mining in those areas with consent authorities

5.1.2.1. Activity description

Dams Safety NSW declares mining notification areas that surround, or are in the vicinity of, declared dams.

A consent authority must refer an application for development consent for the carrying out of any mining operations in a notification area to Dams Safety NSW.

Dams Safety NSW raises dam safety matters with the consent authority, which must take these matters into account before granting development consent for mining operations under the Mining Act 1992.

5.1.2.2. Regulatory outcome statement – mining near declared dams

Outcome:
- declared dam notification areas are appropriate to the dams safety risks associated with mining activities, and that consent authorities take into account those risks when granting mining development consents.

Prioritisation basis:
- Dams Safety NSW will provide all relevant declared dams with an appropriate notification area. Priority will be given to those dams that are more vulnerable to mining and those dams where it is likely mining consent applications will be sought.

Rationale:
- an effective notification area process and the provision of timely, risk-based advice to consent authorities will provide confidence that dam safety risks due to mining are addressed appropriately.

5.2. Educate and inform dam owners

5.2.1.1. Activity description

Dams Safety NSW seeks to maximise voluntary compliance through a cooperative and collaborative approach and recognises engagement with declared dam owners is an important way to influence safety behaviours.

Education activities aim to build declared dam owners’ capacity to comply with the legislation. Activities include the provision of information resources and tools to help declared dam owners become aware of their rights, to make sure they are aware of their obligations, and to provide certainty for their future planning. This helps declared dam owners meet their obligations and avoid inadvertent non-compliance.

Education activities may include:
- visiting dam owners during the regulation transition period to educate dam owners on the new requirements and to check on transition progress
- engaging with declared dam owners to build capacity, such as through workshops and sharing of best practice
- promoting and reinforcing good compliance practices
- promoting the benefits of complying with legislation
- highlighting the potential consequences of not complying with legislation
- providing guidelines on the legislation and tools to aid compliance.

Dams Safety NSW will use the website as the primary means of providing information and will also seek ways to make it easier for the community to access this information and will collaborate with
other organisations that support education activities, including relevant government agencies and local government.

Wherever possible, Dams Safety NSW will work in partnership with peak bodies and stakeholder groups to gain support for, and achieve, compliance.

5.2.1.2. Regulatory outcome statement - education

Outcomes:

- encourage proper and efficient management in matters relating to dams safety and encourage the application of risk management and the principles of cost benefit analysis
- reduce dams safety risks by increasing compliance with the legislation by informing dam owners about the legislative requirements, guiding them to work within the requirements and raising awareness about the consequences of not complying with the requirements.

Prioritisation basis:

- education and information resources are aimed at all declared dam owners and cover topics that are likely to be of interest to most dam owners. Education resources will initially be aimed at declared dam owners who might find it difficult to comply. For example, owners of more than one large declared dam are likely to have the ability to establish and implement the safety management systems needed to comply with the legislation. Owners of smaller dams may need more guidance on the required management systems.

Rationale:

- education activities motivate dam owners to voluntarily comply with the legislative requirements by focusing declared dam owners on the need for compliance, promoting the benefits of complying with the requirements and by making it easier to understand and follow the requirements.
- education also aids in deterring non-compliance by highlighting the consequences of not complying with the requirements.

5.3. Monitor compliance and respond to potential high dams safety risks

5.3.1. Proactive monitoring

5.3.1.1. Activity description

Dams Safety NSW will visit declared dam owners during the regulation transition period to monitor known higher priority dams safety risks and to inform dam owners on what they need to do to comply with the new regulation.

5.3.1.2. Regulatory outcome statement – proactive monitoring

Outcome:

- seek to ensure that dams safety risks are of a level that is acceptable to the community by assessing dams safety risks through visits to/audits of declared dam owners.

Prioritisation basis

- visits to dam owners are prioritised according to dam consequence category, dam societal risk level and on the likelihood that dams safety risks are not being managed.

Rationale:

- visits/audits have been shown to be effective in detecting risks. The combination of detection and reinforcement of legislative requirements will lead to a reduction in dams safety risks.
5.3.2. Reactive response

5.3.2.1. Activity description

**Incident reports**

The owner of a declared dam must report dam safety incidents to Dams Safety NSW in accordance with section 19 of the regulation.

Dams Safety NSW will establish systems and procedures for logging incident reports received from declared dam owners. The information in the incident reports is assessed and prioritised according to risk-based principles. Dams Safety NSW prioritises those issues that have the potential to cause serious harm and looks for patterns of similar incidents that may suggest ongoing or broader issues.

Dams Safety NSW will apply just culture principles so that dam owners feel confident in the reporting system and to encourage the reporting of all incidents.

**5.3.2.2. Regulatory outcome statement – reactive monitoring**

**Outcome:**
- gather important dams safety risk information by logging, assessing and investigating dam incident reports.
- maintain confidence in Dams Safety NSW’s administration of the legislation by ensuring that all reports are recorded and assessed.

**Prioritisation basis:**
- incident reports are prioritised according to the potential consequence of the incident.

**Rationale:**
- each dam safety incident report is an important source of information for Dams Safety NSW, as each report could lead to the detection of significant dams safety risks. Incident report information (aggregated and de-identified) can also be a source of information that is beneficial to the wider dam safety community. An incident reporting system that comprehensively reports incidents to Dams Safety NSW can also show how well dam owners are operating their safety management systems.

5.4. Investigate and enforce

5.4.1. Dealing with non-compliance—regulatory decision-making

5.4.1.1. Activity description

Dams Safety NSW will monitor dams safety risks during the transition period and, if necessary, will direct a person to address a safety risk if anything done, or proposed to be done, by the person in relation to a declared dam may endanger the safety of the dam.

If a declared dam owner does not comply with a direction, or does not comply with a legislative requirement, Dams Safety NSW employs a graduated and proportionate approach to the non-compliance. This is based on the severity of the non-compliance (its potential harm to people, environmental and economic assets), the declared dam owner’s culpability, cooperation and approach to the non-compliance, and the public interest. See Figure 1.

A non-compliance is a breach of the legislation and must be treated as such. While Dams Safety NSW has the discretion to address a non-compliance according to a graduated approach, every non-compliance detected requires a decision on what response to take.
Dams Safety NSW considers the following factors when deciding on the response to non-compliance:

- **degree of harm:**
  - the seriousness of the non-compliance, based on its actual or potential impacts on people, environmental and economic assets

- **culpability of the person:**
  - compliance history of the person, in general and with respect to the specific event
  - evidence of motivation for the non-compliance
  - whether the behaviour is deliberate, reckless or involving consistent carelessness
  - whether the person has made false or misleading statements about the non-compliance
  - any mitigating or aggravating circumstances

- **public interest:**
  - timeframe over which the offence was committed
  - public interest and community expectation about the action taken
  - whether a decision not to act would undermine public confidence
  - whether action is necessary to provide specific or general deterrence
  - whether action is necessary to clarify a grey area in the law

- **attitude to compliance:**
  - voluntary remedial and corrective action taken to address the non-compliance, mitigate the harm and any mechanisms put in place to prevent a recurrence
  - cooperation demonstrated by the dam owner involved
  - the dam owner’s willingness to comply with requirements
  - the dam owner’s ability to comply with requirements

Responses to non-compliance, in increasing severity, include:

- advisory letters
- warnings (written and verbal)
- statutory directions such as Act section 19 directions and section 20 ‘stop work’ directions
These regulatory responses allow Dams Safety NSW to take a balanced approach to non-compliance that stops the improper conduct and promotes changes in attitudes and behaviours rather than simply applying a punishment.

Enforcement decisions must be based on evidence which will be admissible and sufficient to establish that an offence has been committed. Combinations of actions may be taken, for example emergency orders and prosecutions. Wherever possible, Dams Safety NSW will provide reasons for decisions and will explain avenues for review.

5.4.1.2. Regulatory outcome statement – investigation and enforcement

Outcomes:

- seek to ensure dam safety risks are of a level that is acceptable to the community through a proportionate response to non-compliance with the legislation.
- maintain community confidence in the Dams Safety NSW's regulatory oversight.

Prioritisation basis:

- enforcement resources are prioritised according to the potential impact of the non-compliance, the likely culpability and attitude to compliance of the dam owner, and the public interest.

Rationale:

- a proportionate response to non-compliance, including a commitment to carry out prosecutions where warranted, has been shown to provide a specific and general deterrence against future non-compliance
- a proportionate, transparent response will provide confidence to those complying with the law, and the community, that the legislation is being administered fairly
- at the more severe end of the response spectrum, enforcement activities aim to deter non-compliant behaviour (by the declared dam owner involved and other declared dam owners), consistent with legislation.

5.5. Regulatory projects

Some regulatory problems or events require a particular mix of regulatory activities that may not be adequately addressed through Dams Safety NSW's programmed activities and therefore Dams Safety NSW applies a project approach to resolving them.

Dams Safety NSW regulatory projects:

- are established to address emerging regulatory problems
- address regulatory problems (or issues) that cut across Dams Safety NSW's programmed activities or address particular events or risks
- are prioritised according to the potential impact of the risk or problem to people, environmental and economic assets
- are established through a project planning process that includes:
  - precisely defining the problem (through analysis of information)
  - documenting regulatory outcomes for the project
  - determining how to measure success (in achieving the outcomes)
  - allocating specific project resourcing
  - planning specific project operational processes and procedures
  - planning stakeholder engagement requirements
  - carrying out the project (adjusting plans as necessary)
  - evaluating and reporting results
  - project closure (including lessons learnt).
Appendix 1   NSW Quality Regulatory Services Initiative (QRSI) cross-reference

Table 2. Requirements of the NSW QRSI and how they relate to the Dams Safety NSW Regulatory Policy – regulatory transition period

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