



CLAYTON UTZ

Law & Order: WSUD Asset Maintenance

May 30th 2024

Presented by Lauren Smith & Daniel Rider

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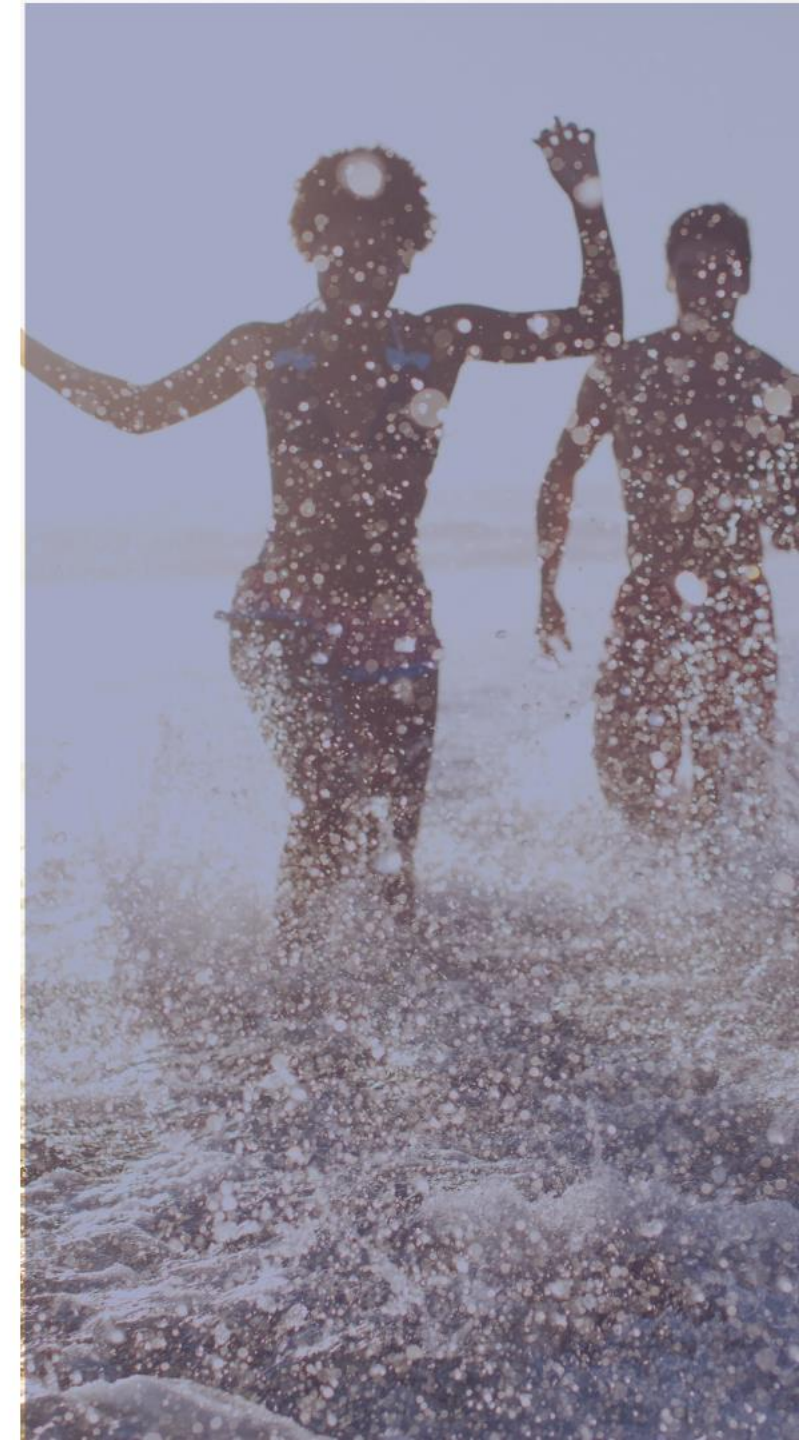
Starts at 12:30pm AEST

Acknowledgement of Country



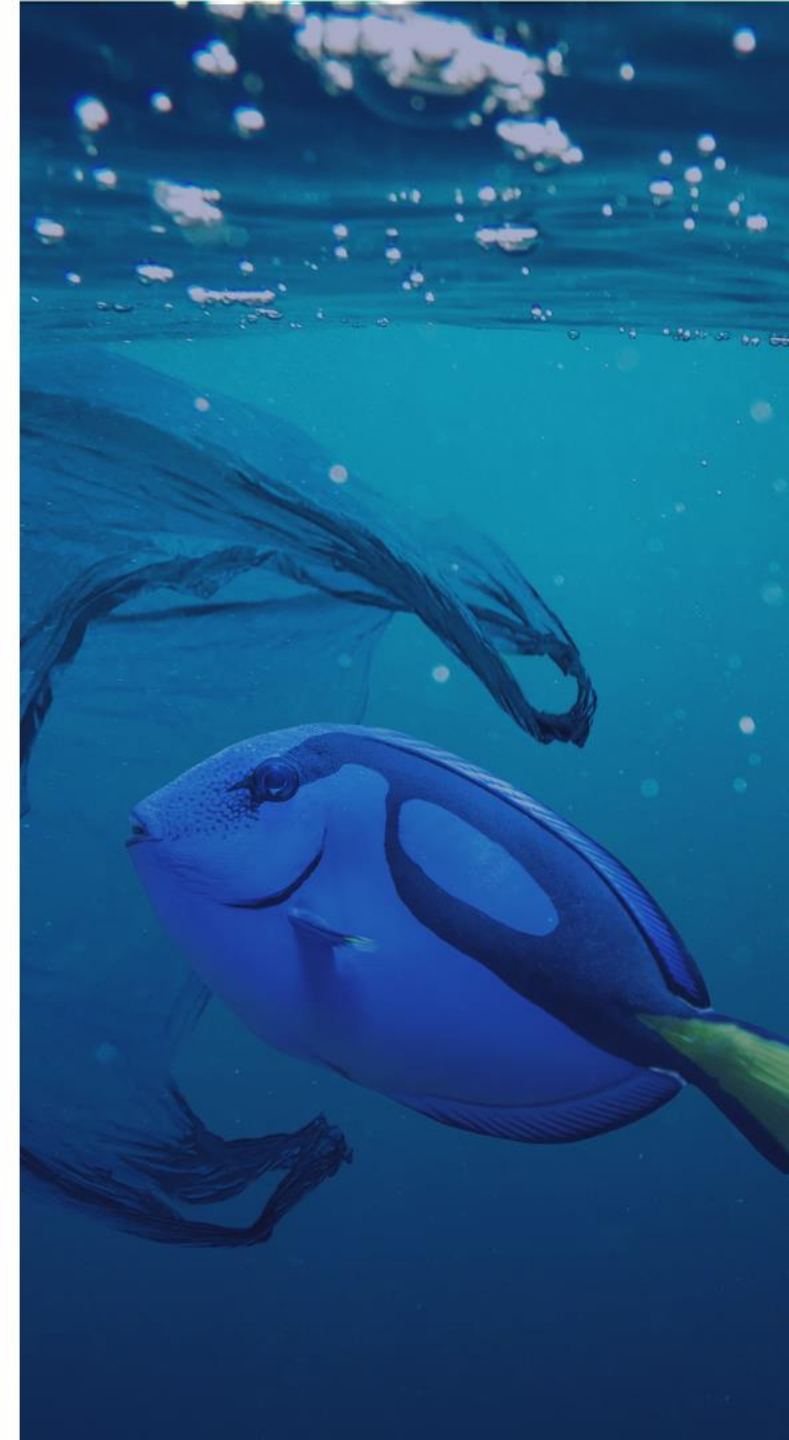
Disclaimer

- ④ The information within this presentation is provided as general information only and is not to be relied upon as legal advice
- ④ I acknowledge that Ocean Protect have a conflict of interest in relation to the topic of improving WSUD maintenance, noting we supply, install & maintain WSUD assets



Reminders

- ④ Please put any questions in the 'Q&A' panel
- ④ The slides & recording will be made available at www.oceanprotect.com.au/webinars
- ④ Please email any CPD form requests to enquiries@oceanprotect.com.au



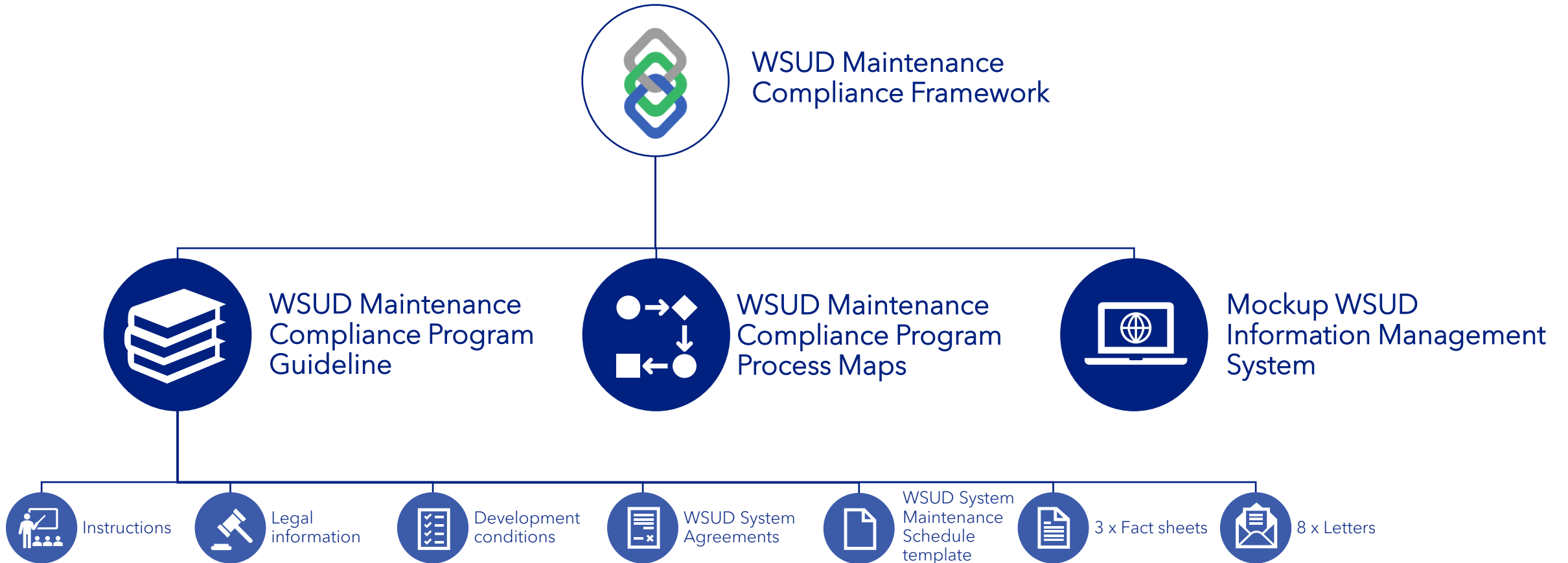
Overview

- ④ Framework
- ④ Review
- ④ Law



About the Framework

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The Review

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The Questions

1. Is it illegal for an asset owner not to maintain their WSUD system?
2. Is it illegal for councils not to enforce maintenance requirements on private WSUD systems?
3. Are there mechanisms that can be used to allow councils to require certain things to be done during and after development projects with a WSUD system?



**Question 1:
Is it illegal for an asset
owner not to maintain
their WSUD system?**

Is it illegal for an asset owner not to maintain their WSUD system?

Yes, if:

- ⦿ Causing environmental harm
- ⦿ Breaching development conditions
- ⦿ Breaching WSUD system agreements
- ⦿ Breaching obligations set out in legislation



Is it illegal for an asset owner not to maintain their WSUD system?

State	Response	Reason	Consequences	References
NSW	Yes, if:	Pollutants escape & cause environmental harm;	<p>Individuals: ≤ \$2,000,000 and/or 7 years' imprisonment (offence committed willfully) or ≤ \$1,000,000 and/or 4 years' imprisonment (offence committed negligently)</p> <p>Corporations: ≤ \$10,000,000 (offence committed willfully) or ≤ \$4,000,000 (offence committed negligently), special executive liability for director or managers.</p>	ss 116, 119, & 169 POEO Act
		Causes water pollution; or	<p>Individuals: ≤ \$500,000 (and ≤ \$120k per day for continuing offences)</p> <p>Corporations: ≤ \$2,000,000 (and ≤ \$240k per day for continuing offences), special executive liability for director or managers.</p>	ss 120, 123, & 169 POEO Act
		Breaching development condition	Development Control Orders, civil enforcement proceedings, criminal proceedings, and penalty infringement notices.	EP&A Act 1979 NSW

Is it illegal for an asset owner not to maintain their WSUD system?

State	Response	Reason	Consequences (2023/2024)	References
QLD	Yes, if:	Directly or indirectly causing environmental harm (General Environmental Duty);	<ul style="list-style-type: none"> • ≤ \$967,500 or 5 years imprisonment for willful and unlawful environment harm, or • ≤ \$257,742 for: <ul style="list-style-type: none"> • Willful and unlawful material environmental harm • Willful and unlawful environmental nuisance • Willfully contravening s 440ZG 	Environmental Protection Act (Qld)
		Causes prescribed water contaminant to enter waters, roadside gutters, and/or stormwater drainage;		s 440ZG Environmental Protection Act (Qld)
		Causes a build-up of earth in waters, a roadside gutter or stormwater drainage due to unlawfully released stormwater; or		s 440ZG Environmental Protection Act (Qld)
		Breaching development condition	≤ \$696,600	s 164 Planning Act 2016 (Qld)

Is it illegal for an asset owner not to maintain their WSUD system?

State	Response	Reason	Consequences (2023/2024)	References
VIC	Yes:	Where breach of GED applies to an activity which gives rise to risk of harm to human health or the environment from pollution or waste – person must minimise risks so far as reasonably practicable	Individuals: ≤ \$384,620 Corporations: ≤ \$1,923,100 Penalties higher for aggravated offences	Environment Protection Act 2017 (Vic)
		Offence where contravention in the course of business or undertaking		
		If breaching development conditions	<ul style="list-style-type: none"> • ≤ \$229,572 (and ≤ \$11,478.60 per day for continuing offences) • Individual PIN: \$956.55 • Body corporate PIN: \$1,913.10 • Enforcement Order or Interim Enforcement Order • Planning infringement notice 	Planning & Environment Act 1987 (Vic) ss 120, 125, 126, 130

**Question 2:
Is it illegal for councils not to
enforce maintenance
requirements on private
WSUD systems?**

Is it illegal for councils not to enforce maintenance requirements on private WSUD systems?

- ⦿ Council has a discretion
- ⦿ Should consider:
 - Objectives
 - Functions
 - Impact & consequences

Note: legal review did not consider in detail whether Councils might owe a duty of care in the exercise of statutory powers or duties in this context



Question 3:
**Are there mechanisms that can
be used to allow councils to
require certain things to be
done during and after
development projects with a
WSUD system?**

Are there mechanisms that can be used to allow councils to require certain things to be done during and after development projects with a WSUD system?

⌚ Planning Controls

- E.g., Development Control Plans & Local Environmental Plans

⌚ Development conditions

⌚ WSUD System Agreements:

- NSW: Covenants (e.g. Blacktown's WSUD System covenants)
- Qld: Covenants or easements
 - *Note: covenants must not provide for anything capable of being subject of an instrument of an easement*
- Vic: Section 173 Agreements



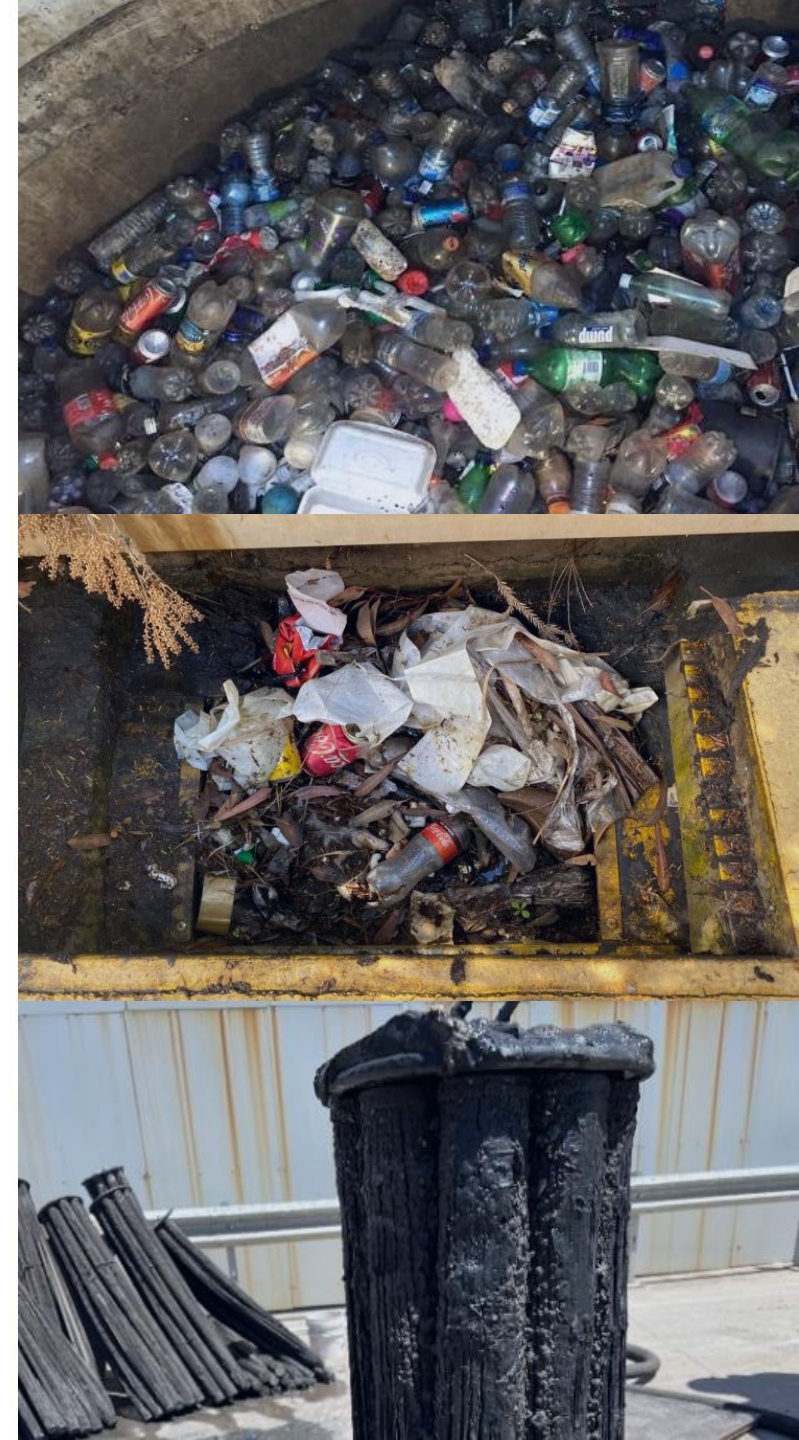
Summary

- ⦿ Illegal not to maintain if it is causing environmental harm, and/or required by a development condition, a WSUD system agreement, and/or legislation
- ⦿ Consequences will vary depending on context but can be significant
- ⦿ Councils need to improve management of WSUD systems

Disclaimer: not legal advice

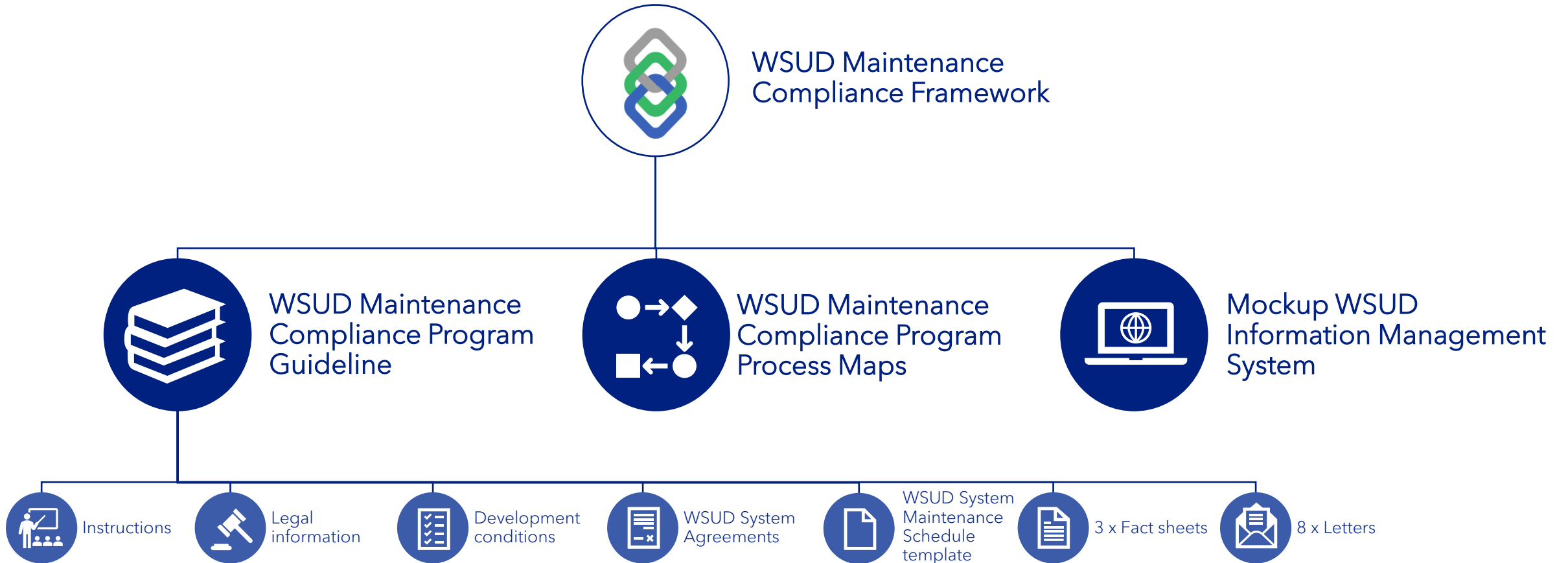


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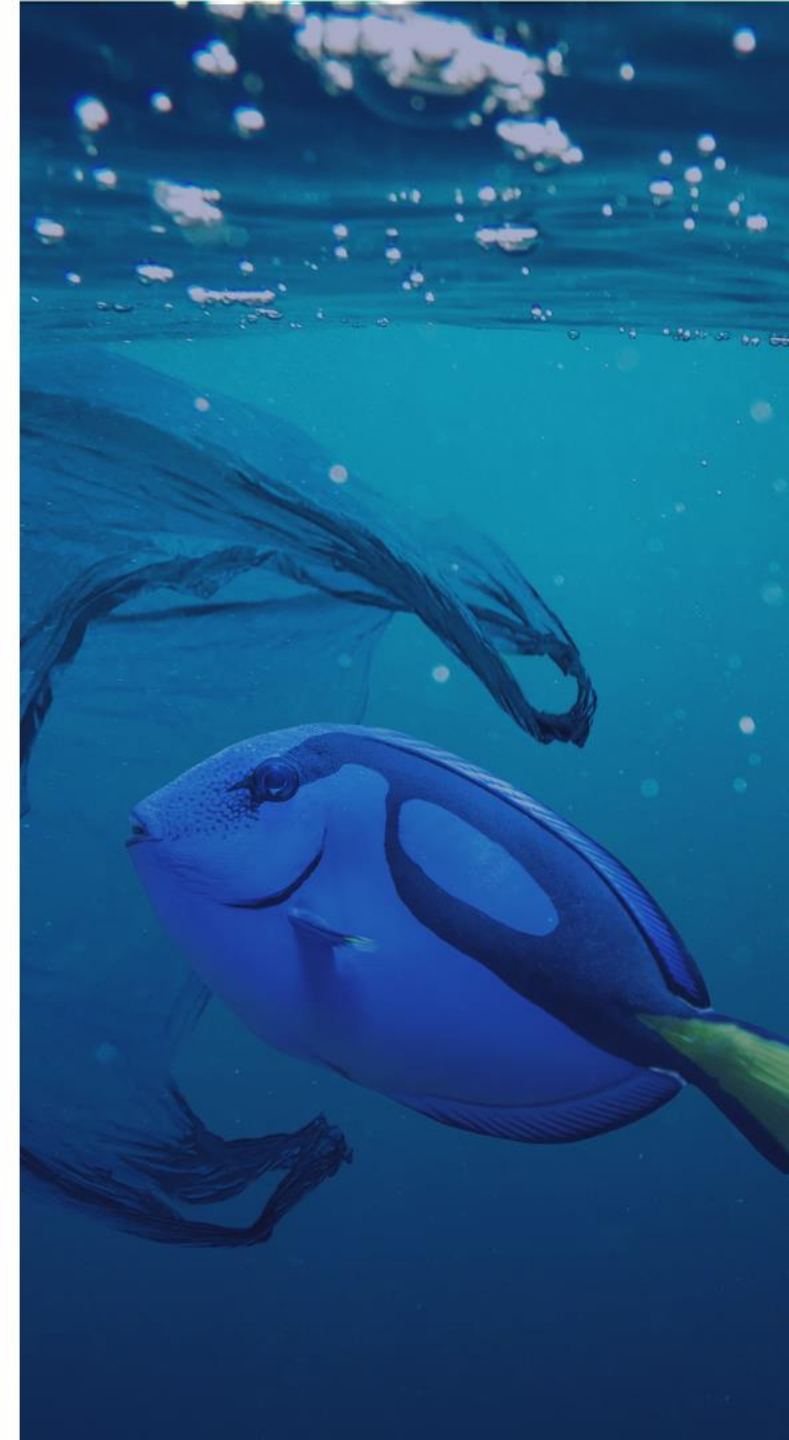
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THANK YOU

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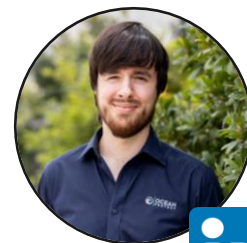
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