

Select Committee on Floodplain Harvesting - Post-hearing responses

Supplementary Questions

Emergency Works Regulation

1. In the hearing you stated that NRAR ensures water captured under the emergency regulation is returned to the environment within 14 days?
 - a. How does NRAR ensure water has been returned to the environment that is captured under this regulation?

Answer:

In the hearing, Mr Barnes did not explicitly state that “NRAR ensures water captured under the emergency regulation is returned to the environment within 14 days”, rather that *“It is our expectation that most water that has been removed would be returned to the groundwater source, either through reinjection or infiltration, or released to the stormwater system”*.

Should there be concerns that the information a proponent has notified is incorrect, NRAR can investigate whether a comparable volume has been returned to the environment, as it would any other alleged breach of the law.

- b. How does NRAR enforce the return of water to the environment?

Answer:

NRAR does not ‘enforce’ exemptions. Rather, NRAR takes into account exemptions when undertaking investigations, audits and licensing activities.

For the emergency works exemption, the details of the works and water volumes taken must be reported or a water user may face action under sections 60A(1), 60A(2), 91A(1), 91B(1), 91E(1) and 91J of the Water Management Act 2000 (WM Act). NRAR may also take action under section 336C, if a section 324 order was in place, under the WM Act. A range of enforcement options are available to NRAR to enforce these provisions, including penalty notices through to prosecutions.

- c. Is there anything in the regulation that requires water to be returned to the environment within a certain time period or at all?

Answer:

No. However, the exemption does not cover use of the water removed for a secondary purpose, i.e. domestic consumption, supplying it to another person or body, or any other use from which a commercial benefit is or may be obtained. If the water taken during an emergency is subsequently used for these purposes then it is not exempt and the standard licensing and approvals requirements apply.

- d. Is there anything in the regulation that prohibits water being held indefinitely?

Answer:

No. However, the exemption does not cover use of the water removed for a secondary purpose, i.e. domestic consumption, supplying it to another person or body, or any other use from which a commercial benefit is or may be obtained. If the water taken during an emergency is subsequently used for these purposes then it is not exempt and the standard licensing and approvals requirements apply.

2. Could an irrigator capture water under the emergency regulation in a water year when their floodplain harvesting allocation is down to zero, hold the water until the next water year and then use it for a secondary purpose applying it to the new years floodplain harvesting allocation?

Answer:

No, because the water is being subsequently used for a secondary purpose.

- a. If yes, does NRAR think this scenario is an appropriate use of the regulation?
- b. If they can do this, aren't irrigators incentivised to capture water under this regulation?

NRAR Emails (refer to document, 'NRAR Annexures', tabled by Mr Searle)

1. Regarding the email on page 3, Andy Mannall of NRAR states on 22 September 2021 that "we already have 2 cases where this has occurred". Have these cases been advanced?

Answer:

The two matters referred to in this email were in relation to floodplain harvesting. However, it was later confirmed the alleged conduct took place when the *Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020* was in effect. The investigations were subsequently closed.

2. Regarding page 4 cover email and board pack. Noting that NRAR did not make any indications or clarifications, which option of the three listed on page 10 were selected by the Board of NRAR?

Answer:

The question is answered in the publicly available 30 September Board meeting minute (https://www.dpie.nsw.gov.au/data/assets/pdf_file/0007/367216/NRAR-Board-Minutes-30-September-2020.pdf) that details the decision of the NRAR Board:

- Mr White provided the Board with proposed options as per the paper provided.
- The Board commented that NRAR has been committed to a pathway for licensing and approvals for the take to flood plain harvesting to commence on 1 July 2021 for Floodplain harvesting in the 5 Northern valleys of NSW. We have been involved in the development of the monitoring policy and look forward to its implementation. We have been focussed on ensuring we are ready to enforce the rules at this time.
- The current situation is a result of the actions of the Legislative Council of NSW Parliament. The disallowance of the exemption will mean that this activity is not exempt under the Water Management Act 2000.
- NRAR will as an independent regulator continue to enforce the law. We will do this reasonably and this will be no different to any other matter that we deal with.
- NRAR will respond to suspicious activity reports received using its current risk-based processes, and where a breach is confirmed, take proportionate compliance action in accordance with NRAR's published regulatory policy (i.e. take seriousness of the offence, impact on the environment and other water users, culpability, community interest and willingness to cooperate into account).

3. Regarding the email on page 12, is it normal practice to ban all staff from talking to stakeholders?

Answer:

The direction was simply to ensure that Mr Horne was directed to the correct NRAR officers to receive a response. The NRAR SST and duty officer staff referred to in the email are the contact point for external communications to NRAR. As NRAR had corresponded with Mr Horne on several previous occasions about the same matter, this instruction was given to ensure that any future correspondence was directed straight to the relevant NRAR officers so that a response could be expedited.

4. Regarding the email on page 15, what is "serious, substantiated and wilful non-compliance"?

Answer:

The NRAR Regulatory Policy guides our approach to all compliance and enforcement activity. NRAR investigates alleged non-compliance to assess and collect evidence to act against unlawful activity. We employ a graduated, proportionate approach, and base our decisions on factors which include: the degree of harm, the culpability of the offender, the public interest and the attitude to compliance.



The factors which guide our decision-making are considered in combination to identify what action is warranted. The greater the impact to any or all factors, the more severe the response and enforcement action will be.

Severe enforcement deters non-compliance and maintains public confidence in the regulation of the natural resource management legislation. Enforcement decisions are based on evidence, which will be admissible and sufficient to establish that an offence has been committed to the criminal standard.

Prosecutions are undertaken to address non-compliance in serious circumstances to ensure both specific and general deterrence, and to act in the public interest. Prosecution is a strategic response we may choose based on the circumstances and supporting evidence. NRAR's Prosecution Guidelines detail the approach we take when considering and undertaking prosecution action.

When taking severe action, we also consider if a licence holder is not willing or able to comply with the regulatory requirements or has been prosecuted and convicted for offences and continues to be non-compliant. NRAR may, in those circumstances, decide to vary, suspend, amend licence conditions, or cancel the licence. The main reason for this action is to protect persons, property or the environment, and we reserve this action as a last resort.

We do not have discretion on whether to enforce the law. A non-compliance is a breach of the law and is treated as such. Each non-compliance requires a decision and we do not hesitate to take strong enforcement action when required. Where alleged non-compliances are suspected we employ a risk-based approach and may use discretion on how to respond. We will focus more effort on non-compliances that cause greater harm and have a higher likelihood of reoccurring.

5. Regarding the email at page 15, is this the approach of NRAR to all unlawful activities or is it just confined to floodplain harvesting activities?

Answer:

The NRAR Regulatory Policy guides our approach to all compliance and enforcement activity.

6. Why did NRAR send dam numbers to Russell Johnson stating that 560 storages > 1000ML northern floodplain harvesting; 840 storages < 1000ML northern floodplain harvesting, then in the letter to Southern Riverina Irrigators (at page 20) state: 373 storages > 1000ML; and 693 storages < 1000ML?

Answer:

The initial numbers provided to assist with drafting the letter were subsequently cross-checked and corrected as part of any normal letter drafting process. The numbers are sourced from DPIE Water as the owners of the Healthy Floodplains Project.



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7. Regarding the email on page 26 that states “NRAR expect water users to understand their obligations and comply with the law” what did NRAR understand their obligations to be?

Answer:

Water taken in NSW must be done so in accordance with the conditions of an access licence, works/use approval, exemption, or basic landholder right.