



Natural Resources Access Regulator

# Regulatory policy

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Regulatory policy

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**More information**

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Table 1. Document change history

Version	Approved date	Approved by	Notes
1	January 2018	Interim Chief Regulatory Officer	Endorsed by NRAR Board January 2018
2	August 2018	Chief Regulatory Officer	Regulatory Lifecycle updated; lifecycle elements re-ordered; new penalties added; minor wording edits
3	May 2019	Chief Regulatory Officer	<p>Document transferred to the Department of Industry publication template</p> <p>Edits to the document purpose section</p> <p>Changed Regulatory “Framework” diagram to Regulatory “Process”</p> <p>Edits/additions to the Regulatory Process descriptions</p> <p>Added NRAR Code of Ethics to Appendix 1</p> <p>Edits to NRAR regulatory principles</p> <p>Expanded culpability definition</p> <p>Appendix 3 document hierarchy diagram updated to include Regulatory Priorities and other QMS documents</p> <p>“Reactive monitoring” change to “reactive response”</p> <p>Clarification that the NRAR does not act on behalf of persons added in the Reactive response section.</p> <p>Edits to Figure 4 and associated text to include more explicit explanations of non-compliance response escalation</p> <p>Language changed from passive to active throughout the document, where possible</p>

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# 1. Introduction

The Natural Resources Access Regulator (NRAR) is an independent regulator established under the *Natural Resources Access Regulator Act 2017*. The NRAR has responsibility for ensuring compliance with natural resources management legislation, which currently includes the *Natural Resources Access Regulator Act 2017*, *Water Management Act 2000*, *Water Act 1912* and associated regulations.

The NRAR legislative objectives are to:

- ensure effective, efficient, transparent and accountable compliance and enforcement measures for the natural resources management legislation
- maintain public confidence in the enforcement of the natural resources management legislation.

To do this, the NRAR will:

- promote compliance with the objectives of the *Water Management Act 2000* and the *Water Act 1912*
- achieve best-practice management and regulation of surface water and groundwater
- 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
- ensure decisions on enforcement action are transparent to the community.

The NRAR seeks to build community confidence as a trusted, credible, effective, efficient and transparent regulator. Application of this policy and its associated policies and strategies will better mitigate regulatory risks, deliver greater certainty for the regulated and wider community and achieve sustainable use of, and access to, natural resources.

To achieve these outcomes, the NRAR expects the regulated community to comply with regulatory requirements. The NRAR recognises that the majority of the regulated community voluntarily meet their obligations and want fair sharing of natural resources to achieve long term economic, environmental and social outcomes. The NRAR will encourage and assist high levels of voluntary compliance with appropriate education, guidance and advice. However, when instances of non-compliance are detected, the NRAR will not hesitate to take enforcement action, including prosecution where appropriate.

## 1.1. Purpose of this document

This document sets out the policies and principles that determine how the NRAR employs regulatory measures for the natural resources management legislation. The NRAR will apply this policy to establish regulatory strategies that use best practice regulatory approaches to effectively and efficiently achieve regulatory outcomes.

The policy is relevant to people and corporations who:

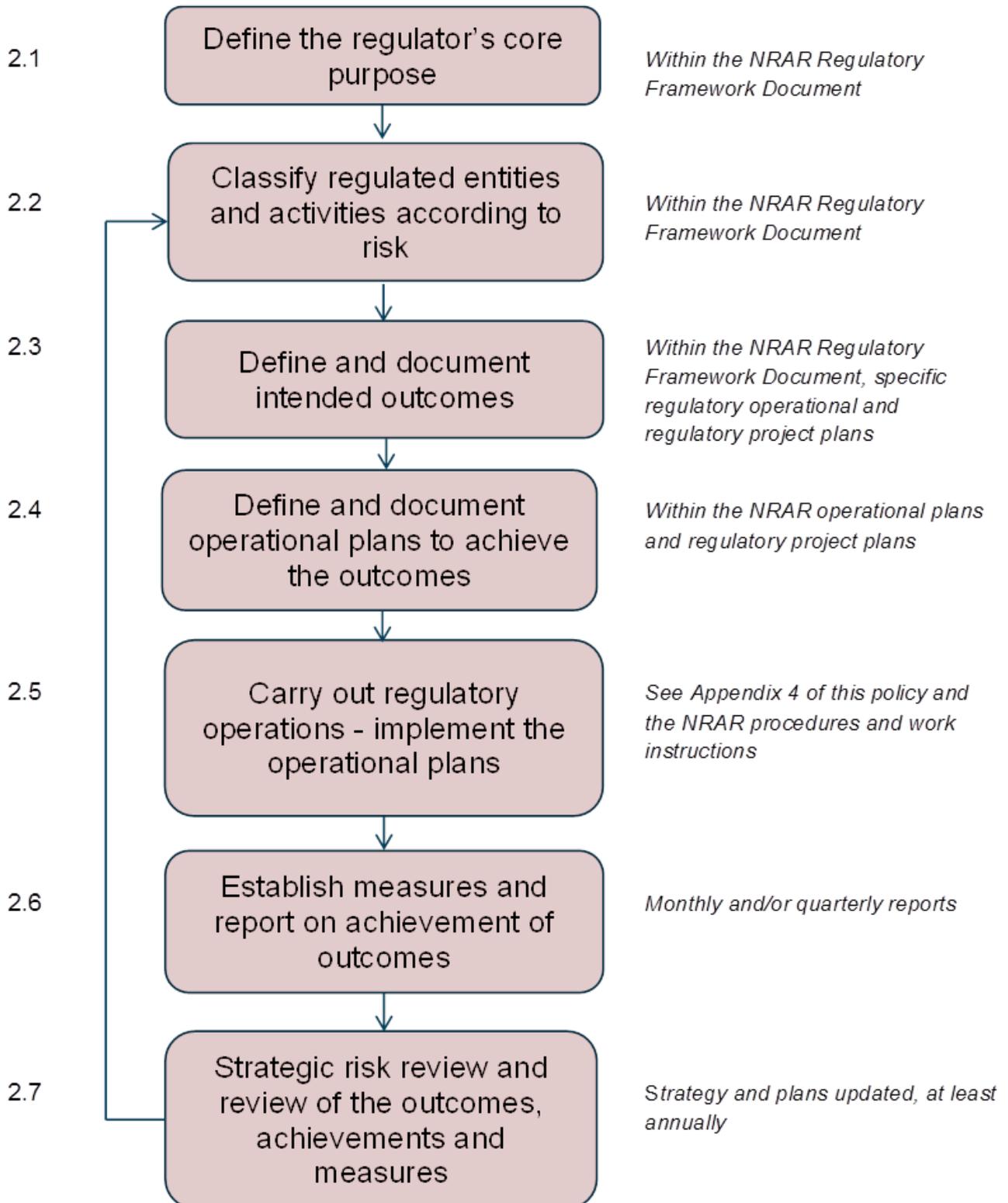
- take water from rivers or aquifers, or harvest water from floodplains
- use water
- construct or use water management works
- exercise basic land holder rights under the *Water Management Act 2000*
- conduct controlled activities on waterfront land
- conduct aquifer interference activities
- construct controlled works on floodplains

It is also relevant to bore drillers, members of the community who have an interest in natural resource management, and NRAR staff.

The policy adopts an outcomes-focused and risk-based regulatory approach that aligns with the requirements of the NSW Quality Regulatory Services Initiative, and will be reviewed annually or in response to any significant contextual change to ensure it meets NRAR requirements.

## 2. Regulatory process

Figure 1 Regulatory framework process



## 2.1. Core purpose statement

A core purpose statement describes the reasons for the existence of a regulator or regulatory regime, and communicates to the community that the NRAR is working towards a clear and specific goal.

The NRAR defines its core purpose statement within the NRAR Regulatory Framework.

## 2.2. Classify regulated entities according to risk

The NRAR applies risk-based principles to ensure efforts are focused on the most important, or highest potential consequence, compliance issues. This is done through the ongoing analysis of regulated entities (or activities), firstly according to the consequence of non-compliance (impact, or harm) and secondly according to the likelihood of non-compliance.

The NRAR then uses this risk approach to prioritise education, licensing, compliance monitoring and enforcement resources. The priorities could, for example, be determined by factors such as sensitivity of a water source to ecological impact, the size of water access, water sharing characteristics, geographical location and other environmental impacts.

## 2.3. Define and document intended outcomes

The NRAR documents its intended outcomes for each segment in 'outcome statements'<sup>1</sup>, which describe what a regulator expects to achieve for a specific target group through a particular regulatory action or initiative.

The NRAR develops initiatives, programs and projects to achieve the outcomes. Within the NRAR Regulatory Framework document, the NRAR describes the reasons for selecting a particular initiative, program or project and the rationale for how the initiative, program or project contributes to the outcome<sup>2</sup>.

## 2.4. Make operational plans to achieve the outcomes

The NRAR plans regulatory activities and allocates resources to initiatives and programs to achieve the regulatory outcomes identified in the outcome definition process.

Operational plans are prepared annually for longer-term regulatory programs and as required for regulatory projects that address particular regulatory problems.

## 2.5. Carry out regulatory operations—implement the operational plans for each segment

The NRAR carries out regulatory operations in accordance with NRAR operational plans and regulatory project plans.

Appendix 4 of this policy describes the tools the NRAR employs to achieve regulatory outcomes within the regulatory lifecycle, including the full range of tools available when dealing with non-compliance (a breach of the law).

The NRAR will report regularly against the achievement of operational plans. Plans will be adjusted throughout the year to take into account changes in priorities that arise from unforeseen events and new information gained through compliance monitoring activities.

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<sup>1</sup> Refer to 'Guidance for regulators to implement outcomes and risk-based regulation' from NSW Finance, Services and Innovation, October 2016

<sup>2</sup> *ibid*

## 2.6. Establish measures and report on achievement of outcomes

The NRAR will establish a comprehensive set of effectiveness and efficiency measures and will regularly report progress towards outcomes and regulatory achievements.

## 2.7. Strategic risk review and review of the outcomes, achievements and measures

At least annually, the NRAR will review its strategic risks and the achievement and relevance of its outcomes in preparation for the strategic and business planning cycle for the next financial year.

The regulatory planning cycle includes a strategic risk identification and assessment process, where known and emerging regulatory risks will be identified, assessed and incorporated into the strategic and business planning process, as appropriate.

# Appendix 1 The NRAR regulatory principles

Regulatory principles support and influence the way we perform our functions, exercise our powers and engage with the NSW community.

We apply the principles to complement the NSW Public Sector's core values of integrity, trust, service and accountability and the NRAR Code of Ethics and Conduct.

## A1.1 Committing to regulatory best practice

We are committed to building the trust of the NSW community and fostering mutual respect between the NRAR and the regulated community.

We seek to understand the expectations of the community through engagement on key issues. We strive to meet those expectations through the application of our regulatory framework, which sets our core purpose, regulatory outcomes and our risk-based regulatory approach.

We will ensure 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 whether our framework and approach achieves best practice for regulators.

## A1.2 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 ensure we apply our finite resources to their greatest effect. We will focus proactively where the consequences of non-compliance are greatest and where the likelihood of non-compliance is highest.

Taking a risk-based approach to administering regulation will also result in individuals and businesses not being inconvenienced by unnecessary regulatory activities.

## A1.3 Taking an outcomes-focused approach to regulation

We will clearly define regulatory outcomes to guide the application of education, licensing, compliance monitoring and enforcement activities to achieve our regulatory core purpose.

We will invest in the development of the NRAR staff to ensure we have the skills and knowledge of the desired regulatory outcomes to choose an appropriate and proportionate response to non-compliance.

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

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

## A1.4 Accepting accountability

We are accountable for our compliance and enforcement activity, which means we are answerable for our decisions, including when we take action, the type of action we take, or when we decide not to take action.

Our decision-making will be done within effective processes of corporate governance to maintain objectivity, independence and integrity.

We will employ processes that provide procedural fairness and natural justice.

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

## A1.5 Providing transparency

We will publish our policies and priorities, and provide information that explains what the community and regulated entities should expect from a regulatory process.

We will promote awareness of our regulatory activities. Where legislation allows, the results of enforcement actions may be made public to deter future non-compliance as well as to build the credibility of, and confidence in, our regulatory approach and processes.

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 needed, when it is required and the consequences of continuing non-compliance.

## A1.6 Acting in a timely way

We will conduct education, licensing, compliance monitoring and enforcement activities in a timely way to minimise harmful impacts, maximise deterrence, minimise disruption and provide certainty to the regulated and wider community.

We acknowledge that regulated entities and the wider community value timeliness in assessing and issuing licences and approvals.

We commit to timely compliance and enforcement action to maintain the principle of fairness to those involved.

## A1.7 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 take into account the specific circumstances of a situation, to produce sensible, predictable and fair results.

## A1.8 Demonstrating proportionality and exercising discretion in regulatory decision-making

We expect people and organisations to comply with regulatory requirements. We commit to taking regulatory action that is proportionate to the circumstances of the regulatory breach. The more serious the offence, the more serious should be the response, and we will not hesitate to take strong enforcement action when required.

We strive to achieve fairness in regulatory outcomes while ensuring we act in the public interest.

## A1.9 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 undertaking enforcement activity and will not require the regulated community to observe requirements that are not authorised by law.

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## Appendix 2 Definitions

**Effective and efficient regulator:** A regulator is effective when education, licensing, compliance monitoring and enforcement activities achieve the intended regulatory outcome.

A regulator is efficient when it conducts education licensing, compliance monitoring and enforcement activities with maximum productivity, minimum wasted effort or expense, and with the minimum burden on the regulated community.

**Regulatory compliance:** Adhering to the requirements of laws, licence conditions, industry and organisational standards and codes.

**Licence:** For the purposes of this policy, a licence is taken to be a licence, registration, notification, authorisation, accreditation, permit, approval, certificate or other instrument issued by the NRAR to allow an entity to carry out a regulated activity.

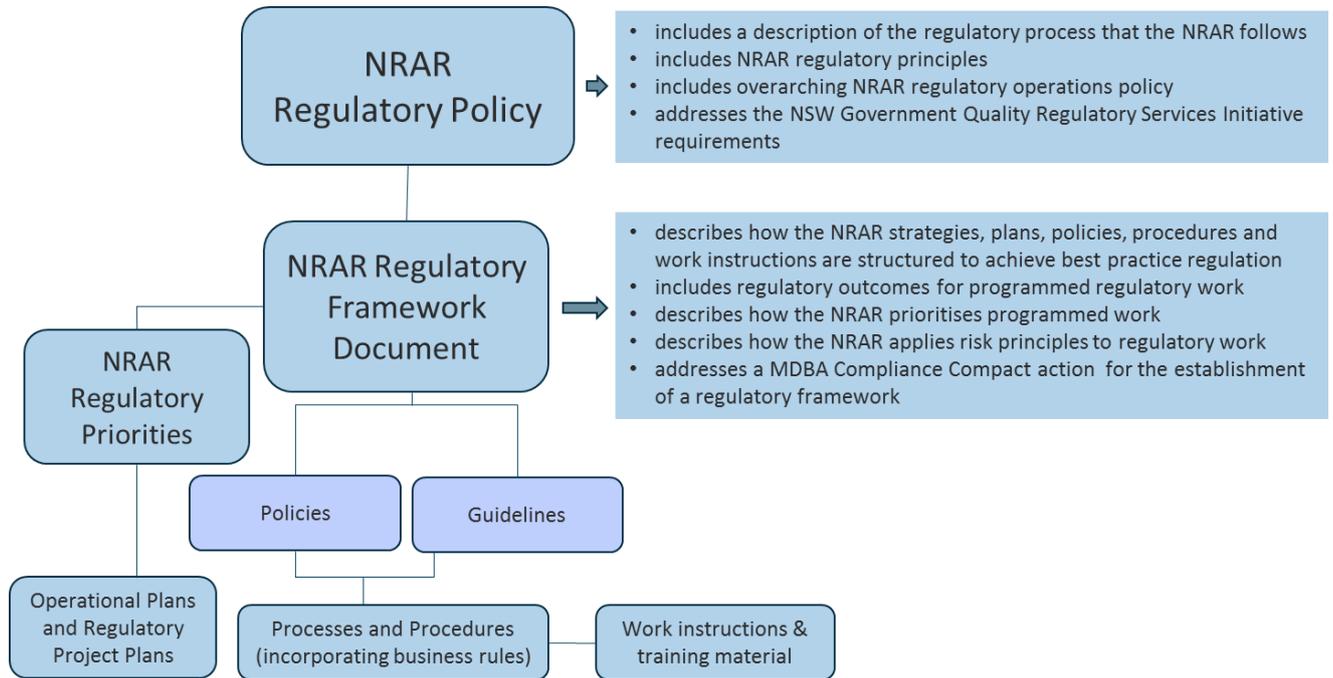
**Remedial action:** Actions taken to fix the effects of a non-compliance, as directed by the NRAR.

**Corrective action:** Actions taken by the regulated entity to ensure a non-compliance does not recur. This usually requires analysis of the cause of the non-compliance and changes to systems, as well as the required remedial action.

**Quality Regulatory Services Initiative (QRSI):** The QRSI is a NSW Government initiative that maintains a focus on regulatory outcomes to reduce regulatory burden on those that are compliant, prioritises resources towards those that present the highest risk, and promotes flexible and innovative responses to non-compliance. All NSW regulators are required to adopt the QRSI requirements. This NRAR Regulatory Policy is designed to meet or exceed the requirements of the QRSI.

# Appendix 3 NRAR regulatory documents

Figure 2. Overview of NRAR regulatory documents



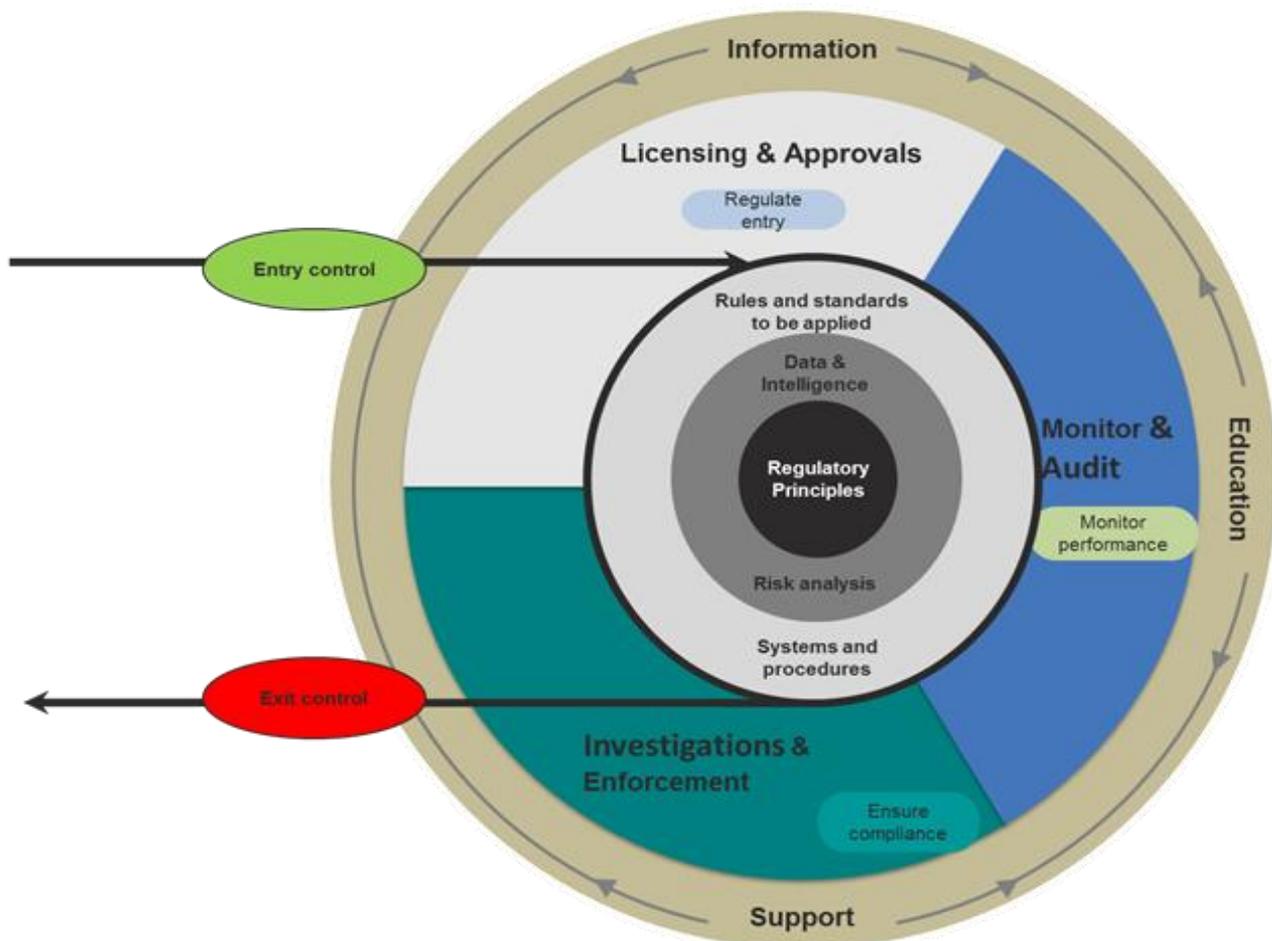
## Appendix 4 Carrying out regulatory operations—the regulatory lifecycle model

A licence is normally required when the risks to consumers, third parties, the community, and/or the environment are sufficiently high as to require increased monitoring by the regulator.

The regulatory model in Figure 3 depicts the activities undertaken by the NRAR to address the risks associated with a licence holder's activities.

Not all regulated activity requires a licence—a licence generally is not required for activities that have lower consequences of non-compliance. The NRAR also allocates resources to informing/educating the community about the need to comply with regulatory requirements not associated with a licence (general regulatory requirements), monitors compliance with those requirements and carries out enforcement activities as required.

**Figure 3. Regulatory lifecycle model**



## A4.1 Education and information

The NRAR seeks to maximise voluntary compliance through a cooperative and collaborative approach, and promotes engagement with the community and regulated entities as an important way to influence compliance behaviours.

Education activities aim to build a capacity within the regulated community to play an informed and active role in complying with regulations. Activities include the provision of information resources and tools to help regulated entities become aware of their rights, to make sure they are aware of their obligations, and to provide certainty in planning for the future. This helps regulated entities meet their obligations and avoid inadvertent non-compliance.

The NRAR's Regulatory Framework, operational plans and procedural documents describe how the NRAR allocates education and information resources according to risk-based and outcome-focused priorities.

Education activities may include:

- providing information and tools on regulated entities' rights and the law to give certainty in planning for the future
- engaging with the regulated community 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.

The NRAR provides regulatory information through multiple channels including websites, information sheets, newsletters and brochures, social media and media releases.

The NRAR also seeks ways to make it easier for the community to access this information and collaborates with other organisations that support education activities, including relevant government agencies, local government and Aboriginal communities.

Wherever possible, the NRAR works in partnership with peak bodies and stakeholder groups to gain support for, and achieve, compliance.

NRAR officers carrying out compliance monitoring activities also play an important role in informing and educating regulated entities of their obligations and rights, and the expectations of the regulator.

## A4.2 Licensing

The NRAR issues licences to entities to establish the conditions with which the regulated entity must comply<sup>3</sup>. The NRAR also assesses controlled-activity applications and issues approvals for all controlled activities carried out in, on or beside rivers, lakes and estuaries.

Timeliness in the licence assessment and issuing process is important. The NRAR provides clear information on what is required to obtain a licence, and on expected processing times for a licence.

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<sup>3</sup> WaterNSW issues the majority of NSW water access licences. The NRAR issues licences to water utilities, government organisations and mines.

## A4.3 Monitoring and auditing compliance

Monitoring compliance is an essential part of the NRAR's role. Information gained during compliance monitoring assists in:

- detecting instances of non-compliance in a timely manner
- determining the level of and trends in compliance
- identifying when and what type of education responses or enforcement actions may be needed
- identifying where action may be needed to avoid or mitigate harm
- assessing and reviewing the effectiveness of regulatory projects, education and information programs.

The NRAR allocates compliance monitoring resources to the regulated community according to the priorities identified in the NRAR Regulatory Framework and operational plans.

### A4.3.1 Proactive monitoring

The NRAR will plan a range of proactive, planned monitoring and inspection programs to determine the level of compliance within a regulated community.

Proactive monitoring can include:

- inspections/audits prioritised according to risk
- the use of remote surveillance techniques such as aerial photography and satellite images, land and river surveys
- follow-up audits or more frequent inspections of identified poor performers, or high-risk activities or businesses
- programs or regulatory projects targeting a particular regulatory problem.

Inspections and audits can be conducted on an announced or unannounced basis.

The compliance monitoring program also plans to include the use of remote surveillance techniques such as aerial photography and satellite images, land and river surveys.

### A4.3.2 Reactive response

The NRAR responds to reports, incidents or other intelligence received from the regulated or wider community.

The NRAR maintains systems and procedures for logging reports from the community and regulated entities. The NRAR assesses the information in the reports and prioritises investigation according to risk-based principles. The NRAR gives priority to situations that have the potential to cause serious harm, and to patterns of similar incidents that may suggest ongoing or broader issues.

The NRAR does not act on behalf of individuals and will not undertake investigations or actions to achieve a remedy for a dispute. People may pursue civil outcomes for grievances in the courts.

### A4.3.3 Intelligence systems

The NRAR is planning for the introduction of a comprehensive information management system to process information about a regulated entity, or group of regulated entities, to determine an appropriate regulatory strategy, regulatory response, or to inform operational planning.

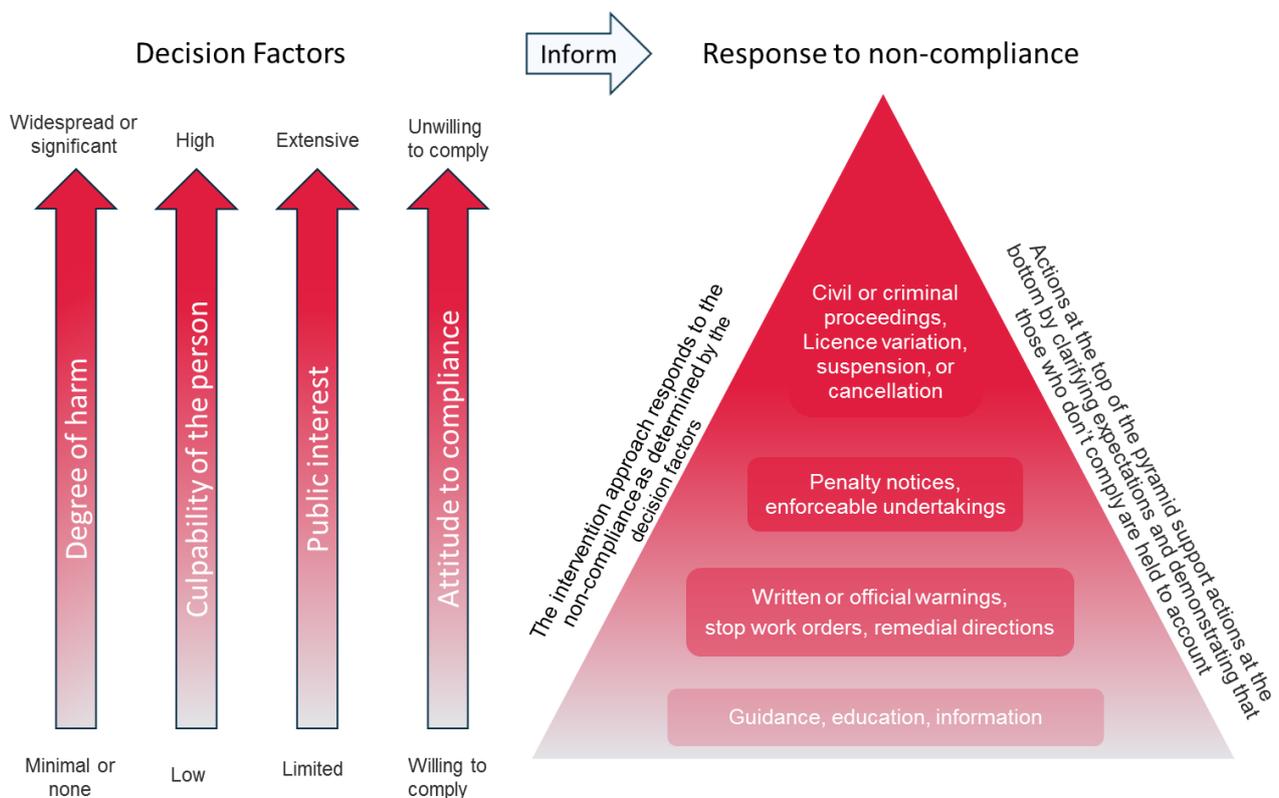
## A4.4 Investigation and enforcement

### A4.4.1 Dealing with non-compliance—regulatory decision-making

The NRAR investigates alleged non-compliance to ensure that there is appropriate evidence for the non-compliance. The NRAR employs a graduated and proportionate approach to non-compliance, based on the severity of the non-compliance (its impact on the environment and potential harm to people or property), the regulated entity's culpability, cooperation and approach to the non-compliance, and the public interest. See Figure 4.

A non-compliance is a breach of the law and must be treated as such. Every non-compliance detected requires a decision on what response to take. The NRAR will not hesitate to take strong enforcement action when required.

**Figure 4. The NRAR response to non-compliance**



The NRAR 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 other water users, the community and the environment
- culpability of the person:
  - compliance history of the person, in general and with respect to the specific incident
  - 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 action taken to address the non-compliance, mitigate the harm and any mechanisms put in place to prevent a recurrence
  - cooperation demonstrated by the person involved
  - the person's willingness to comply with requirements
  - the person's ability to comply with requirements.

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

- advisory letters
- warnings (written and verbal)
- corrective requests
- statutory directions such as stop work orders and remediation notices
- enforceable undertakings
- penalty notices
- licence action (including suspension, variation or cancelation)
- civil proceedings, such as:
  - debiting a water licence holder's account by up to five times the amount of water taken
  - imposing a penalty of up to five times the value of the water taken
- criminal proceedings

These regulatory responses allow a balanced approach to non-compliance that stops the improper conduct and promotes changes in attitudes and behaviours, rather than simply applying a punishment. Combinations of the actions may be taken, for example licence action and prosecution.

At the more severe end of the response spectrum, enforcement activities aim to deter non-compliant behaviour (in the entity involved and other regulated entities), consistent with legislation. Enforcement decisions must be based on evidence, which will be admissible and sufficient to establish that an offence has been committed. Wherever possible, the NRAR provides reasons for decisions and explains avenues for review.

#### A4.4.1.1 Licence action

If the licence holder is no longer willing or able to comply with the regulatory requirements a decision may be taken to vary, suspend, apply amended licence conditions, or cancel the licence. When the NRAR varies, suspends, or cancels a licence, the primary purpose will be to protect persons, property or the environment and not for punitive or disciplinary purposes.

#### A4.4.1.2 Prosecution

The key aims of a prosecution undertaken by the NRAR is to achieve compliance, ensure specific and general deterrence, take action in the public interest and assist in maintaining community confidence in the regulatory oversight provided by the NRAR. Prosecution is a strategic response the NRAR may choose, based on the circumstances and supporting evidence.

The NRAR's Prosecution Guidelines detail the approach that the NRAR will take when considering and undertaking prosecution action.

#### A4.4.1.3 Publication of enforcement action

The NRAR maintains a publically available register of information about enforcement actions under the *Water Management Act 2000*, to aid as a deterrence and to maintain transparency and public confidence.

## Appendix 5 NSW Quality Regulatory Services Initiative (QRSI) cross-reference

Table 2. Requirements of the NSW QRSI and how they relate to the NRAR Regulatory Policy

QRSI requirement	NRAR Regulatory Policy reference
2.1 Defining regulatory outcomes	2.1 2.3 Appendix 1.3
2.2 Identifying risks	2.2 2.7 Appendix 1.2
2.3 Assessing risks	2.2 Regulatory Framework document Appendix 1.2
2.4 Linking your work to outcomes: a contribution story	2.3 Regulatory Framework document
2.5 Identifying measures	2.6
2.6 Allocating resources	2.4 Regulatory Framework document; operational plans and regulatory project plans
2.7 Tailoring the enforcement response	2.5 Appendix 1.8 Appendix 4.4
2.8 Monitoring, reporting and continual improvement	2.6 2.7 Appendix 1.1