



Environmental Defenders Office

Your ref: BN22/5692

11 November 2022

By email only: [REDACTED]

Dear Ms Overton

Excluded work exemptions under the Water Management (General) Regulation 2018

1. We refer to the letter dated 19 September 2022, from Kaia Hodge, Executive Director, Water Strategy and Policy, Department of Planning and Environment (**the Department**), seeking feedback on the Department's interpretation of excluded work exemptions, as set out in its proposed fact sheet titled 'How to interpret excluded work exemptions'.
2. The Environmental Defenders Office (**EDO**) welcomes the opportunity to provide feedback on the proposed fact sheet and the interpretation of excluded works exemptions in Schedule 1 of the *Water Management (General) Regulation 2018*.
3. Our comments are made in light of our role as public interest environmental lawyers representing a diverse client base (farmers, First Nations Peoples, scientists, conservation groups, community groups) concerned about water management issues in NSW and beyond.
4. We have specific experience advising clients about excluded works exemptions. For example, in 2018 EDO made a complaint on behalf of Lock the Gate, to the Natural Resources Access Regulator (**NRAR**), about unlawful water take at the Maules Creek Coal Mine because of the mine's reliance on excluded works exemptions. That complaint led to the successful prosecution of the proponent in *Natural Resources Access Regulator v Maules Creek Coal Pty Ltd* [2012] NSWLEC 135 (**Maules Creek**). We discuss this case below.
5. At the time of the investigation, we requested that the excluded works exemptions be clarified to avoid the types of issues which we highlight in this letter, including where an exemption has been used to justify significant take of water without a licence. NRAR advised EDO that amendments to improve enforceability of the provisions had been referred to the Department. We are therefore disappointed that some four years later, those legislative amendments have not been made, to ensure water is shared equitably in catchments, impacting on water users and the environment.
6. We note that a purpose of the fact sheet is to assist stakeholders and the public to understand how the excluded work exemptions should be interpreted and applied. However, in our view, the proposed fact sheet:

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- a. does not remove ambiguity (and, in some instances creates further ambiguity);
- b. fails to provide further clarification on what may constitute best practice; and
- c. is unlikely to make the exemptions easier to monitor and enforce.

7. Our comments are set out below.

A. Schedule 1, clause 3: Contaminated water dams

(i) Contaminated water dams: clean water can be captured

8. The proposed factsheet states that the words “to prevent the contamination of a water source” allow for the capture of clean water by a contaminated water dam, if that water would have otherwise flowed over land which would result in it contaminating a water source.
9. While this may be the current practice (i.e. that clean water can be captured pursuant to Schedule 1, clause 3), it is not explicit. If the legislature had intended the exemption to work in this way it would have expressly stated that clean water may be captured. It is not best practice to design containment dams in such a way as to capture clean water, nor to allow for the mixing of clean and dirty water.
10. The fact sheet states that this interpretation encourages landholders to minimise risks to water quality. While we are supportive of landholders (and proponents alike) doing so, we note that this exemption is not the only regulatory tool to minimise such risks. For example, Part 5.3 of the *Protection of the Environment Operations Act 1997* (NSW) specifically deals with water pollution, making it an offence to cause or permit any waters to be polluted.¹
11. If this interpretation is promoted, the premise that Schedule 1, clause 3 allows for the capture of clean water gives rise to a number of key issues that the fact sheet attempts to address, namely:
 - how is the clean water to be captured and stored (see further discussion at (ii) below)?; and
 - what can the clean water be used for (see further discussion at (iii) below)?
12. In our view, the fact sheet does not satisfactorily address these issues. It fails to clearly set out what is best practice for the purpose of applying the exemption, and the guidance it does provide will likely lead to a broad application of the exemption and perverse outcomes in practice. In our view, the broad application of the exemption is contrary to the objects of the *Water Management Act 2000* (NSW), ‘to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations’.²

¹ *Protection of the Environment Operations Act 1997* (NSW), s 120.

² *Water Management Act 2000*, s 3.

(ii) Contaminated water dams: storage of clean water

13. While the fact sheet encourages clean water captured by this exemption to be stored separate to dirty water, it does not describe this as essential for the proper application of the exemption. That is, as drafted, there is nothing that explicitly states that clean water must be kept separate to dirty water. However, it is not best management practice to allow dirty and clean water to mix.
14. If clean water is captured under this exemption, then we contend that the exemption requires that clean water is kept separate from dirty water; this should be explicit in the fact sheet. Indeed, the Courts have suggested that the exemption is intended to operate in a protective manner to ensure that water pollution does not occur.³
15. Otherwise, the purpose of a dam that mixes clean water with dirty water cannot, in our view, be described as a dam “to prevent the contamination of a water source” because it would cause the captured clean water to become contaminated.
16. In *Maules Creek*, in which the defendant pleaded guilty, it was an agreed fact by the parties that the capture of clean water by a sediment “dirty” dam was not authorised by the exemption. This was because the clean water runoff was not captured in accordance with best management practice because it captured a volume of clean water that was inconsistent with its purpose, to prevent the contamination of a water source.⁴ Similarly, it was an agreed fact that clean water runoff that flowed into the defendant’s mine pit because of an improperly constructed water diversion system was not authorised by the exemption because it was not captured in accordance with best management practice or to prevent the contamination of a water source.⁵
17. The fact sheet, which does not explicitly state that best practice requires clean water captured by this exemption to be stored separately, contradicts the accepted interpretation of the exemption, outlined in *Maules Creek*.

(iii) Contaminated water dams: captured water can be used for any purpose

18. As noted at [12], the Department’s factsheet suggests that water captured in a contaminated water dam may be used for “any” purpose. We are concerned that:
 - firstly, this interpretation of Schedule 1, clause 3 is inconsistent with the broader water management framework and will lead to perverse outcomes; and
 - secondly, the fact sheet does not explain if and when a water use approval may be required, or if water can be used for an exempt purpose.

³ *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 2)* [2014] NSWLEC 129, [249], [252].

⁴ *Maules Creek*, p 23, [67]-[68] of the Statement of Agreed Facts.

⁵ *Ibid*, p 23, [62]-[63] of the Statement of Agreed Facts.

Use of water for any purpose is inconsistent with the broader water management framework and will lead to perverse outcomes

19. In our view, it would not be appropriate for clean water captured under the excluded works exemptions to be used for a purpose inconsistent with the general intent of the provisions (i.e. for a purpose other than the prevention of contamination).
20. The Department should clarify that this exemption is not an opportunity to use water that is captured by a contaminated water dam, simply because it would have been contaminated anyway. If captured water can be used in this way, it would have the perverse and unjust outcome of giving the landholder access to water it would otherwise not be entitled to, or at the very least, require approval for.
21. By way of example, the proponent of the proposed McPhillamys Gold Project (SSD 9505) intends to rely on the exemption in Schedule 1, clause 3 to divert clean runoff around its mine site via a series of diversion drains, dams, pumps and pipelines and then purports to either direct that water to existing gully lines or pump it back into the Belubula River.⁶ The proponent has estimated that, without this exemption, it would be required to apply for between 206-1751 ML⁷ of water.
22. As drafted, the fact sheet seemingly suggests that, bar any conditions of consent to the contrary, there would be no legal barrier to the McPhillamys proponent capturing and using that clean water for another purpose, for example for the processing of ore or for dust suppression. However, the relevant water sharing plan provides that there is only a total of 264 ML of available water in the catchment for consumptive use.⁸ We are concerned that the Department's interpretation does not prevent the proponent from relying on this exemption to potentially take water far in excess of the annual extraction limit in the catchment. This will have significant adverse impacts on other water users and the environment.
23. This interpretation would lead to an absurd outcome for two reasons. Firstly, because it is the proponent who is creating the source of the risk of contamination. Secondly, it provides for the potential to circumvent annual extraction limits and the water licencing regime. The exemption therefore cannot be, and should not be promoted as possible of being, interpreted in this way.
24. This scenario is contrary to the purpose of the exemption, which is preventing the contamination of water. The scenario is also contrary to the objects of the Act at section 3 discussed at [12]; particularly, the objective to apply the principles of ecologically sustainable development and to enhance and restore water sources, their associated

⁶ Regis Resources Limited, Amendment Report, Appendix A – updated project description, <https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=SSD-9505%2120221020T013409.613%20GMT>

⁷ Regis Resources, Response to DPE Water and NRAR advice on the McPhillamys Gold Mine Project's Submissions Report, Amendment Report and additional information, <<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=RFI-14372995%2120221007T033648.662%20GMT>>, 7.

⁸ *Water Sharing Plan for the Lachlan Unregulated River Water Sources 2012* (NSW), s 28.

ecosystems, ecological processes and biological diversity and their water quality. Therefore, the suggested interpretation is inconsistent with the rules of statutory interpretation.⁹

25. In *Maules Creek*, the parties agreed that the capture, as well as the subsequent management of the water captured, must be done in accordance with best management for mines or to prevent the contamination of a water source. In that case, the capture of clean water runoff by a clean water diversion dam was not authorised by the exemption in circumstances where the water was not diverted to downstream water sources.¹⁰
26. Without licencing this type of water take, it is not possible to accurately account for all water take in a catchment. This prevents appropriate water planning, including accounting for climate change and drought. If the Department wishes to encourage the reuse of water caught by the Schedule 1, clause 3 exemption, it could bring that reuse within the licencing framework, for example, by establishing a separate category of licence for this purpose.

The fact sheet does not explain if and when a water use approval may be required, or if water can be used for an exempt purpose

27. If water can be used for any purpose, the fact sheet does not explain if and when a water use approval may be required, or if water can be used for an exempt purpose (for example, for basic landholder rights¹¹ and for State Significant Development (**SSD**)).¹² Without this clarification the factsheet could be misleading and result in landholders using the water without a relevant water use approval or exemption.

(iv) Contaminated water dams: Best management practice obligations

28. As the fact sheet does not provide for any specific best management practices, the Department has suggested that a number of documents provide useful guidance. Indeed, as the decision in *Maules Creek* demonstrates (see [15],[25]) the use of best management practice is heavily relied on by regulators and industry to determine the appropriateness of excluded works exemptions. However, the Department has not endorsed any of these documents.
29. We think it is undesirable to have ambiguity around what best practice means. Instead, we suggest that the Department develop a clear set of guidelines with respect to best practice management for contaminated water dams and/or in the interim identify a specific document, rather than leaving it uncertain. This has been our position since at least 2018 when EDO, on behalf of Lock the Gate, requested that NRAR undertake same.

⁹ *Interpretation Act 1987* (NSW), s 33.

¹⁰ *Maules Creek*, p 22, [56] of the Statement of Agreed Facts.

¹¹ *Water Management Act 2000* (NSW), s 91A(4) .

B. Schedule 1, clause 2: Flood detention and mitigation dams

(i) Flood detention and mitigation dams: captured water can be released

30. The fact sheet states that this exemption applies to the construction of a dam for the purpose of flood detention and mitigation and from which water cannot be reticulated or pumped. The fact sheet also states that under the current wording of this exemption the release of water from the dam and any legal downstream extraction of it, does not invalidate the exemption.
31. While we understand the general intent behind this exemption, there appears to be little guidance about the release of water from flood retention and mitigation dams. Consideration should be given to whether any safeguards are needed to prevent landholders abusing this exemption by capturing water under the guise of flood detention and mitigation and then timing the release of water to their benefit (e.g. by subsequently capturing the water for another legitimate purpose).

C. Public consultation

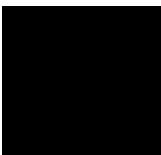
32. We note that the proponent of the McPhillamys Gold Project appears to have been consulted regarding this fact sheet and we are concerned that other mining interests may also have been consulted.¹³ However, we are not aware of any other stakeholders or members of the public having been provided with the same opportunity. If that is the case, then given the implications the fact sheet may have on the way the excluded works exemptions are understood and relied on moving forward, it is in the public interest for the Department to also consult more broadly with the wider community before the factsheet is finalised and published.

Should you have any questions regarding this letter you can contact the writer at



Yours Sincerely,

Environmental Defenders Office



Nadja Zimmermann, Solicitor

¹³ Regis Resources, Response to DPE Water and NRAR advice on the McPhillamys Gold Mine Project's Submissions Report, Amendment Report and additional information, (Letter, 6 October 22) <<https://majorprojects.planningportal.nsw.gov.au/prweb/PRRestService/mp/01/getContent?AttachRef=RFI-14372995%2120221007T033648.662%20GMT>> p, 2.