

**Stronger Primary
Industries**



Department of
Primary Industries

Enforcement Response Guidelines

Plantations Regulation Unit

Introduction

The Plantations Regulation Unit (the PR Unit) is a risk-based regulator that responds to alleged breaches under the *Plantations and Reafforestation Act 1999* (the Act) and the Plantations and Reafforestation (Code) Regulation 2001 (the Code). The PR Unit applies appropriate and proportionate enforcement responses, relating to its compliance activities, using sound decision-making processes.

The purpose of any enforcement response is to prevent further offending, either personally, in the case of an individual entity, or generally, in the case of other industry stakeholders and encourage future voluntary compliance. Enforcement often results in a financial penalty of some sort, for example, a monetary fine or the additional costs imposed by remediation works. An enforcement response aims to correct a lack of knowledge, poor or inadequate business practices, and offset economic drivers for non-compliance (that is, it's cheaper to not comply with the rules).

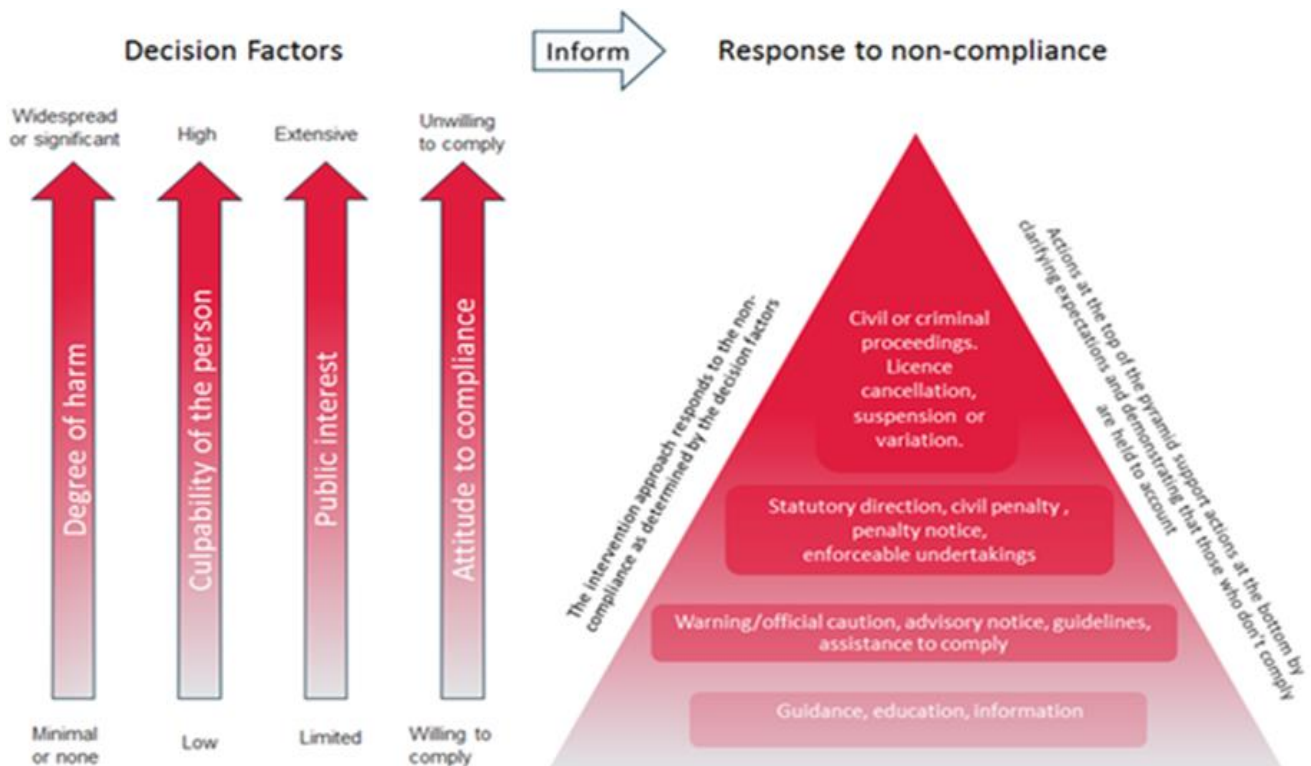
This Guideline features that decision-making process and has been developed to deliver transparency and accountability and provide clarity and confidence to stakeholders.

Developing a graduated & proportionate enforcement response

The PR Unit employs a graduated and proportionate approach to enforcement, based on the environmental harm that occurs (or could occur) and other factors (shown in Figure 1) as a result of non-compliance.

Where the evidence shows that the impacts are low, the PR Unit will apply a corresponding enforcement response, including the investigative effort. Where the evidence shows the impacts are high, a higher enforcement response will be applied. This may result in more intensive investigations.

Figure 1 Factors driving a response to non-compliance



The PR Unit undertakes a risk-based audit program to deliver compliance across authorised planted forests in NSW. Officers within the PR Unit also respond to complaints alleging illegal activities on or near planted forests. As part of the audit or complaint investigation process, officers will consider the full extent of the offending and the resultant impacts, including discretionary factors¹ such as, but not limited to:

- degree of harm:
 - the seriousness of the non-compliance, based on its actual or potential impacts on 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 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, e.g. self-reporting
 - the person’s willingness to comply with requirements or the person’s ability to comply with requirements.

The environmental value is pre-determined by a rating assigned to the relevant section of the Act or clause of the Code. The environmental harm rating is determined based on the field observations and impact assessment by the Plantations Assessment Officer (PA Officer). The PR Unit’s compliance audit application has been developed to reflect the relationship between the level of environmental harm and the environmental value associated with an offence. Using a compliance response matrix assists with highlighting an appropriate enforcement response based on an objective and informed risk matrix.

The application includes an environmental value for potential offences under the Act and the Code. A summary of the assigned environmental values is provided in Table 1.

Table 1. Environmental risk rating²

| Plantations & Reafforestation Act 1999 | | |
|--|--|---------------|
| Section | Specific impacts | Value summary |
| 9. Unauthorised plantations | Unauthorised plantations creating broad scale environmental impacts on soil and/or water quality, cultural heritage and unique and special wildlife values, and poor plantation operational practices. | VH |

¹ See Part 4 of the PR Unit’s *Prosecution Guidelines*

² This summary is designed to provide an overview only and risk ratings associated with specific provisions of the Act and Code may differ.

| Plantations & Reforestation Act 1999 | | |
|---|---|----------------------|
| Section | Specific impacts | Value summary |
| 20. Breaching conditions of authorisations | Breaches of conditions creating broad scale environmental impacts on soil and/or water quality, cultural heritage and unique and special wildlife values, and poor plantation operational practices. | VH |
| 58. Stop work orders | Breaches of a stop work order creating broad scale environmental impacts on soil and/or water quality, cultural heritage and unique and special wildlife values, and poor plantation operational practices. | VH |
| 59. Remediation orders | Breaches of a remediation order resulting in environmental impacts on soil and/or water quality, cultural heritage and unique and special wildlife values. | VH |

| Plantations and Reforestation (Code) Regulation 2001 | | |
|--|---|----------------------|
| Part | Division | Value summary |
| Part 4 Complying development standards for establishment operations | Division 1 Standards relating to the protection of soil and water | H |
| | Division 2 Standards relating to the protection of places, objects or items of heritage significance | H |
| | Division 3 Standards relating to the protection of biodiversity | VH |
| | Division 4 Standards relating to bush fire hazard reduction | L |
| Part 5 Regulation of management operations | Division 1 Operational plans, records and data | M |
| | Division 2 Roads and tracks | |
| | <ul style="list-style-type: none"> Subdivision 1 Road location and design | H |
| | <ul style="list-style-type: none"> Subdivision 2 Crossings over drainage features | H |
| | <ul style="list-style-type: none"> Subdivision 2A Fire roads | L |
| | <ul style="list-style-type: none"> Subdivision 3 Road construction and road and track drainage | M |
| | <ul style="list-style-type: none"> Subdivision 4 Road maintenance and closure | M |
| | <ul style="list-style-type: none"> Subdivision 5 Road management during harvesting | M |
| | Division 3 Site management | H |
| | Division 4 Protection of places, objects and items of heritage significance | H |
| Division 6 Managing retained areas | VH | |
| Part 6 Regulation of harvesting operations | Division 1 Slope limits for harvesting operations | H |
| | Division 2 Log dumps and landings | H |

| Plantations and Reafforestation (Code) Regulation 2001 | | |
|--|--|---------------|
| Part | Division | Value summary |
| | Division 4 Restoration of harvested area | H |
| | Division 5 Timber extraction | M |
| | Division 6 Wet weather provisions | M |

Legend: VH – Very high H – High M – Medium L - Low

The application includes a harm rating for impacts on the environment. The harm rating is based on standard risk assessment terminology and identifies the impacts on the environment, communities and specific elements within plantations. For example, where officers find issues where soil regolith stability and rainfall erosivity may increase the resultant harm, the response criteria increases.

Impacts are not applied collectively. A single impact or multiple impacts still result in the same harm rating. Table 2 summarises the ratings and their impacts.

Table 2. Environmental harm criteria

| Environmental Harm Rating | Impacts |
|---------------------------|--|
| Insignificant | Change from normal conditions within environmental regulatory limits. No community impact. Roads & Tracks don't comply but no pollution of drainage features. |
| Minor | Short-term and/or well-contained environmental effects. No community impact. Limited pollution, localised effects of short duration Localised and incidental effects on land |
| Moderate | Impacts ecosystem & remediation required. Minor impacts on the community. Increased pollution, localised effects of longer duration Local limited and/or temporary impact to water, land or retained areas |
| Major | Long-term environmental impairment. Extensive remediation required. Extensive community impact Heavy pollution, localised effects of extended duration Major effects on water quality Major damage to an ecosystem (e.g. significant but repairable impact on retained area or downstream aquatic environment) |
| Severe | Irreversible large-scale environmental impact with the loss of a valued ecosystem. Irreversible impact on the community. Very heavy pollution, widespread effects of extended duration Irreversible impact on Unique or Special Wildlife Values Irreparable damage to a cultural heritage site Irreparable damage to a retained area Irreparable damage to a buffer zone |

In some situations, there may be no physical evidence of environmental harm, but the offending has created a potential for harm to occur and action is necessary to prevent it from being realised. In these cases, it is

appropriate to assign an environmental harm rating to the potential harm. It is recommended this only occur where the officer (who detected the offending) is satisfied there is a reasonable likelihood that environmental harm is imminent, such as where the consequences of past non-compliance in similar situations have been observed.

Compliance Referral Framework

To ensure an appropriate level of probity and to maintain a superior level of industry and community confidence, there is an institutional separation within the PR Unit between the PA officers, who are in the Authorisation & Audit (A&A) team and the Governance and Systems (G&S) team.

The matrix (Table 3) is the governance mechanism by which alleged non-compliance will be managed. All audit activities (whether part of the planned audit program or as a result of a complaint) that allege offences identified as moderate to severe (see levels 3 - 5 below) will be referred for an independent review by the Investigations Officer, a member of the G&S team.

The PA Officer who detected the non-compliance will provide specific advice on the impacts of the alleged offence and an appropriate compliance response. The Investigations Officer will review the audit findings and advice to determine the effectiveness and suitability of the proposed response.

A compliance response matrix will guide the Investigations Officer in determining the appropriate response, including where an audit finding requires further investigation. This approach allows minor actions to be applied to offences at the lower end of the severity range. Where the non-compliant activity is found at the higher end of the range, or offences continue over some time, more serious action will be taken.

The Manager Governance and Systems (G&S) oversees the audit review process and reports of non-compliance and where necessary, will mediate discussions where an audit recommendation is unclear or contrary to the relevant response matrix.

The Manager G&S will regularly review these guidelines to make sure they reflect a reasonable and consistent response to non-compliance, including the need for specific case management practices.

Audit response

As a result of a non-compliant audit being completed, the PA Officer will submit the audit report and recommendations through the digital record system.

Note: The audit report will include a recommended compliance response based on the audit findings and any additional information addressing the discretionary factors associated with the offences detected.

Audit reports will be reviewed by the Investigations Officer who will review the audit findings and the recommendations and consider the required action against the compliance response matrix.

The following matters will be referred to the Investigations Officer, G&S team:

- Matters with a risk matrix outcome of Levels 3-5, and/or
- Matters where the PA Officer recommends one or more compliance options at the moderate to higher end of the response spectrum (i.e. numbers 5 to 11), and/or
- Matters where actions are escalated from the initial response.

Generally, compliance options falling in the moderate to higher end of the response spectrum (options numbers 5 to 11) are managed by the Investigations Officer and compliance options 1 to 4 are managed by the PA Officer.

The PA Officer will be advised of the outcome of the review and the referral of the matter to the Investigations Officer. Where an audit finding is retained by the Investigations Officer, the PA Officer will be provided with a copy of the completed audit report for their records only.

- The PA Officer will not send a copy to the relevant plantation owner/manager without written approval from the Investigations Officer or Manager G&S.

Where recommended action on detected non-compliance may be subject to a real or perceived conflict of interest, the Manager G&S will refer the recommended compliance response to the Senior Manager Plantations Regulation for determination.

Table 3 Risk matrix outcome

| | | Harm Criteria | | | | |
|---------------------|-----------|---------------|---------|----------|---------|---------------|
| | | Severe | Major | Moderate | Minor | Insignificant |
| Environmental value | Very High | Level 5 | Level 5 | Level 4 | Level 3 | Level 2 |
| | High | Level 5 | Level 4 | Level 3 | Level 2 | Level 2 |
| | Medium | Level 4 | Level 4 | Level 3 | Level 2 | Level 1 |
| | Low | Level 4 | Level 3 | Level 3 | Level 2 | Level 1 |

Level 1 - Technical or other breaches where minimal or no action is required.

Level 2 - minor breaches where some environmental harm is occurring or has the potential to occur, requiring a non-urgent remedy.

Level 3 - moderate breaches where more significant environmental harm is occurring or has the potential to occur, requiring more immediate management;

Level 4 - serious breaches of the legislation where major environmental harm is occurring or has the potential to occur, requiring urgent management;

Level 5 - severe breaches of the legislation where significant environmental harm is occurring or has the potential to occur.

The matrix considers the environmental value against the harm criteria. The result gives the PR Unit a consistent method of determining the most appropriate response to any non-compliance.

There may be occasions where discretionary factors, for example mitigating or aggravating circumstances may require the anticipated response to be moderated. Where this occurs, clear record keeping and review processes will be maintained by the decision maker. The actions undertaken are determined based on the matrix outcome and factors listed in this guideline.

Based on the severity and additional factors one or more of the compliance options will be implemented.

Compliance Options

The options available where non-compliance is deemed to be at the low end of the compliance response spectrum are:

1. No further action

2. Advisory and extension activities
3. Caution notice
4. Corrective Action Request

The options available where non-compliance is deemed by the matrix to be at the moderate to high end of the enforcement response spectrum are:

5. Request to show cause
6. Formal warnings
7. Stop work order
8. Remediation order
9. Penalty Notice/s
10. Cancellation of plantation authorisation
11. Prosecution, including civil action through the Land & Environment court.

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, administrative action (like cancelling an authorisation) and prosecution. Across the response spectrum, compliance responses aim to deter the person or entity involved from reoffending and to encourage voluntary compliance in other industry participants. The action is also outcomes focused to achieve the environmental standards of the code in the most effective way.

Compliance decisions must be based on evidence, which will be admissible and sufficient to establish that an offence has been committed. Where a plantation owner or manager does not respond to an initial compliance response, it may be appropriate to escalate the matter and use alternate compliance options. The appropriate response will be determined by the Officer managing the compliance action. PA Officers will refer the matters to the Investigations Officer for review.

Use of multiple enforcement measures

In certain circumstances, it may be appropriate to use multiple enforcement responses for multiple offences, especially where the harm from one offence is more significant than others. Issuing multiple enforcement responses enables offenders to be dealt with fairly and ensures future voluntary compliance, in addition to creating both personal and general deterrence.

Examples include (but are not limited to):

- a remediation order and a penalty notice for a serious environmental offence.
- combining a caution notice with a corrective action request for minor matters, especially where the plantation owner or manager has been subject to similar action in the past.

Some situations may require that interim enforcement actions are implemented swiftly to stop significant environmental damage from occurring. In these cases, the use of a stop work order or remediation notice may be required temporarily until a full investigation can be completed. Where further or stronger enforcement action is needed, the stop work order or remediation notice may be revoked.

Version Control

| Version no | Authorised by | Authorised date | Changes made |
|------------|---------------|------------------|---|
| 1.0 | Nick Milham | 5 May 2020 | Initial release. |
| 1.1 | Nick Milham | 31 August 2020 | <ul style="list-style-type: none"> • Inclusion of discretionary factors • Revised risk matrix • Revised referral process • Inclusion of levels and seriousness. • Minor formatting and erratum |
| 1.2 | Nick Milham | 19 November 2020 | <ul style="list-style-type: none"> • Minor change to matrix to reduce disproportionate responses. • Minor erratum. |



PUB20/285

© State of New South Wales through Regional NSW 2020. The information contained in this publication is based on knowledge and understanding at the time of writing (November 2020). However, because of advances in knowledge, users are reminded of the need to ensure that the information upon which they rely is up to date and to check the currency of the information with the appropriate officer of the Department of Regional NSW or the user's independent adviser.