

Release of Unallocated Water POLICY

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Purpose

This document provides a definition of unallocated water and a process for its identification. It also defines the preferred process for granting licences to access unallocated water on the basis of applications submitted to the Minister for Sustainability, Environment and Conservation (the Minister).

Objectives of the policy are to:

1. provide a clear and consistent approach to the management of unallocated water statewide;
2. ensure unallocated water is available for consumptive purposes in a manner that is fair and equitable and makes certain that environmental water requirements are met prior to granting water for consumptive purposes;
3. create a decision-making process that carefully evaluates the risks of any decision that may adversely affect the environment or ecosystems that depend on the water resource; and
4. support the effective and efficient operation of water markets.

What guides this Policy?

National Water Initiative

South Australia is committed to the NWI, including the implementation of a policy for the release of unallocated water (paragraphs 70-72 of the NWI).

70. *Release of unallocated water will be a matter for States and Territories to determine. Any release of unallocated water should be managed in the context of encouraging the sustainable and efficient use of scarce water resources.*
71. *If a release is justified, generally, it should occur only where alternative ways of meeting water demands, such as through water trading, making use of the unused parts of existing entitlements or by increasing water use efficiency, have been fully explored.*
72. *To the extent practicable, releases should occur through market-based mechanisms.*

Intergovernmental Agreement on a National Water Initiative, 2004

South Australia's Strategic Plan

The following target in South Australia's Strategic Plan is relevant in relation to the release of unallocated water.

Goal: Industry and agriculture are highly efficient and innovative in their use of water.

Target 75: *Sustainable water use*

South Australia's water resources are managed within sustainable limits by 2018.

Relevant Powers and Functions under the Natural Resources Management Act 2004

When identifying excess water, resource managers must have regard to and seek to further the Objects set out in Section 7 of the Act (as set out in s8 of the Act). The Objects aim to assist in the achievement of ecologically sustainable development (which includes the use, conservation, development and enhancement of natural resources) while also allowing South Australians to provide for their economic, social and physical well-being. Through the establishment of an integrated scheme to promote the use and management of natural resources, the State can achieve the objects and achieve ecologically sustainable development.

Section 147(2) provides that the Minister may issue licences with respect to a particular water resource, or a particular part of a water resource, on the basis of applications submitted to the Minister under procedures determined by the Minister as being appropriate in the relevant circumstances (including procedures that require applications to be submitted as tenders or furnished as part of an auction process).

Section 147(7) provides that the Minister may, if the licence is being issued under procedures that require the payment of a fee or purchase price with respect to the licence, require the relevant payment before granting a water licence.

State Natural Resources Management Plan 2012-17

The State NRM Plan is the highest level statutory plan under the NRM Act and provides guidance to Regional NRM Plans and water allocation plans (WAPs). The following goals and targets are relevant in relation to the release of unallocated water

Goal 2: *Sustainable management and productive use of land, water, air and sea*

Target 5: All NRM planning and investment decisions take into account ecological, social and production considerations;

Target 6: Maintain the productive capacity of our natural resources.

What is the scope of this Policy?

This policy is applicable to all Department of Environment, Water and Natural Resources (DEWNR) personnel as well as Natural Resources Management (NRM) Boards involved in the development and administration of Water Allocation Plans (WAPs) where excess water is potentially available for licenced purposes in prescribed water resources within regions.

Who is responsible for what?

Minister: Approves this policy.



Chief Executive: Recommends the policy to the Minister for approval.

Executive: Ensure that the release of unallocated water is carried out in accordance with this policy.

Manager: Ensure that the staff assigned to the policy, undertake the tasks outlined and are informed of the outcomes.

Staff Member: Ensures that the policy is current, relevant and practicable.

Important Information

Defining Unallocated Water

For the purposes of this policy, the definition of unallocated water is:

Water within a prescribed water resource identified as being potentially available for licensed consumptive use, without compromising the reliability of existing entitlements, authorised or exempted unlicensed use,¹ provisions for environmental, social or cultural water and reserved water.

Unallocated water is that portion of the excess water under section 164N (8) of the Act that has not been reserved under section 166 of the Act (or reserved water that has been released under a regulation).

Unallocated water is identified after issuing licences to existing users during the existing user process of the WAP. That is, the level of water extraction from a particular system which, if exceeded would compromise key environmental assets, or ecosystem functions and the productive base of the resource². When identifying unallocated water, regard must be given to the level of water extraction allowable in a particular water resource that ensures that the environmental outcomes and critical human needs can be met at a specified level of risk. That is, the level of water extraction from a particular system which, if exceeded, would compromise key environmental assets and key ecosystem service and functions from being protected, and their water requirements.³

Identifying Excess Water

Section 164N (8) of the *Natural Resources Management Act 2004* (Act) refers to excess water:

If the quantity of water available for allocation exceeds the entitlements of existing users, the Minister may allocate the excess in accordance with this Act and the relevant water allocation plan.

¹ Authorised or exempted unlicensed use includes riparian stock and domestic use under section 124(4), authorised use under section 128.

² Intergovernmental Agreement on a National Water Initiative, 2004

³ National Water Initiative Policy Guidelines for Water Planning and Management, 2012



Once entitlements are issued, water may become available for allocation as a result of action taken pursuant to sections 151 and 164Q of the Act. Under s151 a licensee may surrender their water licence at any time, resulting in an amount of excess water in a particular area that could be made available for consumptive use. Under s164Q any entitlement under a water management authorisation that has been cancelled under the Act is forfeited to the Minister. Both of these sections outline events that may also contribute to excess water within a prescribed water resource.

A WAP must comply with section 76 of the Act in defining consumptive pools and determining the amount of unallocated/excess water that is available. The section sets out the principles for determining water access entitlements, that there needs to be assessment of the capacity of the resource to meet water demands on a continuing basis, and that it requires a WAP to provide for regular monitoring to see if the resource meets that demand. Section 76 also requires a WAP to set out principles that are associated with the determination of water access entitlements and the taking and use of water so that an equitable balance is achieved between environmental, social and economic needs and that the rate of the taking and use of the water is sustainable.

Section 170 provides that the needs of the ecosystems that depend on a resource for water must be taken into account when a decision is being made on the quantity of water available from the water resource.

Reserving Excess Water

When a water allocation plan identifies excess water, the Minister needs to decide whether or not to reserve any of this water.

The Minister may make a decision to reserve all or a portion of excess water at any time, in accordance with section 166 of the Act. At the time of adoption of a water allocation plan that identifies excess water, the Minister is satisfied on the appropriateness of the reservation of all or a portion of the excess water.

Excess water can be reserved if the Minister is satisfied that it is necessary or desirable for the management of the water resource by reserving the whole or part of that excess water, either from allocation under any circumstances or for allocation subject to restrictions. The provisions for allocating reserved water are outside the water allocation plan, but are set out in a Regulation and the notice that reserves the water. If there is no regulation, the reserved water cannot be allocated.

DEWNR and the relevant NRM Board can advise the Minister on the desirability to reserve water on the basis of uncertainties or risks that have been identified during the development of the WAP and/or the existing user process. Uncertainties and risks can occur because of:

- knowledge gaps relating to ecosystems and ecosystem functions;
- environmental water requirements;
- the capacity of the resource;
- impacts of climate change on the water resource ;



- unknown levels of use (for example stock and domestic dams or forestry interception);
- unresolved Native Title claims ;
- any appeals against the issue of water access entitlements to existing users upon prescription of a water resource in accordance with section 164N;
- the variation of licences to be consistent with a changed WAP in accordance with s149.

Where possible, such advice should be provided concurrently with the request to the Minister to adopt the water allocation plan or as soon as possible after adoption of the plan. This enables an early reservation decision and avoids overestimating the volume of unallocated water.

The reservation of water can be reviewed from time to time and where risks have been addressed (e.g. better information is available or appeals have been resolved), a decision can be made to revoke or vary the decision to reserve water.

There may be other reasons for the reservation of water, and this policy statement does not limit the Minister's discretion when deciding to reserve water.

Releasing Unallocated Water

If unallocated water is available, following adoption of a WAP and the Minister's decision on the reservation of water, justification for its release should be in accordance with paragraph 71 of the NWI and the objects of the Act.

Paragraph 71 of the NWI states that a release of unallocated water should generally only occur where alternative ways of meeting water demands have already been explored. There are three specific examples referred to, these being:

- water trading is already occurring;
- total water use is at or close to total allocations; and
- there is no substantial room for improved water use efficiency.

To meet NWI requirements it is important that the demand for unallocated water is tested prior to or as part of the release of any unallocated water. It is also essential that licences to existing users following prescription of a water resource have been issued, prior to the release of unallocated water.

Release of Unallocated Water

When the Minister is satisfied that releasing unallocated water will not compromise the future sustainability of the resource, the following policies should be applied.

For prescribed water resources where unallocated water exists and has not been reserved by the Minister, and where licences have been issued to existing users, demand for the unallocated water needs to be demonstrated first, through an Expression of Interest process.



Where the Minister is satisfied that demands for the unallocated water on that resource have been demonstrated, a market-based approach will be applied to release unallocated water.

Where there is a limited number of interested parties, unallocated water should not be released and the water should remain as unallocated water.^{4*}

Where unallocated water is to be released, the type of entitlement offered (including the water resource, the basis of which entitlement is determined, transferability characteristics, and the relevant conditions relating to take and/or use of water if attached to the entitlement⁵) should be clearly specified before the release is made.

A market-based approach includes offering unallocated water for sale by either public auction, tender, or private contract. When releasing unallocated water through a market based approach:

- a reserve price should be fixed for the water;
- a notice of the sale should be published in a newspaper generally circulating throughout the State and in the relevant region;
- finalisation of a water purchase will be subject to the conditions of sale, approval of the licence application (taking into consideration the Water Allocation Plan and Act provisions), and payment of the agreed purchase price; and
- water may be withdrawn from sale if bids fail to reach the reserve price.

The information outlined above is the preferred method for releasing unallocated water.

When unallocated water is being sold, it is important that prospective buyers are made aware of the following:

- allocation against entitlement may vary from time to time;
- an entitlement does not guarantee access to water, it is an entitlement to take water if it is available;
- a water resource works approval is required to construct, maintain and operate any works for the purposes of taking water⁶;
- allocations granted against entitlements cannot be used unless the person holds a site use approval⁷;
- there may be conditions attached to the entitlement and/or allocation, in the case of partial unbundling of water rights.

Determination of unallocated water pricing

As per paragraph 72 of the NWI, releases should occur through market-based mechanisms. Pricing within South Australia may be determined through consultation with the Department

⁴ If a particular prescribed area, after the expressions of interest have been submitted, reveals a limited number of interested parties, a private sale may be considered.

⁵ Where a prescribed water area is fully unbundled, there should be no conditions set on the entitlement.

⁶ Applies to unbundled areas only.

⁷ Applies to unbundled areas only.



of Primary Industries and Regions (PIRSA), the Department of Sustainability, Environment, Water, Population and Communities, the State Valuation Office Land Services, and/or private water brokers.

If unallocated water is to be tendered or sold in a private treaty, a market-based price should be determined through similar locations and circumstances from areas within the State (i.e. Marne Saunders determining its baseline price on the similar Mallee region) along with consultation as mentioned above. Circumstances that may influence the price per megalitre (ML) are the current level of trade maturity, aquifers, location, water availability, salinity levels, water in storage, land-use, market performance for various commodities, etc.

Further information is available from:

- Relevant Water Allocation Plan
- National Water Initiative Policy Guidelines for Water Planning and Management 2012;
- Related legislation or plans
 - South Australia's State Natural Resources Management Plan 2012-17 (Goal 2, Targets 5 &6);
 - Intergovernmental Agreement on a National Water Initiative (paragraphs 70-72);
 - Natural Resources Management Act 2004;
 - South Australia's Strategic Plan 2011 (Target 75).

Additional Information

- Appendix 1 of this document clarifies the transitional arrangements, particularly when transitioning from bundled to unbundled water licences.
- Appendix 2 of this document is a guide to the review of the Release of Unallocated Water Policy.

NOTE

This policy is not written as a procedure pursuant to s147 (2) (procedures determined by the Minister) of the Natural Resources Management Act, but as a guide for those involved in the implementation of Water Allocation Plans and related policies. It is envisaged that a procedure, for the purposes of s147(2) of the Natural Resources Management Act may be approved by the Minister for each prescribed water resource (or part of the resource) modelled after this guide.

All attempts have been made to make these guidelines as accurate as possible, but officers involved in water planning should work closely with and be familiar with the key provisions of the Natural Resources Management Act 2004. This document is accurate as at the time of publication, but the law is subject to change. Officers working in the area should ensure that they always work with the most up to date version of the Natural Resources Management Act. These guidelines are not a substitute for seeking legal advice from the Crown Solicitor's Office as required.



This document refers to legislative requirements. Officers must comply with mandatory requirements in legislation when preparing Water Allocation Plans. Mandatory legislative requirements often include the word “must”. However, often the legislation is not mandatory (i.e. when the word “may” is used). This means that officers have discretion. Policies can sometimes be expressed in mandatory terms, but do not have legislative force, and decision makers must always be prepared to depart from the policy in appropriate circumstances. Failure to do so may result in a decision being challenged by an aggrieved party.

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Appendix 1: Transitional Arrangements

Water allocation plan which has not yet been adopted

Where a water allocation plan is in the process of being developed, any identification of excess water in the process of the development of the plan will trigger a review of the trade-offs in the process of determining environmental water provisions to ensure consistency with sections 7, 76 and 170 of the Act and Guiding Target 6 in the State NRM Plan 2012.

“Unbundled” water allocation plan adopted after 1 July 2009

Where a water allocation plan has been adopted after 1 July 2009 that identifies excess water, DEWNR and the relevant NRM Board prepare advice to the Minister on the desirability of reserving water, on the basis of identified risks during the development of the water allocation plan, in particular gaps in knowledge. The advice is prepared as soon as possible, based on existing knowledge at the time of the adoption of the water allocation plan.

If the water allocation plan provides for a consumptive pool and water access entitlements, the release procedure will be for water licences. The water access entitlement included on the water licence will be determined in accordance with the water allocation plan.

“Bundled” water allocation plan adopted after 1 July 2009

Where a water allocation plan is adopted after 1 July 2009 but does not define a consumptive pool or provide for water access entitlements, in accordance with section 76(4) (ab) and (b), the advice on reserving water and any release process will reflect the transitional arrangements for these water allocation plans, under regulation 47 of the Natural Resources Management (General) Regulations 2005. Unallocated water will be allocated by specifying a volume of water on a water licence (this volume is taken to be a water access entitlement). Subject to any reductions, the licensee will obtain an annual allocation equal to the volume of water specified on the licence.

Water allocation plan adopted prior to 1 July 2009

Where a water allocation plan has been adopted prior to 1 July 2009 (and therefore does not define a consumptive pool or provide for water access entitlements) and where that plan identifies excess water, the following steps need to be undertaken:

- the advice on the reservation of water will include an assessment on whether it is consistent with the water allocation plan as well as with sections 7, 76, and 170 of the Act and Guiding Target 6 in the State NRM Plan 2012; and
- the Expression of Interest process will reflect the transitional arrangements and regulation 47 of the Natural Resources Management (General) Regulations 2005. Unallocated water will be allocated by specifying a volume of water on a water licence (this volume is taken to be a water access entitlement). Subject to any reductions, the licensee will obtain an annual allocation equal to the volume of water specified on the licence.



Appendix 2: Review of the policy

The Release of Unallocated Water Policy should be reviewed at least once during each period of 3 years following adoption of this policy to determine whether the policy has met its objectives.

The review will be coordinated by DEWNR, with input from NRM Boards and other relevant stakeholders.

The purpose of the review is to allow those involved in the application, administration, and use of the policy to assess whether it has been effective in meeting its objectives and in its implementation.

The review process will look at:

- the extent to which the policy is compliant with recognised best practice processes;
- the extent that the policy has contributed to changing, maintaining, or improving the water resource;
- any unanticipated (positive or negative) outcomes that occurred;
- the extent (if any) of changes that were directly or indirectly produced by the policy;
- the extent to which the planned outputs have been achieved (why or why not?);
- the extent to which the policy has attained the highest value out of available resources;
- whether the resources could be used more productively;
- what could be done differently to improve implementation, and thereby maximise impact, at an acceptable and sustainable cost
- the level of transparency and accountability of the policy process (was there documentation of the process that was/is easily accessible by the public);
- the policy was communicated in a way that was widely understood by the public;
- templates for auction, tender, or sale are the same across the State.

Other items that may be looked at during a review are:

- similar processes and guidelines present throughout the State, ensuring a consistent approach statewide;
- changes in the legislative environment.

