

Submission
No 3

**INQUIRY INTO IMPACT AND IMPLEMENTATION OF
THE WATER MANAGEMENT (GENERAL) AMENDMENT
(EXEMPTIONS FOR FLOODPLAIN HARVESTING)
REGULATION 2020**

Organisation: New South Wales Irrigators Council

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Inquiry on the Impact and Implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020

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Introduction

The NSW Irrigators' Council (NSWIC) is the peak body representing irrigation farmers and the irrigation farming industry in NSW. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries. Through our members, NSWIC represents over 12,000 water access licence holders in NSW who access regulated, unregulated and groundwater systems.

NSWIC engages in advocacy and policy development on behalf of the irrigation farming sector. As an apolitical entity, the Council provides advice to all stakeholders and decision makers.

Irrigation farmers are stewards of tremendous local, operational and practical knowledge in water management. With over 12,000 irrigation farmers in NSW, there is a wealth of knowledge available. To best utilise this knowledge requires participatory decision making and extensive consultation to ensure this knowledge can be incorporated into best-practice, evidence-based policy. NSWIC and our members are a valuable way for Governments and agencies to access this knowledge. NSWIC offers the expertise from our network of irrigation farmers and organisations on an ongoing basis to ensure water management is practical, community-minded and follows participatory process.

NSWIC welcomes *the Inquiry on the Impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 (herein, the Regulation)*, and see this as a valuable opportunity to provide expertise from our membership to inform the Inquiry.

Each member reserves the right to independent policy on issues that directly relate to their areas of operation, expertise or any other issues that they deem relevant.



NSW Irrigators' Council's Guiding Principles

Integrity	Leadership	Evidence	Collaboration
Environmental health and sustainable resource access is integral to a successful irrigation industry.	Irrigation farmers in NSW and Australia are world leaders in water-efficient production with high ethical and environmental standards.	Evidence-based policy is essential. Research must be on-going, and include review mechanisms, to ensure the best-available data can inform best-practice policy through adaptive processes.	Irrigation farmers are stewards of tremendous knowledge in water management, and extensive consultation is needed to utilise this knowledge.
Water property rights (including accessibility, reliability and their fundamental characteristics) must be protected regardless of ownership.	Developing leadership will strengthen the sector and ensure competitiveness globally.	Innovation is fostered through research and development.	Government and industry must work together to ensure communication is informative, timely, and accessible.
Certainty and stability is fundamental for all water users.	Industry has zero tolerance for water theft.	Decision-making must ensure no negative unmitigated third-party impacts, including understanding cumulative and socio-economic impacts.	Irrigation farmers respect the prioritisation of water in the allocation framework.
All water (agricultural, environmental, cultural and industrial) must be measured, and used efficiently and effectively.			Collaboration with indigenous nations improves water management.



Overview

NSWIC support the Exemption Regulation (the Regulation) as an **interim transitional measure** whilst the NSW Healthy Floodplains Project (HFP)¹ is implemented to bring Floodplain Harvesting (FPH) into the contemporary legislative framework.

The need for transitional arrangements whilst the HFP is being implemented are foreshadowed in the current Healthy Floodplains Policy²:

Providing a temporary exemption for floodplain harvesting from specified licensing and approvals requirements of the WM Act—An exemption is required so that floodplain harvesting by works constructed on or before 3 July 2008 can continue while the policy is being implemented. The exemption will apply only for the time required to issue work approvals, amend water sharing plans and issue floodplain harvesting access licences. Once implementation has concluded for a given floodplain, the exemption will no longer apply to that area and all floodplain harvesting activities will require a water supply work approval and a floodplain harvesting water access licence authorised under the WM Act.

Simply, this is a transitional measure which will be replaced with new regulations under the HFP that provide the clarity and certainty of volumetric licencing. The implementation of this Regulation should not preclude, nor substitute, the effective and timely implementation of the FPH licencing framework under the HFP.

NSWIC is supportive of the need to bring the legitimate historical FPH access into the current regulatory framework by converting a descriptive take licensed under *NSW Water Act 1912* into a volumetric license consistent with the *NSW Water Management Act 2000*. With all water available to irrigation farmers and the river system limited, licencing of floodplain flows must provide tools to better measure and monitor floodplain take to ensure overall usage remains within described limits, as set out in Water Sharing Plans and the Basin Plan.

It is important to note that if the Regulation did not exist, water users would still have legitimate access to FPH (including rainfall runoff) due to existing rights within the Water Act 1912. This regulation is simply to have that historic legislated access brought into the contemporary legislative framework, whilst longer term measures are implemented.

It is our view that the disallowance motion currently before Parliament is misinformed, as it would not change the practice or levels of FPH take, but would be a significant backward step for the regulatory framework by preventing it from being contemporised. The disallowance motion would not result in the intended objectives being met, but would create unnecessary confusion and uncertainty across the state.

Whilst NSWIC support the Regulation as an interim transitional measure, the implementation of the Regulation was poor, and the impacts were poorly communicated and understood.

These concerns are detailed in this submission.

¹ More information: <https://www.industry.nsw.gov.au/water/plans-programs/healthy-floodplains-project>

² NSW Floodplain Harvesting Policy (P 6):
https://www.industry.nsw.gov.au/data/assets/pdf_file/0017/143441/NSW-Floodplain-harvesting-policy.pdf



Submission

What is your view on the way the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 was implemented?

The implementation of the Regulation was very poor.

This included poor timing, poor execution, lack of communication, and a failure to meet the NSW Government's own guidelines for developing good regulations.

The outcome of poor implementation was the unnecessary degree of significant public concern, confusion, and misunderstanding of the intent and effect of the Regulation.

HFP Implementation

Whilst the Regulation was foreshadowed as part of the *NSW Floodplains Harvesting Policy* (as above), these transitional arrangements were only added into the policy since 2013, and did not form part of the earlier policy. Its implementation was never consulted upon.

The *Implementation Guideline for the Healthy Floodplains Project* does not mention a timeline or background on the need for the Regulation (although the need for an amendment to establish licences is described). Further, the need for the Regulation is also not mentioned in the *Floodplain Harvesting Action Plan* – which is the road map for NSW to meet its obligations on better regulation of FPH. Our members also do not recall it being raised at the consultation events in September 2019.

Alignment with 'Better Regulation' Principles

The NSW Department did not follow the NSW Government's own guidelines for developing good regulations - which if they did - would have avoided much of the confusion and misinformation surrounding the implementation of the Regulation. The State Government guidelines for good regulation are available [[HERE](#)]. These guidelines include clear principles (see below) such as the need for a clear objective, demonstration that it is in the public interest, proper understanding of the impacts with consideration of the costs and benefits, and consultation with a range of stakeholders.

The Better Regulation principles

Principle 1: The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.

Principle 2: The objective of government action should be clear.

Principle 3: The impact of government action should be properly understood by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options.

Principle 4: Government action should be effective and proportional.

Principle 5: Consultation with business and the community should inform regulatory development.



Principle 6: The simplification, repeal, reform, modernisation or consolidation of existing regulation should be considered.

Principle 7: Regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficiency and effectiveness.

Contrary to this, the Department has still not provided a plain English summary explaining the key aspects of the Regulation, particularly:

1. Why the Exemption Regulation was needed;
2. Whether it would be subjected to reviews with a definite expiry date, i.e. when it can be deemed no longer needed;
3. What the likely impacts of the Regulation would be.

Communication and Consultation

There was an evident lack of consultation and discussion with water-users and the broader community regarding the Regulation, which meant the community were unable to have confidence that the whole process was designed and implemented in a transparent way. There is no reason why consultation to explain the purpose, reasoning, and impact of the Regulation could not have occurred to parliamentarians, water users and other stakeholders.

Timing of Implementation

The timing of the announcement of the Regulation (Thursday, 6 February 2020) caused confusion around the purpose of the Regulation, given the NSW Government enacted a Section 324 Temporary Restriction the following day (Friday, 7 February 2020). Given the Regulation was foreshadowed in the *NSW Floodplains Harvesting Policy*, there should have been better consideration of the timing of implementation to ensure it did not get conflated with other events.

Whilst the Exemption Regulation provided a mechanism for the NSW Government to enact a Section 324 Temporary Restriction within the *Water Management Act 2000*, the two actions should be considered separately by government.

[What is your view on the impact of the Water Management \(General\) Amendment \(Exemptions for Floodplain Harvesting\) Regulation 2020?](#)

Objective of the Regulation

As the explanatory note of the Regulation states:

“The object of this Regulation is to provide for exemptions from requirements under the Water Management Act 2000 to hold a water access licence to take water from a water source for the purpose of floodplain harvesting and to hold a water supply work approval to use a work for that purpose.”³

³ See: <https://www.legislation.nsw.gov.au/regulations/2020-35.pdf>



It is important to note that if the Regulation did not exist, water users would still have legitimate access to FPH (including rainfall runoff) due to existing rights within the *Water Act 1912*.

Thus, the objective of the Regulation was to bring water use practices under a **single (contemporary) legislative framework**, rather than having aspects of water management allowable under either the *Water Act 1912* and/or the *Water Management Act 2000*. This provides clarity for all water users around NSW, in legitimately operating their farms as they have historically. For this reason alone, NSWIC support the Regulation as it signals the transition into the contemporary legislative framework.

Clarity of the Impacts

If the Department had followed the NSW regulation guidelines, they would have published an assessment of the impacts of the Regulation at the time the Regulation was announced. Information on the costs and benefits, and any possible third-party impacts, would have guided water-users' expectations as to what the likely outcomes would be for their businesses as a result of the implementation of the Regulation. This would have also guided the general public in their understanding of the intent and impacts. However, this did not occur.

Scope of the Regulation

The Regulation provides clarification by allowing for the use of approved flood protection (work) structures to intercept, capture and store overland flow. Given the definition of overland flow – which includes rainfall runoff and stormwater - the Regulation is pertinent to water users around the state, and not only those within the five valleys where the HFP is being implemented.

Overland flow is defined by the *Water Management Act 2000* in Section 4A [\[HERE\]](#):

4A Meaning of "overland flow water"

(1) In this Act, "overland flow water" means water (including floodwater, rainfall run-off and urban stormwater) that is flowing over or lying on the ground as a result of--

(a) rain or any other kinds of precipitation, or

(b) rising to the surface from underground, or

(c) any other process or action of a kind prescribed by the regulations.

(2) Water is flowing over the ground for the purposes of subsection (1) even if it flows over the ground by means of artificial structures such as roads, canals or road gutters.

The scope to include all water users in NSW is due to obligations under other state-wide regulations and licence conditions to capture and retain runoff and stormwater on the farm to avoid potential environmental impacts (such as contamination / pollutants).

In summary, the regulation provides clarity to all water users in NSW to *continue* the practices of legitimately operating their farms as they have historically for the purposes of:

- Avoiding non-compliance with other rules and minimising environmental impacts from runoff; and
- Collecting a portion of floodwater under a single legislative framework , rather than having aspects of water management allowable under either the *Water Act 1912* and/or the *Water Management Act 2000*.



One of the benefits of this Regulation is that it provides for consistency in the management of this water across the state.

Outstanding Issues

(1) The *Water Management Act 2000* clearly defines that water extraction and use must be taken under an appropriate water access licence, a basic landholder right or a licence exemption. Whilst the valleys included in the HFP will be transitioning to a water access licence, there remains uncertainty for other areas who are not part of planned transitions to a licencing framework, or for those where their works are approved under the *Water Management Act 2000*.

(2) There remains some uncertainty in terms of the historical and legitimate access under the *Water Act 1912* that has not been extinguished i.e. where flood work approvals still sit within the *Water Act 1912* or there is not a gazetted valley-wide *Floodplain Management Plan*. As it stands, the Regulation has created uncertainty amongst *these* impacted water-users as to whether their rights remain protected under the *Water Act* or they have to rely on the Regulation in exercising their rights to FPH. It therefore fails to provide full certainty which is needed for long-term planning and investment to ensure viability of businesses.

(3) Additionally, there remains uncertainty for those water-users where there is a dispute with the NSW Government regarding the eligibility of flood protection works to be used for FPH, despite the historical practices. These water users must be provided the opportunity to resolve these issues and in fact, some water users at the time of implementation would not be aware of their eligibility status given the delays in the approval and anomalies process.

Do you have any other comments on this regulation?

Background on the HFP

The Healthy Floodplains Project involves the development and implementation of the (A) *Floodplain Management Program* and (B) *Floodplain Harvesting Program*.

(A) Floodplain management plans provide the framework for coordinating flood work development to minimise future changes to flooding behaviour; improving the environmental health of floodplains, and increasing awareness of risk to life and property from the effects of flooding.

(B) The Floodplain Harvesting Program Project involves the implementation of the NSW Floodplain Harvesting Policy to license floodplain harvesting water extractions and make them subject to volumetric limits. This will ensure that FPH fits within the Sustainable Diversion Limits set by the Basin Plan by establishing new FPH entitlements and account management rules that are specifically designed to control any growth in use.⁴

Under this project, the licencing framework for FPH is set to be in place by June 2021. The HFP is initially being implemented in five northern valleys: the Barwon–Darling, Border Rivers, Gwydir, Macquarie and Namoi valleys.

⁴ <https://www.industry.nsw.gov.au/water/plans-programs/healthy-floodplains-project/about>



Position of NSWIC on the HFP

NSWIC is supportive of the need to bring the legitimate historical floodplain harvesting access into the current regulatory framework by converting a descriptive take licensed under *NSW Water Act 1912* into a volumetric license consistent with the *NSW Water Management Act 2000*.

NSWIC agree that with all water available to irrigators and the river system limited, licensing of floodplain flows must provide tools to better measure and monitor floodplain take to ensure overall usage remains within described limits, as set out in Water Sharing Plans and the Basin Plan.

Only by converting this descriptive take into a volumetric licence and bringing it in line with other entitlements in the regulatory framework, can we improve its measurement, monitoring and reporting and ensure the sustainability of our industry and communities. Licencing of FPH is critically important, in order to restrict further growth of FPH (thereby maintaining and improving floodplains flows downstream, and ensuring environmental protection), and also to provide certainty to communities who rely on floodplain flows.

The process should be done in a timely and efficient manner, balancing the competing needs of working with sound information, and the need to complete the process at the earliest feasible opportunity as a means to secure the future of industries and communities that rely on floodplain flows.

We encourage the Panel to take this opportunity to learn more about FPH, and the HFP, which is necessary to bring historic practices into the contemporary regulatory framework, and to provide certainty to people upstream, downstream and across the state.

For further information, the NSWIC FPH Policy can be found [[HERE](#)].

Conclusion

NSWIC support the Regulation as an **interim transitional measure** whilst the NSW HFP is implemented to bring FPH into the contemporary legislative framework.

The Regulation should not preclude, nor substitute, the effective and timely implementation of the FPH licencing framework under the HFP.

This transition period is until the HFP is implemented in the selected valleys in 2021, at which point the Regulation would be replaced by the licencing framework. For other areas, this transition is until such a time as the NSW Government considers licencing in those areas.

Whilst NSWIC support the Regulation, there was evidently significant failures in the way it was implemented and communicated, which created unnecessary and unfortunate confusion and angst in the community.

Given that, even without the Regulation, water users would still have legitimate access to FPH due to existing rights within the *Water Act 1912*, we can only conclude that the disallowance motion is misinformed. The disallowance motion would create uncertainty and confusion for all across the state, and would be a backward step in bringing FPH into the contemporary legislative framework.

This Regulation is simply a necessary part of the transition arrangements to have historic legislated access brought into the contemporary legislative framework, whilst longer term measures are implemented, and it must be supported for that purpose.

Kind regards,

NSW Irrigators' Council.