

**Submission
No 4**

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

Organisation: Inland Rivers Network

Date Received: 30 May 2020



I N L A N D
R I V E R S
N E T W O R K

PO Box 528, PYRMONT NSW 2009
ph 0428 817 282
email inlandriversnetwork@gmail.com
web inlandriversnetwork.org
ABN 34 373 750 383

The Director
Regulation Committee
Parliament House
Macquarie Street, Sydney NSW 2000

Regulation.Committee@parliament.nsw.gov.au

SUBMISSION

NSW Parliamentary Inquiry

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

Friday 29 May 2020

Introduction

The Inland Rivers Network (“IRN”) is a coalition of environment groups and individuals that has been advocating for healthy rivers, wetlands and groundwater in the Murray-Darling Basin since 1991.

IRN has been concerned about the poor management of floodplain development and harvesting of floodwaters in NSW for the last 20 years or more.

The unregulated growth of floodplain structures, particularly in catchments such as the Gwydir, has been raised as a critical environmental issue over that time. We understand the volume of Floodplain Harvesting take has been estimated to be between 15% and 35% of overall surface water extractions.

IRN has engaged closely in the development of a floodplain harvesting policy over time, starting with the draft policy produced for public consultation in 2010. The very slow finalisation of a policy and implementation of any regulation of floodplain harvesting is an indictment on the NSW Government’s commitment to protecting the environmental assets and functions of our river systems.

The fact that the irrigation industry has had free access to unmeasured water from overland flows for the past 30 years is a major cost to the environment, cultural values and downstream communities and other industries.

The NSW Government has signed up to various Commonwealth agreements over time that have a requirement to take environmental needs and impacts into account.

The adoption of the Federal Water Act 2007 and introduction of the Murray-Darling Basin Plan in 2012 highlights the need for improved management of water resources and protection of water-dependent ecosystems.

Rigorous assessment of the environmental, cultural and downstream social impacts of Floodplain Harvesting is an important responsibility of the NSW Government. **The protection of first flush flows during and at the breaking of major droughts is a critical issue that needs urgent attention.**

Access to free, unlicensed and unmeasured water harvesting in this period of intense drought and a drying climate is unacceptable. An exemption to allow continued unfettered use of a scarce and critical natural resource is irresponsible.

IRN welcomes the opportunity to provide information to this Parliamentary Inquiry and appreciates the invitation to do so.

OVERVIEW OF THIS SUBMISSION

This submission covers the following key topics:

1. Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020
2. Assessment of environmental and social impacts of Floodplain Harvesting
3. Water Management Act Amendment Bill 2014
4. NSW Floodplain Harvesting Policy 2018
5. Floodplain Harvesting Monitoring Policy

This submission addresses the following key issues:

1. The Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 (“the Regulation”) gives retrospective approval to floodplain works constructed on or before 3 July 2008 that do not have approval and have not undergone an assessment process. The Regulation must be overturned.
2. Floodplain Harvesting must be fully restricted until such time as all environmental assessment, modelling assessment, licensing processes and monitoring and measurement are in place.
3. The cumulative impact of Floodplain Harvesting on environmental, cultural and social assets has not been assessed under any meaningful or transparent process.
4. It is vital that the full impact of Floodplain Harvesting on environmental assets and function, on cultural values and on downstream social assets is rigorously assessed prior to granting new, compensable private property rights in the form of Floodplain Harvesting licenses.
5. First flush flows must be protected through specific rules in Water Sharing Plans.

6. Compensable rights for proposed new, tradable private property rights to access intermittent overland flows on the floodplain are not supported.
7. Opportunistic access to intermittent flood flows should not be a tradeable right.
8. There must be no right to carryover volumes of unused entitlement. The extraction of water from the floodplain should be restricted to 100% of share allocation each year.
9. The developed area rainfall runoff exemption is not supported. The volume of rainfall captured on irrigation areas that is not included under a water access licence must be included under the 10% harvestable right that all landholders have access to.
10. Modelling assessment of the level of Floodplain Harvesting development at 1999/2000, as required by Water Sharing Plans, should be undertaken with a greater level of transparency and conservative assumptions.
11. IRN opposes increase of the Long Term Annual Average Extraction Limit to accommodate new Floodplain Harvesting access license shares. The share of licensed floodplain extraction should be included under the existing volume of shares in each water source.
12. There is no transparent process around the determination of eligibility criteria, capability assessment or environmental assessment as described in the 2018 Policy.
13. The monitoring and metering policy needs to be finalised based on a rigorous, transparent and accountable process, supported by an adequate compliance regime, and fully implemented prior to the granting of new property rights.

Key Topics

1. Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020

The Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 (“the Regulation”) gives retrospective authorisation of structures on the floodplain that divert flood flows to the detriment of natural flooding and replenishment of river, wetland and floodplain health. The Regulation must be overturned.

IRN has concerns about the justification for the very rushed implementation of the Regulation on Friday 7 February 2020. The rushed manner in which the Regulation was adopted to respond to unexpected rainfall in the Gwydir and Namoi catchments in early February 2020 was unnecessary, unjustified and poorly executed.

We consider that a Section 324 order has adequate powers to restrict access to Floodplain Harvesting without applying a licence exemption. We note that such an order was also gazetted on Friday 7 February 2020.

While recognising that there is provision in the 2018 Floodplain Harvesting Policy for establishing a temporary exemption from the specified licensing and approvals requirements of the Water Management Act, the wording of the Regulation is problematic.

We note that the Regulation states that:

The exemption from the requirement for a water access licence applies only in relation to water management works, and the exemption from the requirement for a water supply work approval applies only in relation to water supply works—

(a) located on a floodplain, and

(b) constructed on or before 3 July 2008, or after 3 July 2008 in accordance with an approval under the Act, or a licence or approval under Part 2 or Part 8 of the Water Act 1912, for which an application was pending on that date.

We also note that the Regulation requires clause 39AA to be inserted into Schedule 1 of the Amendment of Water Management (General) Regulation 2018.

Clause 39AA states that:

***eligible work** means a water supply work (other than a work in respect of which an application for a water supply work approval has been refused) —*

(a) located on a floodplain, and

(b) constructed—

(i) on or before 3 July 2008, or

(ii) after 3 July 2008 in accordance with an approval under this Act, or a licence or approval under Part 2 or Part 8, respectively, of the former 1912 Act, for which an application had been made before 3 July 2008 but which, on that date, was yet to be determined.

This exemption appears to ignore works constructed on or before 3 July 2008 that do not have approval or have not made any application for approval under Part 2 or Part 8 of the Water Act 1912 or the Water Management Act 2000.

Our concern is that the Regulation, as currently worded, gives an exemption to floodplain works that do not have approval. This is a form of retrospective approval for works that have not been assessed under any formal process.

IRN does not support that Floodplain Harvesting extraction be given a temporary exemption from the required licences and approvals. There is currently no measurement of take in place. Flood flows during and at the end of this most extreme drought of record have significant environmental and social value, particularly for downstream water users.

First flush flows need to be protected through rules in Water Sharing Plans.

Floodplain Harvesting must be fully restricted until such time as all environmental assessment, modelling assessment, licensing processes and monitoring and measurement are in place.

2. Assessment of environmental and social impacts of Floodplain Harvesting

Flood waters provide very important environmental and cultural functions. The landscape of inland NSW and the arid western lands have evolved around the processes of intermittent flooding of the vast areas of floodplain.

Overland floodplain flows provide lateral connectivity between the river and its floodplain.

Floods allow nutrient exchange between floodplains and rivers, renewing fertility through silt deposits on land and replenishment of carbon and minerals in rivers. They also provide connectivity with downstream rivers. In NSW the Barwon-Darling river system is highly dependent on flows from its northern tributaries.

Floods replenish wetlands, lagoons and billabongs that provide critical drought refuge in dry times. They also recharge groundwater systems that support groundwater-dependent ecosystems such as springs, wetlands and vegetation remote from riverbanks.

These habitats are significant for native fish, waterbirds, reptiles and woodland bird and mammal species.

Because of the very flat surface of the western floodplains, flood waters move slowly over long distances, taking weeks and months to fill up the landscape and travel downstream.

Downstream communities and industries have developed on the replenishment of floods that fill waterholes, town weirs and grow vast areas of fodder. Receding floodwaters keep rivers flowing for long periods of time. Rivers have very high cultural value.

Most floods occur from higher rainfall at the top of catchments that then flow out onto the drier, lower rainfall plains connecting up with downstream rivers. The capture of floodwaters in the mid and lower catchments prevents the natural functions of flooding to meet its full potential downstream.

Significant environmental and cultural assets in the rivers are impacted by the harvesting of floodwaters.

The Gwydir and Macquarie Rivers have Ramsar listed wetlands, the Gwydir Wetlands and Macquarie Marshes. Both the Commonwealth and NSW Governments have obligations under various international treaties to protect these and all other wetlands and their dependent species, especially migratory waterbirds.

The Border Rivers and Namoi have important lagoon and billabong systems that can only refill through floodwaters. The Barwon-Darling has deep waterholes that provide drought refuge, especially for native fish.

The Natural Resources Commission review of the Barwon-Darling described the river as an ecological catastrophe, in view of the loss of vital flows to maintain environmental function.

Likewise, the communities and industries on the Barwon-Darling such as floodplain grazing, tourism and recreational fishing have had major social and economic impacts caused by the diversion of too much water upstream. The impact on First Nations people has been extreme.

In the final Review of the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Source, the Natural Resources Commission suggested when finalising and implementing the floodplain harvesting and storage policy DPIE-Water should recognise *“the importance of overland flows for river health, wetland and floodplain needs and downstream users’ water supply entitlements.”*

The Floodplain Harvesting Policy 2018 sets out the requirements of environmental assessment for the approval of water supply works or flood works. There is no public evidence that this form of assessment has been undertaken.

The cumulative impact of Floodplain Harvesting on environmental, cultural and social assets has not been assessed under any meaningful or transparent process.

It is vital that the full impact of Floodplain Harvesting on environmental assets and function, on cultural values and on downstream social assets is rigorously assessed prior to granting new, compensable private property rights in the form of Floodplain Harvesting licenses.

3. Water Management Act Amendment Bill 2014

IRN notes that amendments to the Water Management Act made in 2014 gave Floodplain Harvesting licenses compensable rights, prior to their existence.

Section 87AA Compensation payable in certain circumstances for reductions in water allocations arising after initial period that management plan is in force

(1) (f):

(f1) floodplain harvesting (regulated river) access licences,
(f2) floodplain harvesting (unregulated river) access licences

We do not support that proposed new, tradable private property rights for access to intermittent overland flows on the floodplain be granted compensable rights.

This change to the Water Management Act must be overturned.

However, while it is in place, this potential impost on the public purse emphasises the importance of getting the proposed license allocations right.

Current compensable rights for Floodplain Harvesting also emphasises the need for a rigorous cumulative environmental, cultural and social impact assessment prior to the granting of these rights.

4. NSW Floodplain Harvesting Policy 2018

IRN notes there have been major changes made to the NSW Floodplain Harvesting Policy since the first draft policy was released for public comment in 2010.

A number of these changes include:

- Tradeable rights
- 500% carry over rule
- Inclusion of rainfall runoff
- Setting the Long Term Annual Average Extraction Limit (LTAAEL)

Other issues with the policy include the eligibility criteria for Floodplain Harvesting works. This issue has been highlighted by the Regulation that is subject of this Parliamentary Inquiry

4.1 Tradeable rights

IRN has held a strong position against the trading of Floodplain Harvesting water access rights. We note that the concept of temporary trade has been removed from the policy. However, permanent trades will be equally difficult, resource-intensive, costly and difficult to manage for compliance purposes.

Permanent trades will require the removal of works. This will be a difficult process to manage and will require a high level of transparency. The management of compliance will need intensive scrutiny and costly staff resources.

Opportunistic access to intermittent flood flows should not be a tradeable right.

4.2 500% carry over rule

Changes in the policy over time have gone from a 200% carry over rule with annual average use over three years being equal to 300% of share component in the 2010 draft policy to a 500% use of share component in any one year in 2013 policy.

The amended 2018 policy does not provide any specific volume for carryover but now refers to account management rules established for each valley. The issue of Floodplain Harvesting carryover rules is now a very opaque process with no clear guidance or opportunity for community engagement.

However, the 2018 policy allows for unused allocations to be carried over from one year to the next with no restrictions on accrued volumes.

IRN strongly supports that only 100% of share component can be used when opportunistic access to intermittent flood flows are available and that any unused allocation cannot be carried over to following years.

The accumulation of carried over allocations from one year to the next will result in capacity to capture a large volume of overland flows, especially after a prolonged period of drought when storages are empty.

This is the circumstance that occurred in February this year when first flush flows were extracted after restrictions were lifted.

First flush flows are critical for replenishing dry river systems, floodplains, wetlands and groundwater sources. The capture of these flows through opportunistic harvesting before the water can enter river systems is a major environmental impact that must be addressed. These first critical flows must be protected from harvesting.

There must be no right to carryover volumes of unused entitlement. The extraction of water from the floodplain should be restricted to 100% of share allocation each year.

4.3 Inclusion of rainfall runoff

The assessment of Floodplain Harvesting volume for granting of new water access licences is now including rainfall runoff in the model.

The inclusion of rainfall runoff capture is a better indication of the share of water extracted through Floodplain Harvesting.

However, there is an exemption provided for take of rainfall runoff on an irrigation area when no other overland flow is being taken. This is known as the ‘developed area runoff exemption.’

This exemption is another example of the irrigation industry getting free access to water that no other industry has and is effectively double-dipping.

The volume of rainfall captured on irrigation areas that is not included under a water access licence must be included under the 10% harvestable right that all landholders have access to.

4.4 Setting the Long Term Annual Average Extraction Limit (LTAAEL)

The new regulated river Water Sharing Plans developed for accreditation under the Basin Plan include the level of development for Floodplain Harvesting that existed in the 1999/2000 water year in the average annual extraction calculations.

The LTAAEL for each regulated Water Sharing Plan is based on the lesser of:

- average annual extraction calculated under Murray-Darling Basin Agreement Cap baseline conditions
- average annual extraction calculated based on various levels of development and plan rules as identified in each plan.

The knowledge of the level of development for Floodplain Harvesting at 1999/2000 is based on various assumptions and guestimates to be included in the modelling assessment.

When the modelling assessment is finalised for calculating the volume of shares to be granted in Floodplain Harvesting entitlements it is proposed to adjust the LTAAEL on the basis of new information.

This process, using model assumptions based on a high level of guess work rather than on actual evidence, should be undertaken with a greater level of transparency and conservative inputs to the model.

The 2018 policy states that *‘In all water sources, the LTAAELs will be updated based on new information gathered through the assessment of eligible registrations of interest for floodplain harvesting’*.

IRN does not support that the LTAAEL in Water Sharing Plans or the Sustainable Diversion Limit set under the Basin Plan for each catchment can be raised based on the outcome of the Floodplain Harvesting model assessment.

Any shares allocated to Floodplain Harvesting should be met under current LTAAEL calculations rather than lifting the annual level of permissible take based on registrations of interest.

The fact that the irrigation industry in the NSW Northern Basin Rivers has had free, unmeasured and unlicensed access to ecologically and socially significant flood flows for over 30 years is no reason to increase the legal volume of water extraction. The share of licensed floodplain extraction should be included under the existing volume of shares in each water source.

4.5 Eligible works

The 2018 policy states that:

Only works constructed on or before 3 July 2008 in accordance with an approval or that did not require an approval, or for which a valid application under Part 2 or Part 8 of the Water Act 1912 or the WM Act was made on or before that date, are eligible for assessment under this policy.

The Floodplain Harvesting Implementation guideline specifies eligible works criteria as:

The criteria relate specifically to works capable of floodplain harvesting that, on or before 3 July 2008, were:

- constructed on a floodplain in accordance with an approval granted under Part 2 or Part 8 of the *Water Act 1912* or Part 3 of Chapter 3 of the *Water Management Act 2000*, or
- subject to a pending application for an approval to construct on a floodplain under Part 2 or Part 8 of the *Water Act 1912* or Part 3 of Chapter 3 of the *Water Management Act 2000*, or
- constructed on a floodplain and it can be proven that the work did not require an approval under Part 2 or Part 8 of the *Water Act 1912*.

The 2018 policy exempts any work with an existing approval from further environmental assessment. Eligible works without an approval must be assessed as a requirement of policy.

This is unacceptable: all and any works should be assessed for their environmental impact prior to issue of a licence, and without an assumption that the relevant works are acceptable

As mentioned above there is no public evidence that any environmental assessment or cumulative environmental assessment has been conducted.

While IRN does not support an exemption for Floodplain Harvesting until such time that all licensing and measurement is in place, the Regulation would be much clearer if eligible works were described in the above manner.

5. Floodplain Harvesting Monitoring Policy

The final policy has not yet appeared. The environmental stakeholder consultation held on 17 March identified a key problem with the proposed metering policy. The measurement of Floodplain Harvesting is proposed to be confined to metering at points of intake or a default method of gauge boards on storages. However, in some areas, such as the Macquarie Valley floodwaters can be diverted directly onto developed fields rather than through storages.

The measurement and monitoring of Floodplain Harvesting must be rigorous, accountable and in place before any access licenses are granted.

IN SUMMARY

IRN strongly recommends that:

1. The Regulation be overturned.
2. The full impact of Floodplain Harvesting on environmental assets and function, on cultural values and on downstream social assets is rigorously assessed prior to

granting new, compensable private property rights in the form of Floodplain Harvesting licenses.

3. Cumulative impact of Floodplain Harvesting on environmental, cultural and social assets is assessed through a transparent process.
4. Floodplain Harvesting is fully restricted until such time as all environmental assessment, modelling assessment, licensing processes and monitoring and measurement are in place.
5. First flush flows are protected through specific rules in Water Sharing Plans.
6. Modelling assessment of the level of Floodplain Harvesting development at 1999/2000, as required by Water Sharing Plans, is undertaken with a greater level of transparency and conservative assumptions.
7. A transparent process around the determination of eligibility criteria, capability assessment and environmental assessment as described in the 2018 Policy is adopted.
8. The share of licensed floodplain extraction is included under the existing volume of shares in each water source and not through an increase in the LTAAEL.
9. The monitoring and metering policy must be finalised based on a rigorous, transparent and accountable process, supported by an adequate compliance regime, and fully implemented prior to the granting of new property rights.

IRN strongly opposes:

1. The gazettal of the Regulation exempting the capture of overland flows prior to its measurement and management through licensing, and providing retrospective authorisation for floodplain works.
2. Compensable rights for floodplain harvesting access licenses.
3. Tradeable rights for opportunistic access to intermittent flood flows.
4. A right to carryover volumes of unused entitlement.
5. The developed area rainfall runoff exemption.

We trust that the Regulations Committee will fully consider the recommendations and issues raised in this submission and thank the Committee for the invitation to lodge IRN views.

Yours sincerely,

Anne Reeves
Hon Secretary