

**Submission  
No 5**

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

**Organisation:** Gwydir Valley Irrigators Association Inc

**Date Received:** 31 May 2020

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

by

NSW Upper House Regulation Committee

Submission by: Gwydir Valley Irrigators Association

**Terms of Reference:** That the Regulation Committee inquire into and report on the impact and implementation of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.

**Survey:** <https://www.surveymonkey.com/r/MKVWVTK> completed 31 May 2020

**1. What is your view on the way the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 was implemented? (max 1000 words)**

The Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 (“the regulation”) was a foreshadowed transitional and temporary step within the NSW Floodplains Policy (“the policy”) since 2013. The Department at the time and now, considered it necessary to provide a transitional coverage for water users with eligible works to address any legislative gaps during the conversion of licences from the *NSW Water Act 1912* to the *NSW Water Management Act 2000*. The policy reads<sup>1</sup>:

*“Providing a temporary exemption for floodplain harvesting from specified licensing and approvals requirements of the Water Management Act 2000 – 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 valley, the exemption will lapse and all floodplain harvesting activities will require a water supply work approval and a floodplain harvesting water access licence authorised under the Water Management Act 2000.”*

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<sup>1</sup> Page 6 [https://www.industry.nsw.gov.au/data/assets/pdf\\_file/0017/143441/NSW-Floodplain-harvesting-policy.pdf](https://www.industry.nsw.gov.au/data/assets/pdf_file/0017/143441/NSW-Floodplain-harvesting-policy.pdf)

Nonetheless, its implementation was plagued by poor timing and poor execution.

On this occasion, the NSW Government's own guidelines for developing good regulations<sup>2</sup> did not appear to be followed and if they were, maybe the confusion and misinformation surrounding the implementation of the regulation could have been avoided. As you will be aware, these guidelines include a clear set of principles and emphasise the need for the change should be clearly established in the public interest and that consultations should involve a range of stakeholders and the benefits and costs understood. In this case the Department has still not provided plain English summary explaining the key aspects of the Regulation especially the following:

1. Why it was needed; and
2. What are the likely impacts.

This lack of consultation and discussion is a clear failing as it raised unnecessary questions about the purpose and reasoning for the regulation, as well as whether it 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 prior to implementation given the regulation does not change the legal status of floodplain harvesting in NSW.

Whilst the transitional arrangements sit within the current policy, there is no evidence of an implementation timeline and no further background on the need for the regulation in any other documentation associated with the Healthy Floodplains Project. This includes the Implementation Guideline for the Healthy Floodplains Project<sup>3</sup> (although the need for an amendment to establish licences is). Nor is it mentioned in Floodplain Harvesting Action Plan<sup>4</sup>, released in 2019 as the road map for NSW to meet its obligations on better regulation of Floodplain Harvesting.

Furthermore, the need for the regulation remains unclear. No such transitional arrangements were required for any other historical conversions prior. But several state-wide issues regarding historical practices, were raised during consultation on the policy in 2018 and the action plan in 2019, which may have meant the regulation was needed.

There seemed little intention on implementing the planned regulation, until the extreme nature of this drought and the perceived need to undertake a temporary restriction on its use.

Finally the timing of the regulation on Thursday, 6 February 2020, meant that it created confusion the following day, with the purposes and reasoning when the NSW Government enacted a Section 324, Temporary Restriction (on 7 February 2020) on northern Murray Darling Basin Floodplain Harvesting activities. While the regulation provided a mechanism

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<sup>2</sup> [https://www.finance.nsw.gov.au/sites/default/files/guide\\_better\\_regulation\\_october\\_2016.pdf](https://www.finance.nsw.gov.au/sites/default/files/guide_better_regulation_october_2016.pdf)

<sup>3</sup> [https://www.industry.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0007/272338/floodplain-harvesting-implementation-guidelines.pdf](https://www.industry.nsw.gov.au/__data/assets/pdf_file/0007/272338/floodplain-harvesting-implementation-guidelines.pdf)

<sup>4</sup> [https://www.industry.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0015/272301/floodplain-harvesting-action-plan.pdf](https://www.industry.nsw.gov.au/__data/assets/pdf_file/0015/272301/floodplain-harvesting-action-plan.pdf)



for the NSW Government to enact a Section 324, Temporary Restriction within the Water Management Act 2000 the two actions should be considered as separate issues.

**2. What is your view on the impact of the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020? (max 1000 words)**

The regulation allows for the use of approved within the *Water Act 1912* or *Water Management Act 2000*, as flood protection (work) structures deemed eligible for floodplain harvesting to intercept, capture and store overland flow. Overland flow since 2014, is described by the Water Management Act 2000 in Section 4A<sup>5</sup> as:

*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.*

Given the definition of overland flow, this regulation was required to provide clarity to all water users within NSW, not just those within the five-valleys where the Healthy Floodplains Program is being implemented to licence and better regulate floodplain harvesting. That's because rainfall run-off and stormwater which is required by other NSW regulations (such as the NSW EPA Act) and various licence conditions, must be captured and retained on farm to avoid environmental impacts.

The GVIA understand the regulation's objective was to provide greater clarity for water users around NSW, in legitimately operating their farms as they have historically, for the purposes of avoiding non-compliance with other rules but also minimising environmental impacts. It is a state-wide regulation and not just for the five northern valleys where the Healthy Floodplains Project is being implemented.

Its implementation means that all water users are being 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*. For this reason alone, we support the regulation as it progresses the transition of these actions into the contemporary legislative framework, which will ultimately lead to improved regulation.

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<sup>5</sup> [http://classic.austlii.edu.au/au/legis/nsw/consol\\_act/wma2000166/s4a.html](http://classic.austlii.edu.au/au/legis/nsw/consol_act/wma2000166/s4a.html)



While the issuing of floodplain harvesting licences for this historical form of take, is not without its challenges and impacts on industry, it will ultimately lead to the following benefits:

- Licensing will protect the environment and users from further growth, providing certainty to communities who rely on floodplain flows.
- Restricting future growth will maintain and improve floodplain flows downstream, including any environmental assets.
- Regulation of access will be via a new three-fold compliance approach rather than the two options available today.
- Communities should have confidence that not only water volumes but floodplain works will be monitored, with all farms on the floodplain (not only irrigation farms) will have their works inspected to ensure they are compliant to current regulations.

The GVIA has supported implementation and are seeking finalisation as part of water resource planning because of these outcomes but also to better align the security of this water right with other entitlements already within the current regulatory framework, as a means to maintain the future of the industry and economic activity in our region and the others that rely on floodplain flows.

It is important to note that if the regulation didn't exist, water users would still have legitimate access to floodplain harvesting (including rainfall runoff) due to existing rights within the *Water Act 1912*. But that there remains uncertainty for water users elsewhere in NSW who are not transitioning to a licence for their historical and legitimate activity and for those where their works are approved under the *Water Management Act 2000*. That's because 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.

Additionally, there remains uncertainty for those water-users where there is a dispute with regarding eligibility of flood protection works to be used for floodplain harvesting, despite the historical practices. These water users must be provided the opportunity to resolve these issues through the anomalies process.

### **3. Do you have any other comments on this regulation? (max 500 words)**

The GVIA support the regulation as an interim measure to provide consistency in management of overland flow across NSW. Whereby legitimate and historical practices are now clearly exempted as part of this regulation, which can be replaced in the five northern NSW valleys where the Healthy Floodplains Project is being implemented, with volumetric licences by 2021. A new regulation would need to be considered for the rest of NSW. This would then ensure there are no administrative technical issues with water users around NSW operating their farms as they are required to (for other approvals) and have done historically.

It's important to note that this approach; either this regulation, or the establishment of volumetric licences for floodplain harvesting, or any new exemption, does not create new water. All arrangements are recognising these legitimate and historical practices and access, and converting descriptive takes under *NSW Water Act 1912* into the current regulatory framework of the *NSW Water Management Act 2000*.



Contemporising the regulatory framework provides NSW more tools to better measure and monitor take to ensure overall usage remains within limits, as set out in water sharing plans and the Basin Plan. Recognising all take is limited, means there will be impacts to those water users and dependent communities, where current access has exceeded historical limits (i.e. there is growth in extractions). But there are also benefits, more broadly to ensure the ongoing sustainability of the industry, as well as for communities everywhere that rely on floodplain flows.

The licencing of floodplain harvesting will enable improved protection for the environment and other users from further growth, providing certainty to everyone, including communities who rely on floodplain flows. It will maintain and improve floodplain flows downstream, including any environmental assets. It also means that new regulatory tools and levers can be used to manage extractions and well as enforce compliance, rather than relying on infrastructure approvals alone.

Importantly, the implementation of this regulation, should not preclude, nor substitute, the effective and timely implementation of the floodplain licencing framework under the Healthy Floodplains Project.

The GVIA does not see any benefit in a disallowance motion, now before the Parliament, given the temporary nature of this regulation and the fact that water users with eligible works approved under the *Water Act 1912* would still have an ongoing legitimate right to continue this historical practice. If it does go ahead, it would put at risk those water users who have their works now already approved under the *Water Management Act 2000* in accessing overland flow.

We do see an opportunity for the committee to provide further advice on how to implement such regulations with greater consultation within Government and within the community, particularly those impacted.

We do see this inquiry as an opportunity for the committee and others to learn more about floodplain harvesting and the Healthy Floodplains Project and gain further understanding of the benefits to all stakeholders of better regulation of this historical and legitimate source of water.

For more information visit our website<sup>6</sup> or contact the GVIA office. We are currently preparing a virtual farm tour regarding floodplain harvesting for the committee's viewing.

Submission ends.

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<sup>6</sup> <https://www.gvia.org.au/water-policy/water-management-framework/floodplain-flow-and-licensing/>