Submission No 8

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

Organisation: Environmental Defenders Office

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

The Environmental Defenders Office (EDO) welcomes the opportunity to make a brief submission in response to this inquiry into the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 (Regulation). The EDO is a national public interest environmental law centre with a long history of advising clients about various aspects of water law and policy, including in relation to the Murray-Darling Basin. This submission is divided into three parts. Note that while Part 1 does not directly respond to the question in this part of the questionnaire, we considered it important to provide some context before commenting more specifically on the Regulation.

Part 1: General comments and recommendations regarding regulatory framework

- The regulatory framework governing floodplain harvesting in NSW is inordinately complex. Based on our analysis, the Water Act 1912 (Water Act), Water Management Act 2000 (WM Act), certain water sharing plans, a number of regulations, floodplain management plans for several valleys and gazetted notices are variously applicable (depending on the context and valley).
- By way of example, this office searched through the NSW Government Gazette in order to determine the extent to which Parts 2 and 3 of Chapter 3 of the WM Act (licences and approvals) had been switched on by way of proclamation in relation to different water sharing plan areas (see editorial note under ss.55A and 88A of the WM Act). We found, for example, that the Water Management (Application of Act to Certain Water Sources) Proclamation (No 2) 2012 (2012 Proclamation) exempted water users in the following water sharing plan areas from the requirement to obtain a flood works approval under Part 3 of the WM Act:
    - Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012;
    - Water Sharing Plan for the Belubula Regulated River Water Source 2012;
    - Water Sharing Plan for the Macquarie Bogan Unregulated and Alluvial Water Sources 2012;
    - Water Sharing Plan for the Murrumbidgee Unregulated and Alluvial Water Sources 2012; and
- Water Sharing Plan for the Namoi Unregulated and Alluvial Water Sources 2012. We will touch on the significance of this exemption in relation to this regulation in Part 2 of this submission. However, and for the purposes of this Part, we wish to note that the regulatory complexity outlined above has given rise to considerable confusion regarding the law that applies in a given situation, which in turn fosters mistrust.
- We would accordingly recommend that the NSW Government publish, as a matter of urgency, a list of all applicable laws, policies, management plans and gazetted notices, their basic function and the circumstances in which they apply. We believe that this is necessary if the government is to improve the community's understanding of the regulatory framework applicable to floodplain harvesting and accordingly its ability to engage in reform processes. We also believe that improving transparency in relation to this highly complex framework will improve levels of trust and confidence in the system.

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

Part 2: Comments and recommendations regarding the Regulation.

- The Regulation creates an exemption in relation to, inter alia, the requirement to hold a water supply works approval, which is provided for under Part 3 of Chapter 3 of the WM Act.
- We note that it has been asserted that there has been no requirement to hold a water supply works approval to undertake floodplain harvesting; rather, where applicable, a flood works approval has been required. However, close examination of the definition of 'water supply work' (in the Dictionary of the WM Act) makes it clear that in certain circumstances, it would be necessary to hold a water supply works approval in order to construct a particular work to divert and store waters from a floodplain. Specifically, we note that the definition includes the following:
    - (b) a work (such as a tank or dam) for the purpose of capturing or storing water, or;
    - (d) any work (such as a bank or levee) that has, or could have, the effect of diverting water flowing to or from a water source, or
- To clarify, the definition of 'water source' (also contained in the Dictionary to the WM Act), includes overland flow.
- We further note that the definition of 'water supply work' outlined above could overlap with elements of the definition of 'flood work', which on the face of it gives rise to a question regarding which species of approval ought to apply when constructing a work on a floodplain. However, as the WM Act does not specify that the only type of approval required to construct works on a floodplain is a flood work approval, we can assume that the legislature intended both to apply, depending on the circumstances.
- Relevantly, we note that while the 2012 Proclamation created an exemption in relation to the requirement to obtain a flood works approval, no such exemption was created in relation to a water supply works approval. We further note that other Proclamations listed under ss. 55A of the WM Act also contain the same exemption flood works approvals (but no exemption in relation to water supply works approvals). See for example the Water Management (Application of Act to NSW Border Rivers Unregulated and Alluvial Water Sources) Proclamation 2012.
- We may therefore conclude that a proper construction of the WM Act would require certain landholders to hold a water supply works approval for any works that satisfy subsections (b) and (d) of the definition of a water supply work. On this basis, we think it is logical to assume that the Regulation (and the exemption contained therein) was made to prevent affected landholders from committing an offence under s. 91B of the WM Act (Constructing or using water supply work without, or otherwise than as authorised by, a water supply work approval).
- For the sake of completion, we note that it has been asserted that the Regulation was made to allow the Minister (or their delegate) to impose an embargo on floodplain harvesting under s.324 of the WM Act. We are intrigued by this assertion as based on our interpretation of s.324, the Minister already had broad discretion to impose an embargo, including in relation to the diversion of water from floodplains. Specifically, under s. 324(1), the Minister may declare that '…the taking of water from a specified water source is prohibited, or is subject to specified restrictions, as the case requires.'
- The definition of 'water source' set out in the Dictionary of the WM Act includes at subsection (b) 'one or more places where water occurs on or below the surface of the ground (including overland flow water flowing over or lying there for the time being),'. We can therefore see no reason why a regulation was required to empower the Minister to impose an embargo on floodplain harvesting.

- In light of the above, we recommend that the NSW Government publish a list of the number, type and location (valley) of works that are now exempted under the Regulation. This should include the storage capacity of any affected storages.

Do you have any other comments on this regulation?

Part 3: Other matters and recommendations

- There is a lack of transparency regarding the capacity of private dams used to store water taken from floodplains in northern NSW.
- There is also a lack of transparency surrounding the volumes that were taken during the most recent floodplain harvesting events (in early 2020), and the methods used to determine those volumes. While the Minister indicated in the media that 30GL was taken, no evidence was provided to support this claim. Nor was it placed in context (30GL out of how much water?). Some experts that we have spoken to have questioned this figure, suggesting that it is implausibly low. While we are unable to comment either way, we believe that this ambiguity reflects a need for much greater transparency vis à vis this issue.
- We therefore recommend that the NSW Government publish details of the aggregate storage capacity of all private dams used to store water during floodplain harvesting events in each affected valley in northern NSW.
- We further recommend that the NSW Government provide details of the precise methods that it used to estimate the volume taken during the most recent floodplain harvesting events; the approximate volume of water taken during each of these events (using the identified method); and the overall percentage that this volume represented (of each event).
- Again, we believe that this level of transparency is crucial if the community is to develop any level of trust in the management of floodplain harvesting in northern NSW.
- As a final point, we wish to note that while our office supports the licensing of floodplain harvesting, we have a number of concerns regarding, inter alia, the volumes that may be licensed in affected valleys in northern NSW; the lack of transparency surrounding this process; whether works that do not meet the eligibility criteria under the Floodplain Harvesting Policy will be decommissioned; and inconsistencies between the Floodplain Harvesting Policy and the Water Act 2007 (Cth).

  We can elaborate on these concerns if required.