

Level 5, 491 Kent Street,
Sydney NSW 2000

PO Box Q640,
Queen Victoria Building NSW 1230



Tel: 02 9264 3848
nswic@nswic.org.au
www.nswic.org.au

ABN: 49 087 281 746

SUBMISSION

Independent Assessment of the Management of the Northern Basin First Flush event

June 2020



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 *Independent Assessment of the management of the Northern Basin First Flush Event* (herein, the Assessment). This is an opportunity to provide the expertise of NSWIC members, particularly in their local, practical and operational knowledge of water management. This is with the aim of improving first flush management in the future.

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

The irrigation industry appreciated the need for a “first-flush” strategy given the extreme drought conditions prior to this event, and the many associated critical needs across system. However, it is not the view of the industry that “first-flush” actions, over and above those already embedded in Water Sharing Plans (WSPs), should become the norm.

It is the industry’s contention that existing WSPs already contain the rules that ensure system connectivity from flows the vast majority of times, and these rules should be abided by in all but the most exceptional circumstance.

In terms of the management of this series of events, as an industry we have significant concerns and these have been documented throughout the submission.

The NSW Government, and thus this Assessment, should be seeking to ensure the water management framework is able to operate effectively in a broad range of circumstances/scenarios, rather than on normalising the practice of suspending the regulatory framework. The **primary recommendation of this submission** is that management of first flush events should be **embedded within the proper regulatory framework**, rather than requiring the WSP to be suspended as common practice. This would be the best-practice and most transparent outcome for all involved.

The first flush of water is what kick-starts drought recovery, and any uncertainty over the management of this water delays drought recovery, and undermines business and community confidence. A clear process is required to give confidence to downstream communities regarding flow assessment and priority of access, and to enable farmers to understand the rules under which their businesses needs to operate when a drought does break. This process must be undertaken with a clear methodology, based on the best-available scientific data, and communicated to communities both up and downstream.

The step missing for all communities is to have transparency in the targets set, the assessment of flows, and the timing of decisions to provide confidence that critical human need requirements will be met. The best-case scenario would be ensuring the water management framework is suitably robust to manage first flush events, so that the heavily flawed approach of actively managing the event as it happens should not be necessary again in the future.

The irrigation industry are on record requesting improvements to the process to manage first flush events (prior to this event), and specifically have been calling for clarity to how the public interest test is applied and determined. For example, a copy of the letter NSWIC sent to Minister Blair in 2018 is available [\[HERE\]](#).¹

NSWIC feel that this Assessment should be expanded to include assessment of the benefits and impacts of the management of the event. For example, questions should be asked around what the benefits were (more detailed than simply delivering volumes to Menindee Lakes), what the costs and consequent impacts were, and whether this was the most efficient and best-practice way for those objectives to be reached (e.g. was this the least possible impact approach).

¹ https://www.nswic.org.au/wordpress/wp-content/uploads/2020/02/180815_NSW-Irrigators-Council-Letter-Public-Interest-Test.pdf



Contents

Introduction.....	2
NSW Irrigators’ Council’s Guiding Principles	3
Overview	4
Submission.....	6
1) Decision-making processes - application of the legal framework for imposing or lifting restrictions	6
1A) S324 and the Public Interest Test	6
1B) Communication and Transparency.....	8
1C) Resourcing of Agencies	12
2) Effectiveness of current and proposed regulatory tools;	13
FPH Exemption Regulation	16
Water Property Rights.....	18
3) Alignment with Review Recommendations.....	18
Conclusion	21
Appendix 1: Example of a proposed S324 Regulation.....	22



Submission

1) Decision-making processes - application of the legal framework for imposing or lifting restrictions

1A) S324 and the Public Interest Test

Overview

Clear justification of the public interest test is required. A clearly defined framework to guide the application of S324 is necessary to enable farmers to understand the rules under which their businesses need to operate when a drought does break, and to give confidence to downstream communities regarding flow assessment and priority of access.

Application of S324 must balance addressing emergency situations with protecting the integrity of the water management framework. This means that application of S324 must be seen as a short-term measure, and a priority of Government during these events should be restoring water sharing arrangements in a clear and timely manner, once the ‘emergency’ high-priority needs have been suitably addressed.

In February 2020, amidst this event, NSWIC issued a Media Release summarising this view:

“Our irrigation community has respected this short-term measure which represented the most comprehensive protection of inflows ever applied, but suspending laws is never a long term solution, and it is disappointing that the Department have not sought to quickly reinstate the rules.”

Background

S324 of the Water Management Act 2000 (the Act) provides the Minister with the power to prohibit or restrict the taking of water if it is necessary to do so in the public interest. This section is effectively an emergency power for the Minister to take action when the water management framework is unable to manage an extreme or unforeseen event, such as unprecedented low inflows.

Specifically, Section 324 of the Act states:

*324 Temporary water restrictions
(1) If satisfied that it is necessary to do so in the public interest (such as (but not limited to) to cope with a water shortage, threat to public health or safety or to manage water for environmental purposes), the Minister may, by order in writing, direct that, for a specified period, the taking of water from a specified water source is prohibited, or is subject to specified restrictions, as the case requires.*

Typically, S324 has been applied in unprecedented circumstances - essentially inflows and/or transmission losses that were worse than any previously recorded. This has previously included:

- Changes to allocations in the Murray and Murrumbidgee Valleys during the millennium drought to allow efficient allocations to be made for towns, stock and domestic, and high security requirements, and
- To restrict supplementary access in the northern regulated river systems and the Barwon-Darling to ensure that supplies could be maintained for Broken Hill.



In 2018, S324 was expanded to include “to manage water for environmental purposes” within the scope of the public interest requirement. Whilst not excluded previously, this change represents a significant widening of the scope of its application compared to past practice.

The intent of S324 is to manage events more severe than anticipated when water sharing plans were made - which is, in-principle, accepted. However, any expansion of its application beyond that intention has the potential to undermine the bulk access regime set by the water management framework. This also undermines property rights of water entitlement holders.

Recommendation

Recommendation:

The NSW Government should expedite the development of a regulation that codifies the application of section 324 of the Act to ensure a clear and transparent framework to guide Government on finding a balance between addressing emergency situations and protecting the integrity of the water management framework.

The S324 regulation must:

- Provide clarity to all stakeholders under which circumstances section 324 will be invoked;
- Confine the circumstances when these powers can be used, such as circumstances that:
 - Are a genuine emergency where there is a threat to people or property,
 - Would result in irreparable or long-term harm without intervention,
 - Were not envisaged or considered when the relevant water sharing plan was made, or
 - Not able to be reasonably managed under the normal operation of the water management framework.
- Require management of such a circumstance to be brought within the water management framework (if possible) within a reasonable timeframe:
 - E.g. not to be used repeatedly for the same or similar purposes - consideration of the likelihood that a similar order would be required in the future and thereby impact consumptive water user property rights whilst avoiding the compensation provisions of the Act.
 - This may include sunset provisions.
- Provide a mechanism to assess, review and publicly report on the action;
- Enable the development of a mitigation strategy²;
- Be accompanied by a comprehensive public statement that outlines the benefits and costs of the proposed action.
 - Identification of what (for whom) the public interest is,
 - A recognition/assessment/summary of the benefits and impacts of the proposed action.

Drafting of a proposed S324 regulation, as an example of what is required to meet these requirements, is provided as **Appendix 1**.

² An example of a mitigating action could be to allow unregulated river licences or supplementary water access licences additional access to uncontrolled flows to make up for lost extraction opportunity.



1B) Communication and Transparency

Flow Targets

One of the most significant concerns in the management of this event was transparency. The lack of firm target during this event was unacceptable, and sparked significant concerns over the transparency of decision-making. In normal circumstances, WSPs outline the flow targets for how much water is required to make it downstream based on the best available science, and as determined by hydrologists. However, when these plans are suspended, there is little information available to show how and why new flow targets are established. During this event, NSWIC actually had to call on the NSW Department to establish flow targets to give certainty to water users as to when normal established water sharing arrangements would resume.

NSWIC said in a Media Release during the event:

“All we are asking for is a flow target for this event that would give downstream communities certainty that water is on its way to serve their needs, including the needs of the environment; whilst giving upstream communities certainty that they will be able to recover from drought during this critical opportunity. We need certainty so we can all recover from this drought.”

Whilst a target was eventually established, it then continued to change without justification or explanation, which only fuelled uncertainty. These changes were significant, with the initial target at 60-70GL in Menindee Lakes, which eventually significantly increased over the period to later reach a 200GL target.³ This is approximately 3 times the initial target.

The flow targets are now explained in the DPIE Factsheet⁴, but it is noted that this Factsheet was written in May 2020, well after the event (see copyright statement). This includes:

“This was based on a flow sufficient to re-fill the drought block banks and to provide domestic and stock supplies along the Lower Darling (approximately 20- 30 GL), and to retain a volume of around 40 GL in Lake Wetherell as a drought refuge. This was based on a flow sufficient to re-fill the drought block banks and to provide domestic and stock supplies along the Lower Darling (approximately 20- 30 GL), and to retain a volume of around 40 GL in Lake Wetherell as a drought refuge.

Similarly, as flows continued to occur in the northern valleys, the department looked to securing 12 months’ essential supply in the major northern storages before considering allowing access to general security water held in accounts.”

With the initial flow target of 60-70GL established, water users were then closely watching the WaterNSW Operations Updates to see when this flow target would be reached. The critical information provided in each of these updates, at each point in time, is displayed in Table 1.

Table 1: Forecast Estimates of Flows to Lake Wetherell based on WaterNSW Operations Updates

Date of Update	Observed Volume	Total Forecast Volume – including already observed (ML)	Date or expected date of flow arrival
10 Feb	0	0 -5,000	18-26 March

³ https://www.industry.nsw.gov.au/data/assets/pdf_file/0015/301416/northern-basin-restriction-triggers-and-principles-fact-sheet.pdf

⁴ https://www.industry.nsw.gov.au/data/assets/pdf_file/0015/301416/northern-basin-restriction-triggers-and-principles-fact-sheet.pdf



12 Feb ⁵	0	10,000-30,000	18-26 March
14 Feb ⁶	0	15,000 -35,000	18-26 March
17 Feb ⁷	0	15,000 -35,000	18-26 March
18 Feb ⁸	0	25,000 -45,000	18-26 March
19 Feb ⁹	0	30,000 - 60,000	15-27 March
21 Feb ¹⁰	0	60,000 - 80,000	15-27 March
24 Feb ¹¹	0	85,000 - 105,000	15-27 March
28 Feb ¹²	0	150,000 - 170,000	7-15 March
2 Mar ¹³	0	170,000 - 200,000	7-15 March
4 Mar ¹⁴	0	215,000 - 240,000	7-15 March
6 Mar ¹⁵	0	205,000 - 250,000	10-17 March
9 Mar ¹⁶	0	230,000 - 285,000	10-15 March
11 Mar ¹⁷	0	250,000 - 305,000	10 March
13 Mar ¹⁸	24,606	250,000 - 305,000	10 March
18 Mar ¹⁹	80,142	275,000 - 340,000	10 March
23 Mar ²⁰	143,520	290,000 - 355,000	10 March
27 Mar ²¹	186,123	325,000 - 380,000	10 March
30 Mar ²²	208,500	340,000 - 390,000	10 March
1 April ²³	227,210	365,000 - 405,000	10 March

⁵ https://www.waternsw.com.au/data/assets/pdf_file/0003/153660/Barwon-Darling-flow-12-Februray-2020.pdf

⁶ https://www.waternsw.com.au/data/assets/pdf_file/0011/153794/200214-Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-14-Feb-2020.pdf

⁷ https://www.waternsw.com.au/data/assets/pdf_file/0004/153832/Barwon-Darling-flow-from-Feb-2020-rainfall-event-17-Feb-2020.pdf

⁸ This Update has since been removed from the website. NSWIC can provide a saved copy upon request.

⁹ https://www.waternsw.com.au/data/assets/pdf_file/0010/153991/200219-Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-19-Feb-2020.pdf

¹⁰ https://www.waternsw.com.au/data/assets/pdf_file/0004/154084/Ops-Update-BD-Flow-21-Feb.pdf

¹¹ https://www.waternsw.com.au/data/assets/pdf_file/0019/154126/200224-Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-24-Feb-2020.pdf

¹² https://www.waternsw.com.au/data/assets/pdf_file/0019/154306/200228-Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-28-Feb-2020.pdf

¹³ https://www.waternsw.com.au/data/assets/pdf_file/0017/154340/200302-Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-2-Mar-2020.pdf

¹⁴ https://www.waternsw.com.au/data/assets/pdf_file/0005/154427/200304-Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-4-Mar-2020.pdf

¹⁵ https://www.waternsw.com.au/data/assets/pdf_file/0004/154642/200306-Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-6-Mar-2020.pdf

¹⁶ https://www.waternsw.com.au/data/assets/pdf_file/0003/154731/200309-Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-9-Mar-2020.pdf

¹⁷ https://www.waternsw.com.au/data/assets/pdf_file/0003/154875/200311-Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-11-Mar-2020.pdf

¹⁸ https://www.waternsw.com.au/data/assets/pdf_file/0009/154971/200313-Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-13-Mar-2020.pdf

¹⁹ https://www.waternsw.com.au/data/assets/pdf_file/0014/155102/Barwon-Darling-Flow-Update-18-Mar-2020.pdf

²⁰ https://www.waternsw.com.au/data/assets/pdf_file/0018/155250/Operations-Update-Barwon-Darling-flow-from-Feb-2020-rainfall-event-23-Mar-2020.pdf

²¹ https://www.waternsw.com.au/data/assets/pdf_file/0004/155443/Barwon-Darling-Flow-Update-27-Mar-2020.pdf

²² https://www.waternsw.com.au/data/assets/pdf_file/0006/155526/Barwon-Darling-Flow-Update-30-Mar-2020.pdf

²³ https://www.waternsw.com.au/data/assets/pdf_file/0003/155649/Barwon-Darling-Flow-Update-1-Apr-2020.pdf



By April 1st for example, the water flowing into Menindee Lakes was 592% of the initial flow target²⁴. This large figure above the initial flow target, with no justification for why the flow target had changed at the time, understandably caused angst amongst water users.

It is important to note that the NSW Minister for Water is no longer responsible for this, as the Department of Planning, Industry and Environment - Water Division (DPIE-Water) now has the delegated authority to make determinations of temporary restrictions (as of 2018). We understand that this change was an outcome of the Matthews Inquiry. We do not believe that the effects of this change were positive in this case at this time, as it meant the decision-making lacked due process, was not transparent, and lacked communication and responsiveness. Ultimately, flow targets should be (and are) established in WSPs, and the role of the Minister and DPIE-Water should be facilitating those scientifically determined and agreed upon flow targets to be met, by adhering to established water sharing arrangements wherever possible. That is the most appropriate and transparent option.

NSWIC note that in in DPIE Factsheet²⁵, it says:

“The volumetric targets were interim and were adopted as a guide to decision-making as the Northern Basin rainfall events unfolded. The extent to which the targets were met, the appropriateness of the targets, and the outcomes of the restrictions are being further evaluated.”

NSWIC do not feel it was best-practice to determine flow targets amidst the event itself, as this did not allow sufficient time to properly develop the targets, for them to be subject to scientific assessment, nor did it allow for an assessment of the costs and benefits of all options, or for any consultation/communication on those targets and how they were set/implemented. Government must have confidence to set and lock-in targets and objectives at the forefront (well ahead of time) and work to those set objectives. There was a conflation of ‘flow targets’ and ‘flow forecasting’ in the management of this event. These are separate and should thus be considered separately. Treating these components separately allows decision-making on forecasting to be independent of flow targets (which did not occur for this event). It would also allow for clear assessment of the effectiveness of the flow forecasting.

Flow targets and objectives should not only be communicated publicly, but also within and between Government agencies, so that personnel are all on the same page and working to the same objectives.

Furthermore, the outcomes (both intended and actual) from the water that is forgone under restrictions must be clearly communicated to all. This is due to:

- The magnitude of flows that have been foregone by those upstream communities to address critical needs; and
- The need to demonstrate to downstream communities that the event was managed in a way that resulted in high-priority needs being sufficiently met and prioritised.

18 February Update

NSWIC had significant concerns with one of the WaterNSW Operations Updates – the 18th February 2020. It was not considered appropriate or professional for this Update to include comments on storage capacity of a specific property (i.e. Cubbie Station). The Update stated:

²⁴ Median of initial flow target range = 65,000ML. Median of forecast flows range (April 1st) = 385,00ML.

Percentage of the initial target forecast to reach Menindee Lakes = $385,000 / 65,000 \times 100 = 592.30769...%$.

²⁵ https://www.industry.nsw.gov.au/data/assets/pdf_file/0015/301416/northern-basin-restriction-triggers-and-principles-fact-sheet.pdf



“Inflows to the Barwon Darling will depend on extraction volume and there is around 500GL on farm storages near Cubbie station. No inflow is considered from that system yet.”

Not only is it misleading and incorrect to correlate storage capacity with water access opportunity, but this was inappropriate fearmongering to imply a significant impact on inflows from extractions from a singled out specific property. This is not acceptable conduct. The Update was removed following concerns being raised.

Recommendations:

- Greater transparency and certainty is required in the setting of flow targets.
- Flow targets should be scientifically determined, based on best-available data, set with a clear methodology, and this should be communicated publicly.
- Flow targets (or at least frameworks to establish flow targets) should be established in WSPs (e.g. prior to the event), so there is greater preparedness when an event does occur.
- Any changes to flow targets during an event should be avoided, but *if* required, must be accompanied by a justification for the change, including explanation of the changed circumstances since the flow target was established which were unforeseeable at the time.
- Flow targets must consider the needs of all users across the system - downstream and upstream - in a fair, equitable and impartial way.
- This Assessment should assess the appropriateness of established targets, how they were set, how they were communicated, what they achieved, and how they were reported on.

Countering Misinformation

During the event there was significant misinformation circulating in the public domain (including by the media, MPs and individuals), and it should be a role of Government to actively communicate factual information and counter any misinformation. This should occur through the provision of accurate and timely information. The risk of information not being publicly available/accessible, or misinformation not being corrected, is that it undermines confidence in the management of the event, and also unfairly undermines the social licence of irrigation. Additionally, this has impacts on the mental health of the people involved, who face unsubstantiated allegations circulating in the public domain about their livelihoods.

Water users had to call on DPIE-Water to communicate key figures, such as the volumes of water which were actually taken during access opportunities, in order to counter incorrect claims. There were claims circulating at the time of volumes of up to 5000GL being ‘unlawfully’ taken through Floodplain Harvesting (FPH), when in fact, there was just 32GL taken in what was a legal access opportunity. The NSW Department clarified this figure in their May 2020 ‘Water News’ which was positive, however, this should have occurred sooner as reputational damage had already occurred. The ‘Water News’ states:

“In a world first, the NSW Government has used sensor technology to estimate the volume of floodplain harvesting captured in private water storages in the Northern Basin valleys.

LiDAR is a high-resolution, remote sensing technology that constructs 3D images, and when used in combination with traditional 2D satellite imagery, allows for a more accurate measurement of floodplain storage capacities and water take.



*'Using this technology, we were able to assess the volume of water harvested was around 32 GL during this time. Now, over 380 GL has made it to the Menindee Lakes, reconnecting the Lower Darling to the Murray River for the first time since 2016', said Minister Pavey.*²⁶

Recommendation:

Community understanding is vital, and Government must be proactive to improve water literacy and facilitate a single source of truth for water information, as part of elevating public confidence and countering misinformation.

Government must provide accurate and timely information.

1C) Resourcing of Agencies

There was a tendency for decisions to be implemented late on a Friday afternoon, which meant that if work was not finalised, or if stakeholders had queries about the decision, there was no one available to contact until Monday morning. This time period is significant, as between Friday afternoon and Monday morning, water in many parts would have flowed on, and the opportunity for water access would have ceased. In many cases, this was the difference between the beginning of drought recovery and not. The sense of urgency felt by water users is because flows move through a community and the window of access opportunity is limited. Once water flows on, it is gone to that community, and cannot be recovered back. This sense of urgency was not reciprocated by agency staff, and unfortunately, delays due to time lags, resourcing and uncertain processes, meant many water users missed opportunity for water access unjustifiably.

Recommendation:

Processes and requirements must be put in place to ensure timely implementation from decision-making – both to minimise lost opportunity for water users due to time lags, and to minimise the period of uncertainty for all involved (e.g. to ensure protections are in place for high priority needs).

Water users who did contact the Department with queries outside of business hours – e.g. over the weekend via email – were responded to by senior agency staff condemning their actions of contacting staff on the weekend. When water users clarified that they were not expecting an immediate response, and respected the rest time of staff, they were still met with resistance. In most instances, the information being sought was critical points of clarification around access arrangements.

In 'emergency' situations such as this, where rules are unprecedented and unpredictable, water users require a point of contact to seek clarification about the arrangements. This point(s) of contact should be readily available and able to assist water users with queries. During this time period, there was enormous pressure and strain on local water user representative groups who had water users calling them asking questions. This put enormous

²⁶ Water News (May 2020): http://planning-nsw.gov.au-2148779.hs-sites.com/water-news-may-2020-sensor-technology-measuring-floodplain-harvesting-apply-for-water-caring-rebate-drought-update-and-more?acid=ACsprvuDIJibh3bAZehf5d_caLEI6RRdXPTozPvt4r7N5yvBKwDbmCXniBQ8I-JX_shk27-AlaMr&_hsmi=88823408&_hsenc=p2ANqtz-DUuzPLpRjCEdYxyBqy6SDpKIbQXbt8rFCsUKSA6qt6NJdnC68EurBl7ZigwsTQq6Xf12ppvM6INDO3azUEo7SE4xmaQ



responsibility on the shoulders of their staff, despite the staff also having little information provided by Government on what the rules were, why they were as they were, and what they could be anticipating to change in coming days. Water users who were impacted by the embargo were anxious and frustrated, and fearful of inadvertently breaking the rules which they were not clear on. Ultimately, it should be up to Government to ensure that the arrangements are clearly understood by stakeholders. In this event, Government did not even have a database to communicate to people that the restrictions had been lifted.

These points are consistent with the Matthews final report, which states:

“...that is no reason for the department to be hesitant about close consultation with irrigator groups in the future. Indeed, the department has a special obligation to understand the views of irrigators, and irrigators have a right to be heard.”²⁷

Recommendation:

Water users require a point of contact from the onset to seek information and clarification of rules, particularly where new rules and arrangements are in place that differ to standard practice / business as usual arrangements, and are thus unpredictable. The point of contact must be easily accessible, and able to work outside of usual business hours.

Government must have a database of water users so timely communications can occur.

A further grievance expressed by water users during this period, was that there was a common perception by agency staff that this was ‘the end of the drought’, and this perception was reflected in the way it was managed. For many water users who had faced 3 years of extreme drought, there was less certainty that this was a ‘drought breaking’ event, but rather an intermission amidst the drought. There was an assumption that water users who missed out this time, would have access next time, yet there was little certainty or confidence about when ‘next time’ would be and what would be different then. Rural communities understand that drought recovery is a long process, and were eager for the road to recovery to commence. The ‘end of the drought’ mentality should not be adopted or assumed in managing events of this kind, as this cannot be guaranteed. In many areas, there still has not been rainfall or flows of that magnitude since this event took place.

Recommendation:

The management of first flush events should not assume a drought has ended, and thus, every drop of water must be managed with the highest regard.

2) Effectiveness of current and proposed regulatory tools;

Generally speaking, it is difficult to comment on the effectiveness of ‘current regulatory tools’ given those tools had been suspended for the purposes of this event, and the alternative arrangements are not clearly defined in regulations. NSWIC note that the approach of Queensland is to stand by their WSPs, rather than using embargos, and if the WSP is unable to satisfy the needs/requirements than the WSPs would be updated so that it does. NSWIC are concerned if this Assessment purely seeks to better manage embargos in the future, as ultimately, the NSW Government should be seeking to ensure the water management

²⁷ Matthews Final Report (P 17):

https://www.industry.nsw.gov.au/data/assets/pdf_file/0019/131905/Matthews-final-report-NSW-water-management-and-compliance.pdf



framework (e.g. WSPs) are able to operate effectively in a broad range of circumstances (thus reducing the need for embargos into the future).

The focus of the NSW Government, and thus this Assessment, should be working to improve the effectiveness of the water management framework so that it can cater for a broad range of circumstances/scenarios, rather than on normalising or accepting the practice of suspending the regulatory framework. That would be the best-practice and most transparent option. The departure from the water management framework has been described as *disrespectful*, and as a motion of no-confidence in management framework by Government, which is unhelpful in efforts to improve public confidence in water management. It also makes the management of the event susceptible to being politicised, rather than being on evidence-based and thoroughly developed measures.

NSWIC are highly concerned that the departure from the established regulatory framework enables DPIE-Water to pick winners and losers, which is not appropriate, particularly with little or no time to consult and identify ways to mitigate impacts. The management of a first flush event must consider the needs of all users across the system - downstream and upstream - in a fair, equitable and impartial way. NSWIC feel the best way to do this is by ensuring the established water management framework is able to cater for a broad range of circumstances, to limit the need for suspensions.

The optimal best-practice outcome would be having a robust water management framework that means there is no need for the management of a first flush event in this way again.

Recommendation:

The NSW Government, and thus this Assessment, should be seeking to ensure the water management framework (e.g. WSPs) are able to operate effectively in a broad range of circumstances, rather than on normalising or accepting the practice of suspending the regulatory framework.

The management of first flush events should be embedded within WSPs, rather than requiring the WSP to be switched off.

Clear triggers for the implementation and lifting of restrictions must be established.

Furthermore, NSWIC note that in the decision-making of lifting/applying restrictions in certain reaches of particular rivers, there was little understanding by Government agencies that reinstating the WSP would actually deliver significant flows (as required under the WSP), meeting many (in some cases all) of the targeted objectives. In many instances, the WSP would have satisfied the intended objectives of the embargo, had the WSP been in place. The implication that an embargo was required to meet the objectives showed little understanding of the WSP by agency staff, and reflected a highly faulted process that lacked proper investigation of whether such significant measures were required and justifiable.

NSWIC also remind the Panel that under law, regulatory measures must be a proportionate response to meet the situation that it is intended to address. Whilst the situations in these circumstances were indeed severe (e.g. meeting critical human need) - the extent, breadth and longevity of the measures, as well as the impacts, and the implementation issues, should be investigated. We draw the attention of the Panel to the recent precedent set around the use of wide powers as being *capricious and unreasonable*²⁸. Under law, when using a wide power such as this, the decision-maker is not to make unnecessary limitations on the common law right of persons to carry on their lawful business. The common test to ascertain if a provision

²⁸ Brett Cattle Company Pty Ltd v Minister for Agriculture [2020] FCA 732

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0732>



is unnecessary, is to consider if there is an *obvious and compelling alternative*²⁹. NSWIC seek that the Panel investigate such alternatives.

2A) Process for water users to provide input into the active management of the event

NSWIC would like to comment on the processes which were in place for water users to provide information to Government for this event – particularly regarding the active management of this event (i.e. application and lifting of restrictions). NSWIC wish to reiterate that the NSW Water Minister was very clear during this event that responsibility had been delegated to DPIE-Water, and the Minister was not involved in the decision-making.

If events are to be actively managed, it is very important for Government to have access to information on the ground as the event is happening. It is thus very important that appropriate channels are established for this information to be provided to Government. During this event, the process for water users to contact Government to provide on-ground information to inform the event being actively managed was:

- Water users and water user groups could contact WaterNSW and provide evidence of what was happening on the ground;
- That evidence was then fed into an embargo discussion (occurring twice daily, or on demand, depending on circumstances) involving DPIE-Water and WaterNSW;
- DPIE-Water were then to make a decision.

This was the established process (which water users were asked to follow), and this was what followed.

NSWIC would also like to emphasise that the role of peak bodies is to represent water users and to provide a forum to ensure (1) Government are aware of the needs of water users across NSW, (2) water users are able to provide feedback to Government on the effectiveness and appropriateness of policy in meeting those needs, and (3) to be a liaison between water users and Government, such as to assist in communications. The involvement of water users and water user groups is thus an important component in the active management of events.

Recommendation:

Local knowledge is essential to effectively managing flows, particularly to inform understandings of risks and behaviours.

Consultation and engagement prior to, and during, the first flush event is critical. Appropriate channels/forums must be established to facilitate this.

Case Study: Embargo of FPH

This event was the first time FPH had been subject to an embargo. The frustration expressed by water users is not to do with the principle of applying an embargo on FPH, but the way in which it was done and how it was managed.

Implementation

The notification of the temporary restriction order was made at the last minute on a Friday afternoon (the media release was sent at 4.04pm) and a notice was sent to farmers at 5.15pm. This was the first-time such a requirement had been made. No information or detail on how a farmer could reasonably comply with the new rules was provided.

²⁹ Ibid.



Water user groups urgently asked DPIE-Water, NRAR and WaterNSW to ensure that all farmers were provided adequate information and that a process be implemented to manage issues when and if they develop due to the rain.

The Department subsequently provided additional explanatory material via email on Saturday afternoon but refused to provide a contact for farmers to ask questions about how they could operate their farms. DPIE-Water provided an email address for farmers to contact late on Monday afternoon.

Impact

Throughout the weekend, farmers impacted by rainfall and flooding in many cases were faced with not only the challenges of managing an excessive amount of water, but also trying to operate their farms differently to how they are specifically designed, given the change in rules, which were not clearly understood.

In some instances, overland flows could not be excluded and were causing damage to roads and other infrastructure. In other instances, the exclusion of overland flows meant that their farms could not operate properly, which also caused damage. Flood heights and flood direction was unusual and somewhat unpredictable, given the change in historical practice (of FPH) and the intensity in which the rain fell in isolated areas. For example, above Narrabri this local water was higher than the 2012 floods in sheds and around farms.

The limited gauging network in these areas and the reporting delay of real time data, meant that information from those on the ground was crucial to better understanding where water was and where it was heading. Water users groups followed the process established and provided evidence of the flooding and flow monitoring. This information was forwarded onto WaterNSW to review and assess with DPIE Water (as per the aforementioned process).

DPIE-Water in communicating their decision to lift the embargo announced:

- They were satisfied there is sufficient water available for higher priority needs to approve the take of floodplain water at the locations, and for the limited period.
- Interim flow targets within the valleys had been met and downstream forecasts would provide connectivity.
- The main intent of lifting this order to minimise flood impacts and allow farmers to move water around their property to avoid damage to on-farm infrastructure.

Furthermore, there was an information gap during the lifting of the FPH embargo, which water user groups had to fill. The Government risk assessment was based on storage capacity, rather than opportunity or intake capacity. At the time, the Department were unable to determine the volume of water which could be taken during this period (later confirmed at 32GL). Water user groups thus had to fill this gap, by asking those involved to provide this data, and they then provided this information to Government. This was to ensure the information was captured correctly, out of fear that speculation would emerge (as it did with speculations of up to 5000GL of water), and also out of fear of compliance concerns. It should be noted that Government was able to later determine these figures using lidar technology.

FPH Exemption Regulation

NSWIC note that the FPH Exemption Regulation came into effect on 6 February 2020, the day before the temporary water restrictions were put in place on 7 February 2020. This created enormous and unnecessary confusion, both for the general public but also for MPs.



Given the Exemption Regulation was foreshadowed in the NSW Floodplains Harvesting Policy³⁰, there should have been better consideration of the timing of implementation of the Exemption Regulation to ensure it did not get conflated with other events.

More information on the FPH Exemption Regulation can be found in the NSWIC Submission³¹. Key points from the NSWIC submission include:

- NSWIC support the Exemption Regulation as an interim transitional measure whilst the NSW Healthy Floodplains Project (HFP) is implemented to bring Floodplain Harvesting into the contemporary legislative framework.
- The implementation of this Regulation should not preclude, nor substitute, the effective and timely implementation of the FPH licencing framework under the HFP.
- 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.
- Given the definition of overland flow includes rainfall runoff and stormwater, this regulation impacts water users across the state, due to other regulations requiring farmers to capture and retain runoff and stormwater on-farm to avoid potential environmental impacts (such as contamination).
- 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.

Whilst Government could have provided positive communications to the general public of the first ever embargo of FPH, that news story was overshadowed by the misunderstood Exemption Regulation.

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

Recommendation:

The FPH Exemption Regulation, and the FPH Embargo, are separate matters and should be considered separately by Government.

More information [[HERE](#)].

³⁰ NSW Floodplain Harvesting Policy (P 6):

https://www.industry.nsw.gov.au/_data/assets/pdf_file/0017/143441/NSW-Floodplain-harvesting-policy.pdf

“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.”

³¹ <https://www.nswic.org.au/wordpress/wp-content/uploads/2020/06/2020-05-29-NSWIC-Submission-FPH-Exemption-Regulation.pdf>



Water Property Rights

The application of restrictions without a clear and transparent framework undermines the water management framework and the property rights which exist for water access licences.

In order to protect the property rights instilled in water access licences when agreed water sharing arrangements are suspended, there must be mechanisms in place to remedy the lost access that would otherwise have been permitted. Simply, water used under S324 or other restrictions must be considered a 'loan' rather than 'take' of water from productive water users. This is necessary to not only protect water property rights, but also to maintain the integrity of the water management framework.

As a fundamental principle - Government must commit to providing compensation in the event of any impacts to water property rights. Compensation must occur following loss of access, availability, or reliability through rule changes or regulation.

To do this, a form of repayment mechanism should be established to make up for the forgone access to water. Government should work with water users to determine agreed upon measures in each valley that would allow the use of water at the time of the restriction for reasons of the public interest, but then provide remedy for those impacted. The strongly preferred approach where an impact to property rights is to occur is through the market, rather than an impact to reliability without compensation

3) Alignment with Review Recommendations

NSWIC note that the Terms of Reference include assessing the extent to which management of the event satisfied relevant aspects of the NSW Government responses to recent inquiries, including the 'Independent investigation into NSW water management and compliance' by Ken Matthews (the NSW Government Water Reform Action Plan); the Independent Assessment of the 2018-19 fish deaths in the Lower Darling (Vertessy Report); and NRC reviews.

More broadly, NSWIC are concerned that there is a tendency of Governments to simply conduct inquiries and then have an underwhelming response to delivering upon the recommendations. In the context of these inquiries, many of the findings centred around key themes of needing to establish agreed processes, improve transparency, improve information availability and accessibility, and improving the overall effectiveness of management arrangements. Two relevant examples from the Vertessy Report include:

- *Recommendation 15: NSW and QLD should establish an agreed protocol to protect first flushes.*
 - The lack of coordination between the states in the management of this event, fails to demonstrate that this recommendation has been met.
 - NSWIC representatives met with DPIE-Water during the event, and asked whether DPIE-Water had looked at Queensland WSPs (e.g. the Lower Balonne WSP) to assess the rules and thus gain an understanding of what was coming, so that this could be included in NSW forecasts. The response was that they had not looked at this WSP. It is unacceptable for the NSW Government to not have a better understanding of inflows coming from Queensland, to inform the NSW flow estimates and targets from the onset. This is particularly concerning given the inflows from Queensland would have been relatively predictable, given Queensland was adhering to their usual water sharing arrangements with WSPs remaining in place. This requires significant improvements.



- *Recommendation 27: NSW and QLD should improve monitoring of end-of-system tributary flows that contribute to hydrologic connectivity in the Darling system, and make that data readily available.*
 - The rapidly changing flow targets did not provide confidence that there was proper process in place regarding end-of-system flows, nor did it provide confidence that they were scientifically determined.

Whilst these reports provide a range of recommendations with varying degrees of relevance, the ‘Water Goals’ presented in the NSW Water Reform Action Plan³² give a good general indication of the alignment with these general themes of recent reports.

NSW Water Goal	Commentary of whether this Water Goal was achieved in the management of the First Flush event
<i>Introduce best practice water management.</i>	See 1A. The lack of established process or framework under which the event was managed, could not be described as best-practice.
<i>Ensure transparency in how we share, allocate and manage water.</i>	See 1B. The decision-making for the event was not transparent, epitomised by the lack of transparency in the setting, shifting and meeting of flow targets.
<i>Build a compliance and enforcement regime that ensures strong and certain regulation.</i>	See 1A, 1B and 2A. There have been significant changes to compliance and enforcement in NSW, however meeting this goal rests on the successful delivery of a number of ongoing programs.
<i>Build capability to support implementation of reforms.</i>	See 1C and 2A. Water users were without necessary information, and a point of contact, to seek clarification of critical matters in the implementation of the first flush protections.

Whilst these Water Goals are being somewhat effectively worked towards in a number of other areas, they were certainly not reflected in the management of this event.

Recommendation:

As aforementioned, ensuring the water management framework can cater for a broad range of circumstances/scenarios, rather than resorting to suspending the regulatory framework, would be closer to best-practice, and would be more effective in meeting the recommendations of recent inquiries than what occurred during this event.

³² NSW Water Reform Action Plan

https://www.industry.nsw.gov.au/data/assets/pdf_file/0016/136204/nsw-government-water-reform-action-plan.pdf



Transparent data and an agreed basis for the assessment throughout the embargo must be established and publicly available.

Government must continually improve the ability to account for and gauge flows throughout the system.



Conclusion

The irrigation industry appreciated the need for a “first-flush” strategy given the extreme conditions prior to this event, however, it is not the view of the industry that “first-flush” actions, over and above those already embedded in WSPs, should become the norm.

It is our view that existing WSPs already contain rules that ensure system connectivity from flows the vast majority of times, and these rules should be abided by in all but the most exceptional circumstance.

In terms of the management of this event, as outlined this submission, we have significant concerns as an industry. It is the view of NSWIC that this first flush event was poorly managed, lacked an established process, and lacked transparency. The result was water users across the system (and the general public) lacked confidence in the process and people across the state were left feeling aggrieved.

Ultimately, the NSW Government should be able to stand by their water management framework in a broad range of circumstances to be able to meet the needs of the system.

NSWIC staff and Members are available to further discuss any aspects of this assessment, upon request.

Kind regards,

NSW Irrigators' Council.



Appendix 1: Example of a proposed S324 Regulation

An order made by the Minister under section 324 of the Act in the public interest (such as to cope with a water shortage or threat to public health or safety, or the management of environmental water) that, for a specified period, prohibits or restricts the taking of water from a specified water source must only be made when one or more of the following occurs:

- *An event or circumstance is not able to be reasonably managed under the normal operation of the water management framework (the primary past examples have been to coordinate actions across different water sharing plans, and to customise water sharing to most efficiently provide for high priority needs at that time),*
- *There is a genuine emergency where there is a threat to people or property,*
- *There is an event or circumstance which would result in irreparable harm without intervention, or*
- *There is an event or circumstance not envisaged or considered when the relevant water sharing plan was made.*

An order under section 324 of the Act expires (unless sooner revoked) at the end of 30 June following the date on which it is made or, if made on or after 1 April in any year, at the end of 30 October of that year. An order may not be made under this section in relation to a water source where the management plan has, at any time during the previous 12 months, been subject to a prior order under this section unless the Minister is satisfied, for reasons specified in the order, that there is no need for the plan to be amended under Division 9.

Any order made under section 324 of the Act must specify the following:

- *The circumstance or event that has caused the order to be made, including the significance, magnitude or importance of the event,*
- *What, or for whom, the public interest is that requires the order to be made,*
- *An explanation/acknowledgment of take of this water by licence holders that would otherwise have been legally permitted subject to water sharing plan access rules and access licence and works approval conditions*
- *A summary of the expected benefits and impacts of the proposed action to affected parties, including:*
 - *environmental,*
 - *financial, both on an individual and regional scale,*
 - *social or public amenity, and*
 - *any associated actions to mitigate expected impacts that will be undertaken,*
- *Why the action is considered to be proportional to the circumstance or event that has caused the order to be made.*

The implementation of an order made under section 324 of the Act shall be accompanied by appropriate monitoring whenever feasible to allow the effectiveness of the order to be assessed.

Following the conclusion of any order made under section 324 of the Act, a review of the outcomes from the implementation of that order must be completed and made publicly available within a period of six months. This review must address the following:

- *Any monitoring undertaken during the period of the order,*
- *The benefits and impacts of implementing the order, including those expected when the order was made,*
- *The effectiveness of the actions taken under the order to achieve the benefits targeted by that order, and*
- *Whether changes to the water management framework can be made to deal with a recurrence of the event or circumstances that caused the order to be made.*