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Independent Panel,
NSW First Flush Assessment,
Department of Planning, Industry and Environment,
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Dear Dr Wendy Craik and Mr Greg Claydon,

Independent assessment of the management of the Northern Basin First Flush event

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 welcomes the opportunity to provide comment on the NSW Government management of flows resulting from the first rainfall events in northern NSW following record drought conditions.

We note that the Natural Resources Commission (“NRC”) review of the Barwon-Darling Water Sharing Plan described that water source as a ‘an ecosystem in crisis.’

We also note that the NSW Water Management Act 2000 (“WMA”) clearly prioritises protection of the water source and dependent ecosystems, followed by basic landholder rights including native title, and then other extractive uses.

IRN has been very concerned about the management of NSW inland water sources in regard to the objects of the WMA and the rules developed in water sharing plans to give effect to these objects.

Giving priority of access to first flush events to unlicensed, unmeasured floodplain harvesting extraction, Supplementary entitlements and General Security entitlements is poor management and appears to demonstrate an inherent bias within Government agencies responsible for managing water access in NSW.

While there was an initial attempt to restrict access to first flush flows through gazetted section 324 orders commencing on 30 January in Northern NSW Murray-Darling Basin, the ongoing complexity of extensions, exemptions and lifting of restrictions was difficult to follow at the time and is still difficult to follow now when reviewing the record of these decisions.

We strongly supported the section 324 order gazetted on 7 February 2020 to prohibit the take of water from floodplains in the Gwydir, Namoi, Macquarie and Barwon-Darling catchments and consider that this order should now be permanent, including the Border Rivers, until all regulation of floodplain harvesting is finalised and in place, particularly the monitoring and measurement of take.

However, the temporary lifting of restrictions on the 10 February for various forms of water take, resulted in the loss of extremely important flows to downstream environmental assets, communities, basic rights and native title holders. There was no strong justification for this decision.

If there had not been follow up rain and flows in March, the consequences of lifting restrictions in February would have been dire.

This submission will concentrate on the following key issues:

1. Need for clear rules in all Northern Basin Water Sharing Plans to protect first flush events
2. Management of floodplain harvesting in Northern Basin catchments
3. NSW Government obligations as environmental managers

We have a set of recommendations provided within and at the conclusion of this submission.

IRN would appreciate feedback from the Independent Assessment Panel in regard to how these recommendations have been considered.

Key Issues:

1. Rules in NSW Northern Basin Water Sharing Plans

IRN notes that new Water Sharing Plans (“WSPs”) have been developed for the regulated water sources in the Northern Basin. These are:

Water Sharing Plan for the NSW Border Rivers Regulated River Water Source 2020

Water Sharing Plan for the Gwydir Regulated River Water Source 2020

Water Sharing Plan for the Upper Namoi and Lower Namoi Regulated River Water Sources 2020

Water Sharing Plan for the Macquarie and Cudgegong Regulated Rivers Water Source 2020

We also note that the unregulated WSPs for the Northern Basin are amended plans with various commencement dates. These include the amended WSP for the Barwon-Darling water source with new rules based on the recommendations of the NRC Review:

Water Sharing Plan for the Barwon-Darling Unregulated River Water Source 2012

These WSPs have been developed as part of the Water Resource Plan process under the Murray-Darling Basin Plan and after a number of extensions of time, are due to be lodged with the Murray-Darling Basin Authority (“MDBA”) by 30 June 2020.

We are also aware that the NSW Government plans to gazette these WSPs on the same date so that they come into effect on 1 July 2020 for the 2020/21 water year.

It is imperative that the new Regulated WSPs and amended Unregulated WSPs have an amendment clause to allow for the development of rules to protect first flush events. This will allow time for community consultation and assessment of the necessary rules required.

We note that as a result of the NRC review the Barwon-Darling WSP now has *Rule 50 Resumption of flows* that aims to protect first flush events in that unregulated water source.

However, because flows in the Barwon-Darling are entirely dependent on tributary inflows from the Northern Basin regulated water sources and their associated unregulated water sources, it is imperative that all WSPs in the Northern Basin contain similar types of rules to the Barwon-Darling WSP *Rule 50 Resumption of flows*.

The issue of connectivity between WSPs and effective rules to protect important connecting flows both within water sources and between water sources is an outstanding issue that needs to be resolved.

This resolution has some urgency with new Regulated WSPs intended to come into effect at the end of June 2020. These are 10 year plans with a lifespan to 2030. It is imperative that these plans are able to be amended to include a first flush protection rule during that period.

Recommendation: That the Independent Panel recommends an amendment clause under Part 12 of the new Regulated WSPs and amended Unregulated WSPs in the Northern Basin to allow for development of rules to protect first flush events within each water source and between connected water sources.

2. Management of floodplain harvesting in Northern Basin catchments

IRN has been concerned about the poor management of floodplain development and harvesting of floodwaters in NSW for the last 20 years or more. Floodplain harvesting has been a form of unfettered entitlement providing financial gain to an industry at the cost of downstream communities, cultural values and First Nations people and the riverine environment.

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.

This is a significant volume of water to be extracted with no regulation in place. Much of this extraction is in the form of access to first flush events. It has been the practice of the irrigation industry to prioritise access to free floodplain flows, where available, over other licensed entitlements. The NSW Government has turned a blind eye to this practice and has been very slow to bring it under regulatory provisions.

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 free access to unmeasured water from overland flows for the past 30 odd years has been a major, unassessed cost to the environment, cultural values and downstream communities and other industries.

IRN has a number of key concerns regarding the management of floodplain harvesting in NSW Northern Basin.

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

IRN strongly objects to the gazettal of The Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 (“the Regulation”) allowing for the continued access to overland flows prior to the finalisation of the regulatory process.

The Regulation was gazetted on the same day, Friday 7 February 2020, as the section 324 order to restrict floodplain harvesting take for 3 weeks until 28 February. This restriction was lifted for a number of days on 10 February 2020 allowing access to critical first flush overland flows before they entered streams and rivers.

The Regulation had no justification or relationship to the restrictions placed on water users through the section 324 order. This order has broad powers that enabled it to restrict the take of overland flows.

The Regulation, proclaimed with no public consultation and no notice, gives legal effect to water extraction that is currently unmeasured and unlicensed.

The extraction of overland flows during the February and March first flush events gave priority to a form of water take, with no legal status, other than the Regulation, over the priorities of the WMA to protect the water source and dependent ecosystems, followed by basic landholder rights.

The Regulation must be repealed and no access to floodplain harvesting take be available until all assessment, including environmental assessment, licensing, measurement and monitoring is in place, including relevant management rules in WSPs. This must include rules to protect first flush events from floodplain harvesting.

Recommendation: That the Independent Panel advise the NSW Government to repeal the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 and to maintain a permanent section 324 order on floodplain harvesting in the Northern Basin until such time as all regulation, particularly monitoring and measurement, is in place.

2.2 Eligibility criteria for floodplain harvesting works

We also have concerns that the Regulation has given 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, as currently worded, appears to give 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.

The Regulation appears to provide an exemption for 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.

The eligibility criteria for floodplain harvesting works, as laid out in the NSW Floodplain Harvesting Policy 2018 and how this criteria has been applied under the Regulation is unclear.

The environmental assessment of eligible works is also unclear and has not been undertaken in a manner to assess the cumulative impact of floodplain works combined with the impact of floodplain harvesting.

We understand that eligible works are currently being assessed and finalised for modelling purposes to establish the volume of floodplain harvesting take to be licenced in each of the Northern Basin valleys and the Barwon-Darling.

The eligibility of works, the type of assessment that was undertaken for works approved under Part 2 or Part 8 of the Water Act 1912 or the Water Management Act 2000, the assessment of eligible works that did not require prior approval and the assessment of cumulative environmental and social impacts of floodplain harvesting are areas that need closer scrutiny and a greater level of transparency.

All and any works should be assessed for their environmental impact prior to issue of a floodplain harvesting licence, and without an assumption that the relevant works are acceptable

Recommendation: That the Independent Panel require a clear outline of the process for identifying eligibility and the assessment of eligible works for floodplain harvesting, including a cumulative environmental and social impact assessment. This must occur prior to granting new, compensable private property rights in the form of Floodplain Harvesting licenses.

3. NSW Government obligations as environmental managers

NSW has obligations to protect threatened species and ecological communities under the Biodiversity Conservation Act 2016, Fisheries Management Act 1994 and the Federal Environment Protection and Biodiversity Conservation Act 1999. There are also obligations under the National Parks and Wildlife Act 1974 to manage and protect public reserves.

NSW has obligations under treaties signed by the Australian Government:

- (a) the Ramsar Convention; Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar 1971
- (b) the Biodiversity Convention; Convention on Biological Diversity, Rio de Janeiro 1992
- (c) the Desertification Convention; United Nations Convention to Combat Desertification, Paris 1994
- (d) the Bonn Convention; Convention on the Conservation of Migratory Species of Wild Animals, Bonn 1979
- (e) CAMBA; Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment, Canberra 1986
- (f) JAMBA; Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment, Tokyo 1981
- (g) ROKAMBA; Agreement with the Government of the Republic of Korea on the Protection of Migratory Birds, Canberra 2006

(h) the Climate Change Convention; United Nations Framework Convention on Climate Change, New York 1992

Many of these obligations and requirements are pertinent to water management in the NSW Northern Basin Rivers. The protection of first flows provided by drought-breaking rains is essential for meeting many of these legal obligations. This protection must be achieved through clear rules in WSPs.

There are three Ramsar listed wetlands of international importance in the NSW Northern Basin: Narran Lakes, Gwydir Wetlands and Macquarie Marshes. A portion of these are managed under the NSW reserve estate.

The Gwydir Wetlands and Macquarie Marshes are significantly impacted by unmeasured take through floodplain harvesting and lack of rules in WSP to protect first flow events.

This was particularly evident in the Macquarie where access was provided to floodplain harvesting and supplementary entitlements during the February 2020 first flush event before critical environmental needs were met in the Marshes.

Habitat for migratory birds protected under various international agreements mostly occurs on the floodplains. The maintenance of resilience of these habitats in the Northern Basin is critical through improved management of river and overland flows.

The Lowland Darling River aquatic ecological community is listed as endangered under the NSW Fisheries Management Act. Improved management of flows in tributaries of the Barwon-Darling and within the Barwon-Darling are essential to improving the condition of this endangered landscape.

A number of fish species found in Northern Basin rivers are listed as matters of national environmental significance under the Federal Environment Protection and Biodiversity Conservation Act.

These include the critically endangered Silver Perch, endangered Macquarie Perch and vulnerable Murray Cod. Protection and replenishment of water holes as drought refugia for these threatened species is critical for their survival.

Maintaining connectivity within and between rivers and streams and their floodplains in the Northern Basin is also critical to maintain breeding and feeding opportunities for these threatened species.

Menindee Lakes is an important breeding area for native fish populations. First flush events must be protected to ensure that sufficient water will reach the lake system to provide essential habitat requirements.

First flush events are also critical for diluting poor water quality including salinity and blue-green algae caused by drought conditions.

Lateral connectivity between a river and its floodplain during overland flows and first flush events is also critical to maintain breeding and feeding opportunities for many threatened

species. Natural weather events act as a trigger for aquatic biota including native fish breeding.

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.

Recommendation: That rules in Northern Basin regulated and unregulated WSPs to protect first flush events are sufficient to provide necessary flows to provide for threatened species and ecological communities, maintain migratory bird habitat and maintain the ecological character of Ramsar listed wetlands.

Conclusion

In summary IRN strongly recommends that:

1. The Independent Panel recommends an amendment clause under Part 12 of the new Regulated WSPs and amended Unregulated WSPs in the Northern Basin to allow for development of rules to protect first flush events within each water source and between connector water sources.
2. The Independent Panel advise the NSW Government to repeal the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020 and to maintain a permanent section 324 order on floodplain harvesting in the Northern Basin until such time as all regulation, particularly monitoring and measurement, is in place.
3. The Independent Panel require a clear outline of the process for identifying eligibility and the assessment of eligible works for floodplain harvesting, including a cumulative environmental and social impact assessment. This must occur prior to granting new, compensable private property rights in the form of Floodplain Harvesting licenses.
4. That rules in Northern Basin regulated and unregulated WSPs to protect first flush events are sufficient to provide necessary flows to provide for threatened species and ecological communities, maintain migratory bird habitat and maintain the ecological character of Ramsar listed wetlands.

Yours sincerely



Anne Reeves
Hon Secretary