

Gwydir Valley Irrigators Association Inc.

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Gwydir Valley Irrigators
Associations submission on the

*Draft Floodplain
Harvesting Policy*

NSW Office of Water

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Introduction:

The Gwydir Valley Irrigators Association (GVIA) represents in excess of 200 irrigators in the Gwydir Valley of NSW, centred on the town of Moree.

The organisation is voluntary, funded by a cents/ megalitre levy on regulated, unregulated and groundwater irrigation entitlement. In 2008/09 the levy was paid on in excess of 93% of the entitlement.

The Association is managed by a committee of 11 irrigators and employs a full-time executive officer, a full time irrigation extension officer and a part-time administrative assistant.

All members of the GVIA are licenced through the NSW Office of Water, and many are reliant on Floodplain Harvesting as a significant source of their irrigation water.

GVIA is a member of the NSW Irrigators Council, and as well as providing this submission, the Association endorses the submission made by NSW Irrigators Council. If the submissions vary on any point, GVIA's position is as it is outlined in this submission.

GVIA welcomes the opportunity to provide a submission on the draft Floodplain Harvesting Policy, and recognises the introduction of a policy is essential to underpin the legal right of irrigators to access this water source which is an integral part of the economy of north-west NSW.

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General Comments:

GVIA's support for the licencing of Floodplain Harvesting (FPH) extractions and associated works is contingent on the licencing policy being developed in such a manner that it allows irrigators to extract to the levels that are allowed under the 1993/94 Murray-Darling Basin Cap on Extractions and the 2004 Gwydir Regulated River Water Sharing Plan combined.

While GVIA is generally supportive of the draft policy, it does have particular concerns with a number of key features, notably:

1. Environmental Assessments
2. Account Initialisation and Management Rules
3. Compensability

These concerns, along with other matters will be elaborated on throughout the submission.

Should these concerns not be addressed adequately in the final policy, GVIA reserves the right to withdraw any support it may have for the licencing of FPH extractions.

GVIA's submission has been structured to follow the draft policy, and has such will use the same numbering and headings that appear in the draft policy. However, GVIA will not necessarily be commenting on every paragraph that appears in the draft policy.

1. Key points of the Floodplain Harvesting Policy

- GVIA accepts that under the Water Management Act 2000 that water taken as FPH must be taken under an appropriate water access licence.
- GVIA accepts that the adoption of the policy cannot lead to any valley-wide growth in use, and it accepts the constraints applied by the Murray-Darling Basin Ministerial Cap and the water sharing plans. However, the policy and associated licencing rules must allow for long-term average extractions up to those constraints.
- GVIA accepts the need for the licencing of all associated works, but strongly believes that the process should not be overly burdensome on either the NSW Government or irrigators.
- GVIA supports the 3 July 2008 cut-off date for eligible works.
- GVIA strongly believe that in some instances irrigators acting in good-faith may not have applied for the appropriate Part 8 or Part 2 approvals, and these irrigators should not be denied an opportunity to have works licenced if they can demonstrate that they had acted in good faith.
- In broad terms GVIA supports the four implementation stages; however, it seriously questions the need to carry-out additional environmental assessments.
- GVIA supports the establishment of a review process to consider:
 - i. Eligibility of an applicant for a licence based on geographic location.
 - ii. Eligibility of floodplain works for licencing.
 - iii. An individual's share component of the total valley's Long-term Average Extraction Limit.
- GVIA supports the tradability of FPH entitlements, and while it accepts that the vendors would have to provide assurances to the NSW Office Of Water that they will no longer be accessing FPH water associated with the share component sold, it does not believe that works will always have to be decommissioned or modified.
- GVIA believes the temporary assignment of FPH allocations should be able to proceed once licencing is completed. GVIA believes market participants will be able to demonstrate through their on-farm monitoring strategy that their extractions have complied with the conditions of their trades.
- **Additional Key Point** – GVIA strongly supports the issuing of entitlements in perpetuity, but this must also be supported by full compensability under section 87AA(1) of the Water Management Act 2000. In addition, licencing should be structured in such a way as FPH licences are recognised under the Risk Assignment provisions of the Commonwealth Water Act 2007.

2. Purpose of and need for the policy

GVIA understands the legal requirements necessitating the need to licence FPH extractions. However, GVIA also believes that this policy needs to clearly acknowledge that the licencing process is about regularising existing practices that have been accepted and encouraged by successive NSW Governments.

GVIA understand that licencing will provide the NSW Government with a management tool.

3. Scope of the policy

GVIA supports the state-wide nature of the policy.

3.1 Definition of floodplain

GVIA supports the notion that the policy applies to FPH “activities on properties where all or part of that property lies within the designated floodplain”, however it does seek further advice from the NSW Office Of Water as to what constitutes a designated floodplain, and whether there is a single reference source for designated floodplains in NSW.

3.2 Definition of floodplain harvesting

GVIA supports in general the definition of FPH. However, GVIA believes there will be difficulties in practically determining the difference between FPH water and Local Rainfall Run-Off water, and further information is required on how this will be managed.

Point 4 of the definition needs to be amended to:

4. Irrigation run-off and stormwater captured as run-off from irrigation development, and subsequently collected in tail-water return systems or other means in accordance with licence conditions or Industry Best Management Practices which have been adopted as a Ministerial Guideline.

GVIA believes this amendment makes it clear that both tail-water generated through irrigation, and stormwater collected off developed irrigation areas is exempt from the definition of FPH. Stormwater run-off must be captured and contained otherwise irrigators would be in breach of both their licence conditions and the *Protection of the Environment Operations Act 1997 (NSW)*.

3.3 Types of floodplain harvesting

GVIA is supportive of the description of the two main categories of FPH works.

GVIA welcomes the clear statement that this policy will not require any additional approvals for floodplain works that are not associated with FPH.

4. Implementation of the policy

GVIA is in general agreement with the proposed implementation stages.

4.1 Implementation stage 1 – determining eligibility for assessment

GVIA is in agreement with the four categories of works that will be eligible for assessment. However it proposes the inclusion of a fifth category as follows:

5. *Works constructed on floodplains prior to 3 July 2008 for which no application under Part 2 or Part 8 of the Water ACT 1912 was made, where the water supply works applicant can prove to a minister appointed assessment committee; that in failing to lodge a Part 2 or Part 8 application, the applicant was acting in good faith.*

GVIA is proposing this additional category as it has anecdotal evidence that a small number of irrigators have constructed works after receiving verbal advice from NSW Office of Water, or its predecessor organisations, that there was either no need or no point in lodging applications. It is well accepted that the Part 8 application process has been dysfunctional for many years, and GVIA contends that irrigators should not be penalised if they can demonstrate that they acted in good faith on the advice they received at the time.

Given the above, the draft policy would need to be amended to allow the licencing of works constructed prior to July 3, 2008, where no valid Part 2 or Part 8 application was made, if the applicants could demonstrate that in not lodging an application they were acting in good faith.

GVIA supports the right of applicants to have preliminary eligibility assessments reviewed, but strongly believes that additional category 5 as outlined above, needs to be part of the formal application process, rather than a ground that an applicant could seek review on.

4.2 Implementation stage 2 – works assessments

GVIA supports the needs for capability assessments, and the provision by the applicant of an on-farm monitoring strategy. GVIA is strongly opposed to the requirement for further environmental review, when the works in question have been subject to a valid Part 2 or Part 8 application.

4.2.1. Capability Assessment

GVIA supports the use of a robust capability assessment as part of the FPH licencing process. By robust, GVIA contends the assessment must take into account the following minimum requirements:

- The physical capacity of the works.
- The location of the works.
- The frequency of FPH events that occur at the works.

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- The length of FPH events that occur at the works.
- The extent of FPH events that occur at the works.

GVIA is strongly of the view that a capacity assessment alone, in no way fulfils the requirement of a capability assessment.

While GVIA supports the need for these assessments to be thorough and defensible, GVIA does not want the process to be any more onerous or costly than absolutely necessary. Therefore, GVIA recommends that NOW recognises that much of the information on physical capacity is readily available in the form of professionally prepared designs, and these, where available, should be accepted rather than requiring the complete re-surveying of structures.

GVIA believes more information is required as to exactly what a certified on-farm water infrastructure plan would require.

GVIA and its members have a history of actively supporting NOW by providing sound irrigation behaviour information, and GVIA is confident that this support will continue with through the completion of the irrigation behaviour questionnaire.

GVIA is supportive a robust capability assessment being the primary tool for disaggregating the total FPH volume to individual licences.

4.2.2. On-Farm monitoring strategy

GVIA believes the adoption of on-farm water balances, incorporating the use of calibrated storage data, will be the most appropriate manner for demonstrating the take of FPH water under licence.

GVIA believes that while this approach will place considerable costs and effort on irrigators, it represents the only practical way to monitor compliance at this point in time.

4.2.3 Environmental Assessment

GVIA is totally opposed to any requirement for additional environmental assessments when the applicant has lodged a valid Part 2 or Part 8 application.

As GVIA understands it, the Water Management Act 2000 requires the Minister to ensure that no more than minimal harm results if he issues either a new Water Access Licence or a new Water Supply Works Approval.

With regards to the former, a key plank of this policy is that the volume that will be allowed to be extracted will be the volume allowed under the Murray-Darling Basin Plan and the appropriate valley water sharing plan.

Given that key principle, the issuing of Water Access Licences up to the volume identified by the Cap/Water Sharing Plan cannot possibly result in any additional harm to the environment, and therefore the Minister would not require any further assessment.

Precedence for this approach was the issuing of supplementary licences, as part of the Regulated River Water Sharing Plans.

In regards to Water Supply Works there are several arguments that can be applied here.

Firstly, environmental assessments were carried out under the Part 2 or Part 8 process, and therefore the Minister can be satisfied the environmental issues were considered then.

Further, the Minister must consider whether approving an application could cause more than minimal harm. Given, that this policy deals with works that are already in place then it is impossible for any additional harm to result from the approval.

GVIA is very concerned that this proposed requirement for additional environmental assessments could at worst be used by some to try and outlaw FPH, or at best bog the whole process down, and unnecessarily tie up the resources of both the NSW Government and irrigators.

In summary, unless a work is identified as being patently illegally constructed, all existing works should be subject to a transitional arrangement which would deem approval under the Water Management Act 2000.

GVIA concedes that should, as the result of an entitlement trade, an irrigator wishes to make application for a new water supply work, then environmental assessments in accordance with the Act would be appropriate.

4.3 Implementation stage 3 – determining the floodplain harvesting long-term average annual extraction limit

GVIA supports separate Long-Term Average Annual Extraction Limits (LTAAEL) for FPH and extractions from the regulated river.

GVIA is surprised that the total volume of water available for FPH has already been accounted in the existing share components and extraction limits for unregulated streams. GVIA believes this is an area that requires significant extra communication with irrigators and their representatives.

GVIA is aware of a number of holders of unregulated licences, close to where the streams intersect with regulated streams that have a significant history of FPH,

who would feel entitled to a licence, and whose take has probably been recognised by the IQQM.

4.3.1 LTAAELS in regulated river sources

GVIA supports the use of the Integrated Quantity and Quality Model (IQQM) for determining the LTAAEL for FPH provide that the use of the model is transparent, and irrigators are effectively consulted on the key assumptions used in the model.

GVIA accepts the limit on extractions being determined in accordance with the appropriate water sharing plan and the Murray-Darling Basin Cap, but emphasises that the overall policy must allow the determined LTAAEL to be achieved.

4.3.1.1. Setting the floodplain harvesting LTAAELS for commenced regulated river plans

GVIA supports the principles outlined in the draft policy. GVIA thinks it is extremely important that the existing relationship between the various classes of water covered by a regulated river water sharing plan is maintained.

GVIA understands that there may be some variation between the floodplain harvesting LTAAEL allowed for under the Cap and that allowed for under the plan, but total allowed extractions will be equal to or less than what is allowed under the Cap.

4.3.1.2. Setting floodplain harvesting LTAAELS for new regulated rivers

This section is not relevant to GVIA as its membership is already subject to the Gwydir Regulated River Water Sharing Plan.

4.3.1.3. Incorporating floodplain harvesting LTAAELS in water sharing plans

GVIA understands that in the Gwydir Regulated Rivers case, LTAAELs for floodplain harvesting will be incorporated into the existing plan by way of amendments. The amended plan will have separate LTAAELs for FPH and other river extractions.

GVIA has some concerns about the ability to establish environmental water rules relating to FPH. While GVIA acknowledges the right for the NSW Government to make such rules, but rule changes that impact on either the volume or reliability of floodplain harvesting Water Access licences must be fully compensable.

GVIA notes that the draft policy makes specific reference to fact that any environmental rules will be considered only to the extent that the outcomes of the overall LTAAEL specified in the plan is not affected. However, GVIA will oppose any rule that makes it harder for irrigators to extract the LTAAEL.

4.3.1.4. Managing to the LTAAEL in regulated river water sources

GVIA strongly supports the proposition that that by splitting the existing LTAAEL between FPH and other regulated river extractions, both categories can and will manage any “growth-in-use” issues, without having any impact on the other category.

GVIA acknowledges that the LTAAEL can change due to the use of improved models or more accurate model input data. GVIA accepts this as long as it and its members are effectively consulted on any change, and are given the opportunity to independently review the model’s inputs and outputs.

4.3.2 LTAAELS in unregulated river water sources

GVIA does have some members on unregulated water sources, and if it is the case that LTAAEL for FPH were included when volumetric entitlements were made, then GVIA is at a loss why works will have to be assessed under the requirements set out in section 4.2 of the draft policy. GVIA contends that if approvals are required, they should be automatically approved and issued as part of the licencing process.

GVIA is also aware of other members who will be seeking to have FPH Water Access Licences issued in addition to their unregulated licences, as they would be able to demonstrate a capability in excess of their unregulated licencing.

These members primarily operate close to the intersection of unregulated and regulated streams.

The policy must recognise the legitimacy of these people lodging applications, and having them assessed on their merit.

4.4 Implementation stage 4 – issuing water supply work approvals and water access licences

4.4.1. Issuing Works Approvals

As previously discussed, GVIA strongly believes that all works deemed eligible for assessment should be issued a water supply works approval. GVIA is far from convinced of any need to carry out further environmental assessments on any

works that have been built in accordance with a valid Part 2 or Part 8 Approval if it was required.

While there may be a legitimate case for environmental approvals and possible conditions on new works, there appears to be no legal justification for imposing conditions on existing works.

4.4.2. Determining the share components for individual licences

GVIA is firmly of the view that the easiest, administratively simplest, most Cap management effective manner of issuing share components is to issue them so that they equal the FPH LTAAEL for the particular water source.

GVIA contends that in hindsight it would have been better to issue supplementary licences on this basis, rather than on the basis of the highest ever history-of-use.

Having established a strong preference for the draft policy's position on this issue, GVIA must emphasize that the accompanying account management rules must be flexible enough to allow irrigators to access the LTAAEL.

GVIA supports the use of a robust capability model as the primary tool for determining individual share components of the total licence share as determined by the LTAAEL.

Should NOW wish to use a less thorough or equitable form of assessment then GVIA would have to re-assess its support for this method.

Should an irrigator's FPH Water Access Licence be less than the assessed capability GVIA sees no reason why the irrigator should have to modify or decommission works provided an acceptable monitoring and reporting regime is in place.

GVIA considers this is no different from any other class of water, were access is determined by available water allocation, and the irrigator must work within those constraints. Actions outside those limits would be deemed illegal and subject to the due process of the law.

4.4.3 Water account initialisation and carryover

GVIA totally rejects the proposed initialisation and carryover rules included the draft policy.

Given the very limited opportunities for FPH over most of the past decade GVIA strongly recommends an initialisation of 300% of the share component of the licence. This would allow irrigators to adequately access a medium to large flood event during the first year of the plan.

This initialisation is less than what could have reasonably been expected to be in irrigator accounts at this point in time if FPH licences were issued at the commencement of the Water Sharing Plans in 2004.

GVIA very strongly argues that the proposed account management rules are at odds with the stated aim of allowing access in accordance with Murray-Darling Basin Cap/Water Sharing Plans.

Access to FPH is episodic and is subject to location. In general smaller, shorter, and more frequent flooding events occur higher in the valley, while longer, larger and less frequent events occur less often.

GVIA can demonstrate that many of its members who benefit from FPH water only access flood waters every five years or so, and therefore the suggested carry over rules of 200% are totally inadequate.

GVIA can see two potential arguments for the imposition of account management rules:

1. Cap/Water Share Plan Management
2. Limiting access to events

With regards to the first, the easiest and most foolproof way to manage Cap compliance is only to issue shares up to the level of the LTAAEL. If this is done, it is mathematically sound to allow unlimited carry-over. If an AWD is made every year equal to the shares on issue, which is equal to the LTAAEL allowed for under the Cap/Plan limit, then it is mathematically impossible to break Cap. If Cap is broken it can only be through the illegal take of water, and therefore subject to the due process of the law.

With regards to limiting access to an event, GVIA is aware that in some quarters there is concern that if unlimited carry-over is allowed, extractors may effectively “drain a flood”, by extracting all the water in the flood event.

GVIA and its members know from experience that this is not possible. Large events are so large that they overwhelm the capability of infrastructure to take the water, and small to medium floods do not last long enough to allow extractors to remove significant volumes. GVIA understands that NOW has conducted extensive modelling that supports the GVIA position.

NOW has the opportunity to effectively implement a “Greenfield” entitlement and account management system, and it should not be constrained by the imperfect nature of the other systems that have been used.

GVIA is aware that there are current sensitivities about Cap performance in the Barwon-Darling, but NOW must recognise the significant differences between the two entitlement issuing systems.

Under the system proposed by NOW, any limits on carry-over will make it impossible for irrigators to achieve the LTAAEL allowed for under the policy.

While GVIA sees no mathematical reason for not allowing full carry-over, GVIA would accept account limits of 700%, with an average annual use limit of 100% over any consecutive seven-year period.

The alternative to this sensible approach is to issue shares in excess of the LTAAEL, such as was done with supplementary licences. However, this brings in the need for complex AWD and “growth-in-use” rules, and do not serve either the government or extractors well.

4.5 Review Process

GVIA supports the provision of a review process limited to the following:

- Determinations about whether the work was geographically located on the designated floodplain area (GVIA understands the requirement is that part or all of the property the works are located on must be on a designated floodplain area. If this is the case, this point needs to be reworded to accurately reflect that position. GVIA’s support for it is contingent on it reflecting our understanding).
- Determinations about whether floodplain works are eligible for assessment under this policy (GVIA’s support is subject to the inclusion of the fifth category as discussed in section 4.1).
- Determination about the share component of a floodplain harvesting licence.

4.6 Replacement and refurbishment of works

GVIA is supportive of the policy in regards to replacement and refurbishment of works.

5. Characteristics of floodplain harvesting licences

5.1 Tenure

GVIA is supportive of Floodplain Harvesting Access licences being issued in perpetuity.

5.2 Compensation

GVIA strongly believes that compensability goes hand-in-hand with perpetuity. One of the key reservations GVIA has with the draft policy is lack of compensation which is a requirement under the National Water Initiative, and is also offered to other classes of water under the Water Management Act 2000 as listed in section 87AA (1).

GVIA believes this section of the draft policy simply reflects the current Act, and as such requests that this be changed so as to recognise the compensability of FPH licences. GVIA notes that Section 87AA(1)g, allows other classes to be listed by regulations, and GVIA contends that this would be an appropriate action by government.

GVIA is also very concerned that the NSW Government makes every effort to ensure that FPH licences are recognised under the Risk Assignment provisions of the Commonwealth Water Act (2007).

5.3 Trading Arrangements

GVIA supports both the tradability of both entitlement shares (permanent) and allocations (temporary) as soon as entitlements are issued.

GVIA notes the draft policy's position that the vendor will have to demonstrate how works are going to be removed or modified so they can no longer take the share of FPH water that was associated with the shares sold.

GVIA believes this is an unnecessary, and a resource wasteful, requirement. Provided licence holders have an approved monitoring and reporting process in place, there should be no need to remove or modify works, which may be required again in the future, if entitlement was traded back in.

This requirement is without precedence in contemporary water management in NSW. A holder of a water supply works licence is not required to dismantle pump stations in the event of selling a regulated water access licence.

The key to successful management of this issue is a robust, but practical on-farm water balance monitoring and reporting framework.

Likewise, once such a framework is in place, there should be no need for restrictions on temporary trade.

5.4 Floodplain harvesting and harvestable rights

GVIA welcomes the continued separation of FPH water entitlements from the Harvestable Right.

However, GVIA believes clear water accounting and reporting rules need to be established to ensure compliance and avoid confusion.

6. Relationship with the Commonwealth Water Act 2007 and the Basin Plan

GVIA is aware of the need for the NSW Government to prepare Water Sharing Plans that are compliant with the Basin Plan when it is released.

In regards to Floodplain Harvesting, GVIA strongly believes that it should enter the Basin Plan process with the same standing as regulated river water, in particular with regards to the Commonwealth's Risk Assignment provisions.

GVIA understands that timing issues, as reflected in the Commonwealth Water Act may make this difficult to achieve in a strict legal sense.

However, GVIA believes NSW must make it a high political priority to have the Commonwealth recognise the absolute legitimacy of FPH and extend the risk assignment provisions to this class of water.

GVIA believes anything less than that would be treating FPH extractors as second-class water citizens.

Submission ends.