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Water Management General Regulation Review  
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## Consultation on the Draft Water Management (General) Regulation 2011

The NSW Environmental Defender's Office (EDO) is pleased to provide the following comments on the *Draft Water Management (General) Regulation 2011*. The EDO is a community legal centre specialising in public interest environmental law and policy.

### Introduction

The NSW Office of Water has developed the *Draft Water Management (General) Regulation 2011* ("the Draft Regulation"), which proposes to amend and amalgamate the:

- *Water Management (General) Regulation 2004*; and
- *Water Management (Water Supply Authorities) Regulation 2004*.

The Government has stated that the amendments in the Draft Regulation aim to:

- "remove the amnesty for pre-1999 works – being the provisions under which works and water use associated with the diversion of surface water which, before the commencement of the [*Water Management Act 2000*], did not require approval under prior legislation
- provide the Minister with powers to allow water to be made available for emergency environmental requirements and critical human requirements
- clarify and amend previously existing exemptions from the need to hold water access licences
- clarify and amend previously existing exemptions from the need to hold water supply work, water use and controlled activity approvals
- remove duplication of government processes
- make application processes more efficient, and
- improve transparency by making information more readily available to the public."<sup>1</sup>

The EDO's comments focus on the changes to the *Water Management (General) Regulation 2004*, as it is integrated into the *Draft Water Management (General) Regulation 2011*. In particular we address those areas relevant to our field of expertise in public interest environmental law. We have grouped our comments under the following headings:

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<sup>1</sup> NSW Office of Water website, "Remake of the Water Management (General) Regulation – Have your say" (as at July 2011), <http://www.water.nsw.gov.au/Water-management/Law-and-policy/Legal-reform/Legal-reform/default.aspx>.



- A. Removal of amnesty for pre-1999 works
- B. Exemptions from licence requirements
  - i) *Removal of the Aquifer Interference Exemption*
  - ii) *Changes to Dust Suppression Exemption*
  - iii) *Changes to Domestic Electricity Generation Exemption*
  - iv) *New Exemption – Critical Human Needs*
  - v) *New Exemption – Emergency Environmental Watering and related works*
  - vi) *New Exemption – Approved Native Revegetation Watering*
- C. Approvals for water use, supply works etc.
  - i) *Exemption from Advertising Applications for Approval*
  - ii) *Clarification of Security Deposits Provision for Approvals*
  - iii) *Exemptions for Water Use Approvals*
  - iv) *Exemptions regarding the use of Water Supply Works*
  - v) *Changing to the mining and Crown lands Exemption*

In brief, our central concerns relate to the extension and introduction of exemptions from requirements to obtain water approvals and licences. We believe such licences (and public knowledge of them) are fundamental to ensuring water is responsibly used, and transparently accounted for; particularly for mining-related activities. Furthermore, the Draft Regulation provides broad discretion to the Minister<sup>2</sup> to allocate the taking of water and make other decisions in certain situations. We believe transparent, science-based criteria should limit and inform the scope of such discretion. In addition to these suggestions, this submission notes several positive developments in the Draft Regulation.

#### **A. Removal of amnesty for pre-1999 works**

The *Water Management (General) Regulation 2004* (at clause 5) currently provides an amnesty for certain kinds of water supply works (e.g. farm dams and pumps) constructed before 1 January 1999. This amnesty relieves the requirement to obtain a water access licence (to take water) or a water supply work approval (for the works used to take and store water). The EDO supports the proposal in the Draft Regulation to remove this amnesty, and ensure that all such works are required to obtain the appropriate licences and approvals.

#### **B. Exemptions from licence requirements**

The current *Water Management (General) Regulation 2004* provides a number of exemptions for certain entities in certain circumstances from the requirement to obtain access licences. The *Water Management Act 2000* provides that an access licence entitles its holder:

“(a) to specified shares in the available water within a specified water management area or from a specified water source (the ***share component***), and

(b) to take water:

- (i) at specified times, at specified rates or in specified circumstances, or in any combination of these, and
- (ii) in specified areas or from specified locations, (the ***extraction component***).<sup>3</sup>

<sup>2</sup> The Minister for Primary Industries is the Minister responsible for the *Water Management Act 2000* (NSW) under the Allocation of Administration of Acts (see <http://www.legislation.nsw.gov.au> under Regulations).

<sup>3</sup> Sec 56(1), *Water Management Act 2000*.

The Draft Regulation proposes to retain, amend and delete some exemption provisions that make acquiring these access licences unnecessary. The EDO has the following comments in relation to the amendments.

#### *Removal of the Aquifer Interference Exemption*

The EDO supports those amendments to the *Water Management Act 2000* and the new aquifer interference regulation<sup>4</sup>, which aim to ensure that water access licences are required to take water from a water source (including the removal, diversion or relocation of water within an aquifer). The EDO also supports the proposal in the Draft Regulation to remove clause 18(2) from the *Water Management (General) Regulation 2004*. That clause provided an exemption from obtaining a water access licence if a person was involved in an aquifer interference activity in connection with the mining or the extraction of any material.

#### *Changes to Dust Suppression Exemption*

EDO supports the proposed refinement of this exemption so that it only applies to water taken for dust suppression by a public authority, as opposed to any person. The narrowing of eligibility for this exemption reduces the potential for unassessed taking of water to occur. Having said this, the EDO believes that appropriate licencing should be required for all entities taking water for dust suppression purposes. We see the narrowing of the exemption as a positive step towards this outcome.

#### *Changes to Domestic Electricity Generation Exemption*

The EDO also supports the narrowing of this exemption to ensure that not only does water have to be returned to the same water source, but also is to be returned within 50m of where it was taken. The EDO proposes that this could be further improved by a requirement to ensure that there is no substantial physical (i.e. change in temperature or sediment content) or chemical discrepancy in the water that is returned to the source following its use in domestic electricity generation.

#### *New Exemption – Critical Human Needs*

The EDO has concerns with the Minister's broad discretion to allow the taking of water for Critical Human Needs as the scope of such needs is unclear. We note that such a decision should be based on scientific indicators, and accompanied by a process that promotes transparent decision-making, including relevant decision criteria. The only information in the Draft Regulation on what constitutes Critical Human Needs is provided at Schedule 5, clause 16. It provides that for an activity to be classified as Critical Human Needs, the Minister is to be satisfied that the taking of water is:

- “(a) In the public interest, and
- (b) Urgently required for critical human needs.”

This provides broad discretion to the Minister to make a decision regarding the taking of water, without any particular criteria by which the Minister may make such a decision.

The RIS does provide some indication of what is *not* included in critical human needs in stating (at page 32) “it will not cover any normal type of take of water, such as for town water supply purposes.” However neither the Draft Regulation nor the RIS identifies what factors are considered as “critical human needs”, or the policy intention behind this exemption. The EDO suggests that the Draft Regulation set out whether “critical human needs” refers to economic/social/cultural/

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<sup>4</sup> *Water Management (General) Amendment (Aquifer Interference) Regulation 2011*, effective 1 July 2011.

environmental or other needs.<sup>5</sup> We also believe mining-related purposes should be explicitly excluded, except in relation to threats to public health or safety.

We note that the *Water Act 2007* (Cth) provides the definition (at section 86A(2)) that critical human water needs is the minimum amount of water, that can reasonably be provided from Murray Darling Basin water resources, to meet the core human consumption requirements in urban and rural areas and those non-human requirements that a failure to meet would cause prohibitively high social, economic or national security costs. If the intention of the provisions in the Draft Regulation is intended to cover the same matters on a State scale, then this needs to be clearly stated.

#### *New Exemption – Emergency Environmental Watering and Related Works*

In principle, the EDO supports the ability for the Minister to provide water to “prevent a significant negative environmental impact” under this proposed exemption. However, noting our comments above regarding the Critical Human Needs exemption, further information could be provided on what constitutes Emergency Environmental Watering. The only information contained in the Draft Regulation on what constitutes Emergency Environmental Watering (at Schedule 5, clause 14) is that the Minister is satisfied that the watering is:

- “(a) In the public interest; and
- (b) Urgently required to prevent a significant negative environmental impact such as the impact that may be caused by lack of water.”

Similar issues arise in the proposed exemption for approved Environmental Work Construction Watering. This is defined as when the Minister is satisfied that:

- “(a) the watering is for the purposes of constructing a water supply work on waterfront land, and
- (b) the water supply work will have an environmental benefit.”

To clarify what constitutes Environmental Work Construction Watering and inform the Minister’s discretionary decision-making, we believe the Draft Regulation should outline what constitutes an “environmental benefit” in this context (and whether, for example, the exemption is limited to where the *primary or substantial purpose* of the work is for an environmental benefit, as the title suggests). The Draft Regulation could also outline the criteria used by the Minister to assess whether a water supply work will in fact have an “environmental benefit”.

#### *New Exemption – Approved Native Revegetation Watering*

The Draft Regulation proposes to include a new exemption whereby a public authority can take up to five megalitres of water per year for “approved native revegetation watering”. This is defined as “watering to establish native vegetation plantings for the primary purpose of restoring or stabilising river banks.”<sup>6</sup> The EDO welcomes the potential positive environmental outcomes from the ability to rapidly mobilise large amounts of water for native revegetation. We suggest the Draft Regulation include further detail regarding the criteria to be considered when making such a decision. This would help ensure that the limited amount of water specified is directed to the most appropriate sites.

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<sup>5</sup> We make the general observation that economic/social/cultural needs should be seen as occurring within the environmental capacity of the water system. Diversion of water for human needs that has adverse environmental consequences may in fact undermine longer term critical human needs.

<sup>6</sup> Schedule 5, Cl 15, *Water Management (General) Regulation 2011*.

## General Comments Regarding Exemption Provisions

The EDO suggests that amendments be made to the Draft Regulation to clarify the circumstances when the above exemptions apply. The current requirement that the “Minister is satisfied” that the taking of water is “in the public interest” and “urgently required” necessitates a further transparent, scientific based decision making process that identifies the criteria used by the Minister to make the decision. Such criteria could be developed in consultation between the Office of Water, the Office of Environment and Heritage and the Natural Resources Commission.

In another environmental law context, section 79C(1) of the *Environmental Planning and Assessment Act 1979* (NSW) provides an example of how to ensure a decision maker’s discretion can be guided by relevant factors. That section clearly sets out the criteria that the consent authority is to consider in determining a development application:

“(1) Matters for consideration—general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:
  - (i) any environmental planning instrument, and
  - (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
  - (iii) any development control plan, and
  - (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
  - (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
  - (v) any coastal zone management plan (within the meaning of the *Coastal Protection Act 1979*), that apply to the land to which the development application relates,
- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
- (c) the suitability of the site for the development,
- (d) any submissions made in accordance with this Act or the regulations,
- (e) the public interest.”

We suggest that the Draft Regulation adopt a similar approach (obviously addressing different subject matter) to clarify the criteria that the Minister must consider in deciding whether to approve an entity’s use of water under the relevant exemption provisions.

## Emergencies and Critical Needs

The EDO notes that several of the exemptions in the Draft Regulation are intended to be implemented in situations where a rapid response is required to avert a negative outcome (e.g. Critical Human Needs, Emergency Environmental Watering). We understand that a balance must be struck between the need

for water to be taken at short notice, and the implementation of thorough, accountable and transparent decision making.

In other time-critical scenarios, some legislation ties the use of Ministerial discretion to emergency “declarations”, requiring certain considerations such as time limits, appropriateness and consultation. For example, under s 80J the *Privacy Act 1988* (Cth), the Prime Minister or Minister may make a “declaration of emergency” if they are satisfied (among other things):

- that an emergency or disaster has occurred; and
- that “the emergency or disaster is of such a kind that it is appropriate in the circumstances for this Part to apply in relation to the emergency or disaster”.<sup>7</sup>

Furthermore, where the emergency occurs overseas, “The Minister must consult the Minister administering the *Diplomatic Privileges and Immunities Act 1967* before the Minister makes a declaration under this section.”<sup>8</sup>

In determining when the emergency period has passed (s 80N):

- “An emergency declaration ceases to have effect at the earliest of:
- (a) if a time at which the declaration will cease to have effect is specified in the declaration – at that time; or
  - (b) the time at which the declaration is revoked; or
  - (c) the end of 12 months starting when the declaration is made.”

The above provisions give examples of measures to ensure accountability in situations where rapid decisions are being made.

We note, for example, there is no consultation requirement in the Draft Regulation when water may be released for Critical Human Needs (or environmental emergencies). For the purposes of the Draft Regulation we would suggest the Natural Resources Commission as an appropriate body that should be consulted, noting its objects.<sup>9</sup>

In addition to this consultative ‘check’, the Regulation should require time limits be specified, to prevent activities from carrying on for longer than necessary (see the 12 months rule in 80N of the *Privacy Act* above). The use of time limits, and compulsory review periods from when a decision is made (e.g. three months), could help to ensure that decisions made to address short term problems are not extended to have long term or permanent effect.

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<sup>7</sup> See *Privacy Act 1988* (Cth), s 80J, “Declaration of emergency – events of national significance”, which suspends ordinary protections on personal information sharing.

<sup>8</sup> *Privacy Act 1988* (Cth), s 80K(2).

<sup>9</sup> The Natural Resources Commission is “an independent body with broad investigating and reporting functions for the purposes of:

- (a) establishing a sound scientific basis for the properly informed management of natural resources [defined to include water] in the social, economic and environmental interests of the State, and
- (b) enabling the adoption of State-wide standards and targets for natural resource management issues, and
- (c) advising on the circumstances in which broadscale clearing is to be regarded as improving or maintaining environmental outcomes for the purposes of the *Native Vegetation Act 2003*.” Sec 3, *Natural Resources Commission Act 2003*.

## C. Approvals for water use, supply works etc

### *Exemption from Advertising Applications for Approval*

The Draft Regulation proposes to *extend an exemption* from the requirement to advertise an entity's application for approval (at clause 25(2)) for specified "short-term" water supply works.<sup>10</sup> For a number of types of application, such as for river pumps and bores, there is an opportunity for the community to comment on approval applications. We are concerned this proposal will reduce public participation and knowledge of applications, contradicting the Draft Regulation's aim of improving transparency.<sup>11</sup>

Currently if the application is for works that are operational for less than three months, the entity is not required to advertise the application for approval. The Draft Regulation intends to expand this exemption to works used for a period of not more than 12 months. In the absence of clear justification, the EDO does not support this extension in the Draft Regulation, given the environmental consequences that can result from the activities to which this exemption applies (particularly prospecting or fossicking for minerals or petroleum<sup>12</sup>). Maintaining the three-month rather than a 12-month exemption would continue to promote community consultation and participation regarding applications for short-term water supply works.

### *Clarification of Security Deposits Provision for Approvals*

The EDO supports the intention to clarify existing clauses regarding security deposits that project proponents provide to the Minister. This would help ensure that proponents fulfil their obligations following the construction of works or completion of activities. We also have some suggestions for improvement in this area. Clause 29(1) of the Draft Regulation provides:

"An approval may be granted subject to a condition to the effect that, before commencing the construction of any work or the carrying out of any activity, the holder of the approval must provide the Minister with security for the cost of performing the holder's obligations under the approval in the event that the holder fails to perform those obligations."

The EDO believes the Draft Regulation should clarify *when* such a security deposit is required, and the factors to be taken in to consideration when determining the *amount* of the deposit. The Draft Regulation provides for broad discretion – that the security deposit is "to be for such reasonable amount as is determined by the Minister" (clause 29(1)). The Draft Regulation should include more transparent and objective measures (perhaps in a schedule) to determine when and how much of a deposit is required. Finally, the Regulation should clearly outline those exceptional circumstances and reasons when proponents are not required to provide such a deposit.

### *Exemptions for Water Use Approvals*

As the RIS explains, the Draft Regulation intends to amend a number of new exemptions regarding the requirement to hold a water use approval, to make them consistent with those exemptions that exist for access licences. A water use approval "confers a right on its holder to use water for a particular purpose at a particular location."<sup>13</sup> In this submission, the EDO has called for greater clarity around several exemptions for access licences (such as for critical human needs), and for clearer limits on the level of discretion through which those exemptions may be granted. Without such further clarification, the EDO has reservations about the Draft Regulation's proposal to allow any person who is exempt under

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<sup>10</sup> Discussed at Section 5.4.1 of the RIS.

<sup>11</sup> That is, to "improve transparency by making information more readily available to the public" as noted on p 1 above.

<sup>12</sup> Clause 25(2)(b)(iii), *Draft Water Management (General) Regulation 2011*.

<sup>13</sup> Sec 89(1), *Water Management Act 2000*.

clause 18 (access licence exemptions) in relation to the taking of water for specified purposes, to be exempt from section 91A(1), and therefore not required to obtain the relevant water use approvals.

*Exemptions regarding the use of Water Supply Works*

The EDO objects to clause 36 of the Draft Regulation, which provides a range of exemptions from the requirement to obtain a water supply work approval. The Draft Regulation proposes that if a person uses or constructs a water supply work for prospecting for minerals or petroleum, or for a hydro-electric power station owned by State Water Corporation or the Water Administration Ministerial Corporation, then that person is exempted from the requirement to hold a water supply work approval. The EDO believes it is inappropriate for those activities that have the potential to inflict such serious impacts on water flow and quality to be exempted from obtaining the relevant approvals. Accordingly the exemption in clause 36 should be removed.

*Changing to the mining and Crown lands exemption*

The Draft Regulation proposes to extend the current exemption from the requirement to hold a “controlled activity approval” for any activity carried out in accordance with any lease, licence, permit or other right in force under the *Mining Act 1992* or *Crown Lands Act 1989* – to include activities under the *Western Lands Act 1901*. The EDO submits that such exemptions should be narrowed, not extended, given the environmental impacts that can arise from such resource extraction activities.

In closing, the EDO appreciates the invitation for input into the development of the Draft *Water Management (General) Regulation 2011*. We hope our suggestions are of assistance in working towards a final Regulation. If you would like to discuss this submission further please contact me on (02) 9262 6989 or [nari.sahukar@edo.org.au](mailto:nari.sahukar@edo.org.au).

Yours sincerely

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