



Government of **Western Australia**
Department of **Water and Environmental Regulation**

Consultation summary report

Guideline: Spring exemptions

Department of Water and Environmental Regulation

April 2023

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1 Background

The Department of Water and Environmental Regulation (the department) developed the draft *Guideline: Spring exemptions* to inform landowners and occupiers of land about the process for determining a spring exemption under Part III section 5(1)(a) of the *Rights in Water and Irrigation Act 1914* (the Act).

The department released the draft guideline for public consultation on 17 December 2021 for an initial three months. To assist stakeholders who expressed challenges with reviewing and providing input within the initial consultation timeframe, the department extended the public consultation period to give everyone reasonable opportunity to make a submission. The consultation period closed on 31 May 2022 after a five-month period.

In February 2022, the department field tested the draft guideline with members of the Warren Donnelly Water Advisory Committee and some landholders at various properties in the Warren and Donnelly river catchments.

In May 2022, the department hosted online forums with several south-west stakeholder groups to discuss the draft guideline and answer questions to help the groups formulate a written submission as part of the public consultation process.

This report summarises key matters raised during the consultation period, the department's response and how feedback assisted in preparing the final guideline.

2 Submissions received

The department received 73 submissions during the five-month public consultation period. Many submissions were from landholders in the south-west of the state and particularly the Manjimup, Bridgetown and Pemberton areas. Submissions were also received from south-west stakeholder groups, local and state governments, and consulting specialists.

Appendix A contains a list of respondents who submitted written comments about the draft guideline. This list excludes respondents who requested confidentiality.

3 Summary of submissions

All submissions were considered during the preparation of this consultation summary report. Feedback was highly varied, and a range of differing views were expressed by stakeholders. The department has summarised submissions into key feedback themes.

The highest level of interest relating to the spring exemption came from stakeholders located in the south-west of the state, particularly in the Warren-Donnelly area.

Suggestions and recommendations from public feedback on the draft guideline assisted the department to develop a final guideline that is practical, can be readily understood and considers methods of support for a target audience of landholders.

4 Key feedback themes

4.1 General comments on the draft guideline

There were varying and, in some instances, opposing views on the need for a spring exemption guideline. Some respondents supported a guideline to provide a documented process on how to determine the spring exemption. Other respondents expressed concern that the department was over-regulating watercourses and springs, particularly in the Warren and Donnelly river catchments.

Comments on this feedback theme provided perspectives including:

- The determination process previously used by the department was a more practical, repeatable and consistent approach for determining whether an exemption applies. The use of complicated interpretations and self-assessment would not be the best mechanism.
- By using comments that are not a direct or complete quote of the Act, some definitions and wording in the draft guideline cause confusion. Simplified language and clear definitions would make the final guideline a more workable document.

The department response and outcome

The final spring exemption guideline clearly states (on page 1) that the guideline does not involve any change to existing legislation.

After reviewing feedback from the public consultation, the department considered that a defined process is the appropriate outcome to enable consistency and transparency about the spring exemption under section 5(1)(a) of the Act.

The final guideline aims to assist landholders to assess the sometimes-complex considerations for determining spring exemptions. Clarifying interpretations of the spring exemption is a sensible approach and was requested by some stakeholders as part of this consultation process. It is necessary, particularly in cases where common definitions are different from the definitions of terms used in the Act.

The final guideline includes:

- plain language and simpler explanations to make it easier for a variety of audiences to understand and use
- improvements to the flow of information and its ease of use as a self-assessment tool for landholders
- clearer diagrams and accompanying descriptions to help explain springs, watercourses and the self-assessment considerations.

4.2 Comments on the scope and context of the draft guideline and the governance of springs

Respondents noted that the draft guideline was complex and there would be challenges for water users if they engaged a suitably qualified water specialist to ensure the hydrological elements of section 5(1)(a) of the Act were appropriately considered. Definitions need to be further clarified because even specialists are unlikely to agree on what is a spring or a watercourse.

Comments on this feedback theme provided perspectives including:

- Recommending irrigators employ a water specialist would impose costly due diligence for landholders, and the guideline does not indicate what would occur in circumstances where hydrological advice from a water specialist differs from that of the department.
- The Act does not indicate who determines the spring exemption. Some respondents considered it challenging if interactions between the department and farmers involved a debate of definitions on a complex regulatory issue.
- Definitions should be included in the guideline to enable landholders to understand the differences between springs, watercourses, occasional or intermittent flow and naturally rising water at the head of a watercourse.
- There needs to be transparency and consistency in decision-making as supported by the findings of the Legislative Council Standing Committee on Public Administration Inquiry into Private Property Rights (September 2020).

Respondents also commented on the requirements of other decision-making agencies when actions are taken that interfere with watercourses or springs, including approvals that may be required under Australian, State or local government legislation.

The department response and outcome

The final spring exemption guideline clearly states (on page 1) that the guideline does not involve any change to existing legislation.

The final guideline has been developed to:

- highlight the sections in the existing legislation that are relevant to determining the spring exemption
- explain key terms relevant to the spring exemption, particularly in cases where the common definitions are different from the definitions used in the Act
- indicate the importance of a consistent and transparent process to guide assessment and decisions on spring exemptions and dam developments, particularly in catchments that are fully allocated.

The feedback noted that this was a complex and contentious issue. In particular, some landholders were concerned about the costs of engaging water specialists to determine the spring exemption.

The final guideline includes:

- an ‘Additional advice and support’ chapter to outline the level of support (including the provision of information and advice) the department can provide to landholders who have questions about a spring exemption assessment or would like to talk through their individual circumstances in the self-assessment steps
- clear definitions to assist the understanding of springs and watercourses and an improved self-assessment process using supporting diagrams and explanations at each step
- acknowledgement of interactions with other decision-making agencies and clarification that a spring exemption does not exempt the need for other approvals under Australian, State or local government legislation.

The simplified final guideline, along with the additional information and support from the department, should provide landholders with the confidence needed to work through a spring exemption self-assessment.

The final spring exemption guideline is a key step towards developing a documented process for managing this complex issue. It is a recommended outcome arising from the Legislative Council Standing Committee on Public Administration Inquiry into Private Property Rights (September 2020).

4.3 Comments on guidance to identify a section 5(1)(a) spring

Respondents expressed a range of differing views on what guidance should be provided in the spring exemption guideline to identify a spring.

Comments on this feedback theme provided perspectives including:

- The current definition of a spring is adequate and there is no need for further clarification.
 - Classifying the types of springs is irrelevant as a spring is clearly defined as water naturally rising to the surface of the land. Where this occurs with no intervention or change of land condition, it should be considered a spring under the Act.
 - Springs should not be confused with artesian, which is sourced by modifying the ground conditions and is licensed.
- A spring as defined under the Act is complex and improved guidance is needed.
 - Some respondents queried what constitutes ‘spring flow’. Feedback suggested there was ambiguity between ‘non-artesian springs’ and

‘groundwater percolating to the surface’ and that reference to seasonality added to the confusion.

- Springs or soaks in the south-west of the state are discharges from erosion processes known as tunnel erosion and are human induced, not natural. Some respondents queried whether discharges of tunnel erosion caused by land clearing to establish pasture should be classified as springs.

Additionally, some respondents considered it reasonable for a person to dig a spring to collect water. However, other respondents understood that water taken from below ground level was groundwater and, if proclaimed, the take of that water needed licensing.

The department response and outcome

The final spring exemption guideline clearly states (on page 1) that the guideline does not involve any change to existing legislation.

The ordinary definition of a spring is not the same as a spring as defined under the Act. Defining a spring for the purpose of the section 5(1)(a) exemption may be complex, so the department has developed the final spring exemption guideline to provide a documented process and minimise the level of uncertainty for stakeholders. Case-by-case assessment of springs is required due to the unique circumstances on each property.

The final guideline has:

- provided updated figures and diagrams to assist with the communication and understanding of springs, spring generated flow versus flow generated from the catchment and the spring exemption
- not referenced the different ways that water may naturally rise to the surface (e.g. artesian or non-artesian) to avoid confusion
- clarified that water sourced by modifying the ground conditions to either:
 - access underground water, or
 - allow underground water to reach the surface

is not exempt from regulation under section 5(1)(a) of the Act

- clarified that the department can provide information and advice, if requested, to help landholders undertake a spring exemption self-assessment.

4.4 Comments on guidance to identify watercourses

Some respondents indicated that the definition of a watercourse was the most challenging aspect of the draft guideline. Other respondents considered the draft guideline to be clear on how to identify a watercourse.

Comments on this feedback theme provided perspectives including:

- The definition of a watercourse must reflect the intent of the Act and the commonly held understanding of the term.
 - A watercourse is where water begins to flow on the surface of land in a defined channel with a bed and banks. The definition of a watercourse, whether seasonal, periodic or permanent, must be clearly defined.
 - ‘Bed and banks’ imply that water has flowed over time to cut a channel in the land. It would then be possible to see evidence of intermittent flow events at some time during the year.
- The definition of a watercourse has been a significant factor in disagreements, and it appears the department is using a guideline to remove spring exemptions.
 - The amended definition of a watercourse in the Act in 2000 and the department’s varying interpretations of a watercourse has caused confusion among landholders.

The department response and outcome

The final spring exemption guideline clearly states (on page 1) that the guideline does not involve any change to existing legislation. The definition of watercourse under the Act has not changed since the 2000 legislative amendments.

It is acknowledged that defining a watercourse is a challenging consideration for determining the spring exemption. The department noted the inconsistencies of past decisions identified during the Legislative Council Standing Committee on Public Administration Inquiry into Private Property Rights completed in September 2020.

The department recognised the need to take action to develop a guideline to define a transparent and consistent process for assessing and determining a spring exemption under section 5(1)(a) of the Act.

The final guideline has been prepared to improve the understanding of the exemption. Case-by-case assessment of watercourses and how they interact with the spring exemption is required due to the unique circumstances on each property.

The final guideline has:

- provided updated figures and diagrams to assist the communication and understanding of watercourses and how they interact with the spring exemption
- described watercourses, noting that ‘intermittent’ and ‘occasional’ mean that a watercourse may only flow for short periods in some years
- recognised that watercourses, particularly those high in the catchment, may not be clearly defined due to their intermittent/occasional nature and/or because of human interference (including clearing and agricultural practices)
- clarified that the department can provide information and advice, if requested, to help landholders undertake a spring exemption self-assessment.

4.5 Comments on naturally rising water at head of watercourse

Some respondents noted that guidance on naturally rising water at the head of a watercourse was clear in the draft guideline. Other respondents raised questions about the legislative basis of terms used in the draft guideline and raised concerns that the department was applying new regulation without consultation.

Comments on this feedback theme provided perspectives including:

- The draft guideline included terms that are not stated in the Act such as ‘sheet flow’, ‘overland flow’, ‘spring watercourse’ and the ‘head of a watercourse’.
- There is concern that the draft guideline:
 - was seeking to regulate rainwater falling on cleared land or dams capturing any overland flow
 - would result in all drainage lines being classed as watercourses, and that the only location where the spring exemption was allowed would be a dam on top of a hill.

Some respondents also expressed views regarding on-site circumstances within the Warren-Donnelly area.

The department response and outcome

The final spring exemption guideline clearly states (on page 1) that the guideline does not involve any change to existing legislation.

The final guideline is seeking to clarify the spring exemption under the Act for landholders. Terms, definitions and explanations used in the guideline are there to improve the understanding of watercourses and how they interact with the spring exemption.

The final guideline has:

- clarified that it is not seeking to regulate run-off or rainwater falling on cleared land as these sources of water are only regulated in proclaimed surface water areas once they form or enter a watercourse
- confirmed that flow created by a spring at the head of a watercourse is exempt from regulation and clearer explanations and diagrams help communicate this
- clarified how to estimate the volume of flow generated by a spring to inform the spring exempt volume and where to position a dam to best ensure it is not taking water from a regulated watercourse.

4.6 Comments on self-assessment process and tools

Some respondents noted that the self-assessment process was easy to apply and appreciated the instructions. Other respondents suggested that the process should be simplified.

Comments on this feedback theme provided perspectives including:

- Greater clarity and precise definitions are required for the self-assessment process to be of practical use for landholders. The self-assessment process in the draft guideline should be field tested before the final guideline is implemented, and the department and landholders should work together to determine the spring exemption.
- Assistance with desktop assessments should be given to landholders before employing expensive hydrological specialists. The department should provide data and support to water users if needed. There could be concise steps to assess every dam and written approval should be required before works are undertaken.
- There was too much emphasis on desktop research and modelling. Determining a watercourse and measuring spring flows should be undertaken by on-site investigation during varying weather events. Topographical interpretation of cleared land was considered inaccurate.

The department response and outcome

In February 2022, during public consultation, the department field tested the draft guideline's self-assessment process with members of the Warren Donnelly Water Advisory Committee and some landholders through the Warren River and Donnelly River catchments. This process provided valuable input during the consultation period, with stakeholders recommending improvements to the process directly in the field and using the experience to inform their written submission.

The final guideline has:

- provided a simplified self-assessment process with clearer explanations and diagrams to help guide a spring exemption determination
- provided a separate field guide that can be printed and taken into the field to guide landholders in their spring exemption self-assessment
- clarified the level of assistance the department can provide to landholders undertaking a self-assessment
- included more information on how to measure the flow from a spring and how this can inform the size of dam construction that is exempt from regulation.

A clearer and easier-to-understand final guideline, with information available from the department if requested, should enable landholders to undertake a self-assessment without the need to engage a water specialist in most cases. On-site and desktop research are valid assessment methods to determine a spring exemption.

To assist with education and implementation of the spring exemption guideline, the department will offer the option of future field days for interested landholders. At the field days, the spring exemption self-assessment steps can be explained and worked through with landholders in different land settings. Springs are most prevalent in the south-west of the state and options for field days will be discussed with existing water committees (such as the Warren Donnelly Water Advisory Committee).

4.7 Comments on spring management provisions and historical dams

Respondents and landholders expressed concern that reclassification of existing dams as outlined in the guideline may lead to previously unlicensed water being regulated by the department.

Comments on this feedback theme provided perspectives including:

- Recording water take is important for the current and future management of water resources. There should be better regulation of upstream neighbours taking water from springs that impact downstream users and licensed watercourses.
- The 30 September 2020 date proposed in the draft guideline for acknowledging historic spring exemptions may not be appropriate.
- New water take should be subject to assessment to determine the source of water. The terms of licensing arrangements for previously unregulated dams in fully allocated areas is a concern amongst landowners.
- There is concern that the department is trying to stop construction of spring-exempt dams and trying to control dams that are already in place.
- Clear guidance is needed around the options available for landowners if there is disagreement and the department cannot legally make a determination.

The department response and outcome

The final spring exemption guideline clearly states (on page 1) that the guideline does not involve any change to existing legislation.

The department has published the final version of the *Guideline: Spring exemptions* alongside this consultation summary report so that landholders will have greater awareness and understanding of the legislative requirements of a spring exemption and the department's management response for springs.

The chapter on legacy and historical dams has been revised and the 30 September 2020 milestone date has been removed from the final guideline. There may be circumstances where the department's advice regarding the application of a section 5(1)(a) spring exemption to a spring on a certain property was correct at the time the advice was given, but the construction or placement of the infrastructure to take the water has meant that section 5(1)(a) no longer applies.

To ensure landholders construct dams that are compliant with legislative requirements of the spring exemption under the Act, the guideline has been updated with:

- clearer explanations and diagrams, and a simplified self-assessment process
- more information on how to measure flow from a spring and how this can be used to inform dam construction that is exempt from regulation
- the level of assistance and information the department can provide to landholders requesting advice on the spring exemption assessment.

Landholders are encouraged to contact the department’s local regional office (in relation to the property’s location) about the applicability of the spring exemption to the unique circumstances on a certain property. Desktop-based information and advice can be provided to assist landholders in the self-assessment process. In complex cases, the landholder has the option of engaging a water specialist (at their own cost) to ensure the hydrological elements of section 5(1)(a) are considered.

4.8 Comments on explanatory diagrams

Some respondents suggested there was scope to include more visual representation to enhance the understanding of terms used in the spring exemption guideline.

Comments on this feedback theme provided perspectives including:

- More clarity is needed on what constitutes a spring – in different scenarios, landscapes, vegetation and across seasons – to assist self-assessment.
- The definition of a spring provided the greatest uncertainty. Figures should be reviewed to clarify whether the spring-exempt dams have been accurately depicted.

The department response and outcome

Diagrams and explanations in the spring exemption guideline have been reviewed and updated to make it easier for landholders to understand. More visual scenarios on what constitutes a spring or watercourse for the purpose of determining a spring exemption have been provided in the final guideline.

4.9 Comments on costs affecting landowners and farmers

Respondents were concerned that the guideline proposes costly due diligence obligations on landholders by recommending that landowners engage suitably qualified water specialists to determine the spring exemption.

Comments on this feedback theme provided perspectives including:

- Landowners with permanent natural springs on their property would have paid more than the average cost per hectare on purchase.

- Surface water irrigation dams were constructed by landholders at their own cost. Water is costly to collect, store, pipe and irrigate.
- Increasing regulations and costs could be detrimental to primary production and the future of farming and smaller towns.

The department response and outcome

The final spring exemption guideline clearly states (on page 1) that the guideline does not involve any change to existing legislation. There will be no changes to fees, charges or taxes from the introduction of the spring exemption guideline.

The department has considered feedback regarding the due diligence requirements for landholders. Landholders undertaking the self-assessment of a spring exemption can approach the department for assistance.

The final guideline includes an 'Additional advice and support' chapter to outline the level of support (including the provision of information and advice) the department can provide to landholders who have questions about a spring exemption assessment or would like to talk through their individual circumstances in the self-assessment steps.

4.10 Out-of-scope matters

Out-of-scope matters raised during the consultation process for the guideline include:

- New legislation should make spring management less complicated. Changes to water legislation should consider feedback in order to develop a workable Act.
- Local by-laws could be investigated by the State Government and statutory committees formed under the Act to provide an improved platform for advice on local water management issues.
- The [Warren-Donnelly surface water allocation plan](#) released in 2012 needs to be reviewed and water allocation rules should be revised to facilitate better sharing between farmers with agricultural land.
- Water should not be traded as landholders and farmers expressed concern about how water would be distributed among farming communities.
- Landholders and irrigators store water and invest into drought-proofing their properties. There should be more Government investment in water data, bypasses and water-monitoring structures on private and public land.

The department will consider this out-of-scope feedback in relation to its ongoing work to manage and regulate important water resources across the state, including through the current review of the *Warren-Donnelly surface water allocation plan*.

Appendices

Appendix A – List of consultation respondents

Alan Liddelow	John Omodei
Kevin Jones	City of Gosnells
Brian Ede	Brad Rodgers
Mark Dixon	Marco Palermo
Steven Bogdanov	Bill Rice
Lisa Mazzella	Chad Kerr
Roger Wherrett	Robert Introvigne
Barney Vallentine	Alexandra Rey
Syd Hatch	Terry Brooks
Julian Sharp	Simone Bruce
D and H Thiele	Kym Beggs
Adrian Williams	Norman Kingston
Stacey Applin	Barbara Kingston
Jeremy Allen	James Kingston
Edward Liddelow	Rebekah Kingston
Dr Roger Seares	Levi Kingston
Simone Tilley	Tyla Kingston
June Kirwan-Bennett	Alexander Alban
Mitch and Jennifer Watt	Joel Winfield
John and Dayle Lawrie	Chris Mulcahy
Warren Lilleyman and Gillian Lilleyman	Mark Hardisty
Department of Planning, Lands and Heritage	Bruce Pearse
John Wheatley - SWS Pastoral Company	Maree Hurley
Western Australian Water Users Coalition	Diane Fry
Manjimup Water Security Group	Steve Walsh
Warren Catchments Council Inc	Edward Rowsthorn
Marilyn and Gilbert Rowan-Robinson	Jean-Francois Rey
Manjimup Chamber of Commerce and Industry	JA Stokes
Bevan Eatts - Morning Glory Enterprises Pty Ltd	Donato Terrigno
Department of Biodiversity, Conservation and Attractions	

Note: Respondents who requested confidentiality have not been listed.