

**Submission  
No 62**

## **INQUIRY INTO FLOODPLAIN HARVESTING**

**Organisation:** Macquarie River Food and Fibre

**Date Received:** 13 August 2021

---

13<sup>th</sup> August 2021

NSW Select Committee on Floodplain Harvesting  
Inquiry into Floodplain Harvesting  
floodplainharvesting@parliament.nsw.gov.au



Ms. Cate FAEHRMANN, MLC  
Chair  
Select Committee on Floodplain Harvesting  
Parliament of NSW  
Sydney NSW 2000

Thank you for the opportunity to provide feedback to the NSW Legislative Council's Select Committee on Floodplain Harvesting's Inquiry into Floodplain Harvesting.

### **About us**

Macquarie River Food and Fibre (**MRFF**) is an industry body representing water licence holders who are ground and surface water users in the Macquarie Valley catchment. We represent and support over 500 water entitlement licence holders and their communities.

MRFF members are food and fibre producers contributing to the economic, social and environmental health of the Macquarie Valley.

### **Introduction**

MRFF supports the reliable and equitable regulation and licencing of Floodplain Harvesting (**FPH**) to progress NSW water reform and meet the objectives of the Water Management Act 2000 and the Murray Darling Basin Plan.

FPH has historically been a legitimate form of water 'take' in times of an abundance of water and flood. In the Macquarie Valley it is also an important management tool for farmers to remove excess water from cropping areas that would be otherwise inundated for months at a time as a result of a number of factors including prolonged wet periods and flood mitigation operations at Burrendong Dam by WaterNSW.

All legitimate forms of water 'take' should be licenced, metered and accounted for, ensuring that water is managed in line with the existing Cap limits under the Murray Darling Basin Plan (MDBP). FPH regulation and licencing is an important final step to meeting that objective and ensuring Government has the ability to limit extraction within the legal limits. It also provides certainty to water users, a clear mandate for the regulator (NRAR) and ensures equity in the property rights across all classes of water licences.

The detail of our submission responds specifically to the terms of reference of the Inquiry and is outlined below. We welcome the opportunity to provide this feedback and look forward to discussing this matter further at the forthcoming hearings.

---

## Terms of Reference and Specific Commentary

1. ***That a select committee be established to inquire into and report on the Government's management of floodplain harvesting, including:***
  - a. *the legality of floodplain harvesting practices,*
  - b. *the water regulations published on 30 April 2021,*
  - c. *how floodplain harvesting can be licenced, regulated, metered and monitored so that it is sustainable and meets the objectives of Water Management Act 2000 and the Murray Darling Basin Plan and,*
  - d. *any other related matter.*

---

### ***a. the legality of floodplain harvesting practices,***

MRFF has sought legal advice on a number of matters pertaining to the legality of FPH, regulation and licencing, and impacts if it remains unregulated. We have also been the beneficiary of legal advice sought by NSW Irrigators Council to which we are a member.

We have provided the following advices in **Attachment 1** and submit them for review by the committee.

#### ***1. Holding Redlich – 2<sup>nd</sup> December 2021 “Floodplain Harvesting Advice – Transitional Arrangements”***

This advice provides an opinion on the implication of the disallowance of the regulations for irrigators in the Macquarie Valley. Section 3 of the advice responds to questions posed by us in relation to the continuation of FPH in the absence of the regulations as proposed. We note the following response from Holding Redlich;

3. **Response to the specific questions**
- 3.1 **Question 1: Are there any legal obstacles for users to undertake floodplain harvesting between now and July 2021 without an extraction licence under the transitional arrangements of the Water Management Act 2000?**
  - (a) No, in our view, the taking of floodplain water will not be in breach of the WMA.
  - (b) This is because taking overland flow water from the floodplain does not currently require any form of licence or approval and will not until such time as the Macquarie River WSP is amended to make provision for floodplain harvesting extraction licences and the necessary regulations are made under s 57A of the WMA that make it an offence to take overland flow without an access licence.
- 3.2 **Question 2: What is the status of flood work approvals to allow users to continue to take floodplain harvesting water?**
  - (a) Should a floodplain harvesting event occur tomorrow, land holders would not be breaching the WMA by taking water without an extraction licence. This is because currently no licence is required for taking overland flow from the floodplain – provisions are made in the WMA to regulate the take of that water but those powers have not yet been exercised.
  - (b) Land holders who have the benefit of controlled works approvals that were transitioned across into flood works approval should be able to rely on the flood works approval to rebut any claim that a separate works approval is required.
  - (c) Similarly, land holders who construct and uses the flood works “in accordance with” the flood work approvals will be exempt from the requirement to also obtain a supply work approval for that same work.

It is our view given the above and attached advice from Holding Redlich that FPH will continue to occur unregulated and unmeasured until the appropriate regulations are put in place to see it fall under the provisions of the “*Water Management Act 2000*” and included as a specific water source within the “*Water Sharing Plan for the Macquarie and Cudgegong Regulated Rivers Water Source 2016*”

## **2. Holding Redlich – 5<sup>th</sup> May 2021**

### ***“disallowance of Floodplain Harvesting Regulation – implications from a property perspective”***

The attached advice establishes a fundamental notion that FPH is a property right for those who have access to it without the proposed regulations and licencing framework. The advice also outlines the legislation that compels the Minister for Water to act to remedy over extraction against Cap under both State and Federal legislation.

Without the proposed regulations and subsequent licensing, those with access to FPH will be able to continue to do so on an unlimited and unmanaged basis as is their established property right and as outlined in the first advice.

However, given the Minister’s obligations, should over extraction take place in any valley as a result of a continuation of FPH outside a licenced framework, the Minister will be compelled to reduce extraction against other legal forms of take to bring overall extraction back to below legal limits. This may be via a reduction in Supplementary Licence extraction, and if required further, against General Security access eventually.

It is widespread in the Macquarie Valley that those who access Supplementary extraction are not Floodplain Harvesters. The result is that those who access FPH will do so on an unlimited, unregulated and unmeasured basis, with others who don’t access FPH potentially being penalised for the practice as observed in the Gwydir and Border Rivers.

In this instance, the remedy of reducing access to Supplementary access is not appropriate. It creates an inequity in the property rights of those accessing FPH against the property rights of Supplementary licence holders. The rights of one are being advantaged over the other without the commonality of action occurring.

In simple terms, without the regulations “*Bill will be able pump as much as he likes in a FPH event, and Peter who has no FPH and relies on Supplementary access will be asked to pay for it*”.

The regulations as drafted level the playing field for all forms of water take under the one legislative framework (WMA 2000) to ensure that over extraction is avoided and managed equitably in line with people’s rights to various forms of access to water (Supplementary, General security, FPH etc).

## **3. Holding Redlich – 4<sup>th</sup> August 2021**

### ***Advice in relation to the operation and necessity of the Water Management (General) Amendment (Exemption for Rainfall Run-Off Collection) 2021***

This advice outlines the operation and the necessity of the Rainfall runoff exemption under the proposed regulations.

---

***b, the water regulations published on 30 April 2021,  
c, how floodplain harvesting can be licenced, regulated, metered and monitored so that it is sustainable and meets the objectives of the water Management Act 2000 and the Murray Darling Basin Plan,***

There are a number of key principles that all stakeholders agree on in relation to these terms of reference:

- a) Floodplain harvesting must be reduced to the 1993/94 Cap on diversions through licensing requirements (like all other forms of water take);
- b) Floodplain harvesting must be metered and measured (like all other forms of water take);
- c) Downstream connectivity is important at times when critical human, environmental and cultural needs are at risk.

The regulations published on 30 April 2021 addressed both (a) and (b) above in full, with (c) appropriately being considered on a valley by valley basis. We note the many concerns and hesitations of stakeholders, however most of those are matters that fall outside the machinery regulations and generally relate to Water Sharing Plan (**WSP**) rules which will be amended as the licencing process is rolled out.

The regulations published on 30 April 2021 are machinery regulations required to licence and meter FPH. Parliament accepting regulations of this kind is critical for FPH to be regulated consistent with all other major forms of water take. Achieving a regulatory framework to manage FPH must be the priority of NSW Parliament and all stakeholders.

The Rainfall runoff exemption as part of this package is essential as it provides the framework to capture rainfall runoff from developed fields in line with legal and environmental obligations. This exemption affects operations both inside and outside of the floodplain statewide and is crucial to enabling farms to operate responsibly managing this form of water.

***Our recommendation is the Regulations as published on 30 April 2021 be adopted as they provide the appropriate regulatory framework to ensure licencing, measurement and monitoring of FPH occurs in line with all other forms of water extraction.***

We provide the following additional commentary in relation to these terms of reference;

- i. Many of the hesitations and concerns that led to the disallowance of the regulations were not adequately informed, and in some instances the result of misinformation. We believe that these concerns have been adequately addressed throughout the process by DPIE-Water.

DPIE-Water provided ample explanatory material, including videos on each regulation, fact sheets, webpages, and has hosted numerous public webinars to explain the regulations. We therefore do not believe the problem was a lack of available accurate information, rather, an abundance of misinformation. This Inquiry and ultimately Members of Parliament have an obligation to seek accurate and factual information for decision making purposes.

- ii. It must be recognised that there is an urgency to this reform. Given we are in a period of average to higher rainfall and flooding, there is a higher likelihood of unlimited and uncontrolled FPH occurring, which makes this reform a priority.

There are also many stakeholders unfairly impacted as a result of the delay in the regulatory process. In particular we would highlight Supplementary licence holders on the following basis;

- The growth in FPH has led to the Minister taking Cap-compliance action to reduce supplementary water take to ensure total take including FPH remains within the Cap;
  - Under the *Water Management Act 2000* the Minister for Water is compelled to act to remedy over-extraction as noted in our attached legal advice. Without the FPH regulatory and licencing framework, the government has an obligation to reduce extraction to ensure Cap compliance.
  - In June 2021, the Water Allocation Statements for the Gwydir and Border Rivers reduced AWDs for Supplementary access, as a result of growth in floodplain harvesting in those valleys. This has created a significant inequity in the property rights of water users. In simple terms, without the regulations “*Bill can pump as much as he likes in a FPH event, and Peter who has no FPH will pay for it*”.
  - The FPH regulations provide the lever to limit this form of take within water sharing plans to ensure fairness and equity across all licence holders. The continuation of reduced Supplementary access is not an appropriate mechanism to manage extraction in line with Cap limits and must be remedied immediately.
- iii. It is our understanding that many of the concerns raised by stakeholders throughout the consultation process have been addressed or being significantly progressed, particularly regarding connectivity.
- It is our understanding that DPIE-Water is conducting a significant work program on connectivity, as evidenced with changes observed in the Border Rivers WSP. It is expected that this work will continue as the licencing process is rolled out in each of the valleys in the northern basin.
- Importantly, these issues do not form part of the regulations and must be resolved in the WSP's for each individual valley such as the Border Rivers example. As such, these are not reasonable factors to cause further delay in the introduction of the regulations.
- iv. A fair and reasonable approach must be adopted by all stakeholders and Members of Parliament. This is a significant reform in and of itself, and it is important that it is not used opportunistically to address matters beyond its scope. This reform will not, and is not intended to address every concern relating to water management in the State.

---

**d, any other related matter.**

### **Macquarie Valley Connectivity, Valley Targets and BDL following the addition of Floodplain Harvesting licencing**

Provided in **Attachment 2** from our consultant Sustainable Soils Management (**SSM**), is a description of the workings of the Macquarie Valley from a water distribution standpoint for the committee's information and review. The valley is particularly unique in that it has very little connectivity with the Barwon Darling

catchment which leads that end of system (Barwon / Darling system) targets that may be relevant in other valleys are largely irrelevant for the Macquarie.

Further, this paper outlines the valley targets that exist within the current WSP relating to Supplementary events which we would consider adequate for FPH targets within the WSP whilst still maintaining environmental flows to the Macquarie Marshes in these events.

Importantly, as outlined in the DPIE-Water report “*Macquarie Valley: Floodplain Harvesting in WSP’s (Report to assist community consultation)*”, even with a modest increase in FPH within the valley, overall water use remains well below the plan limit and has little to no environmental impact on the downstream environment.

**Table 6 Long term average diversions (1895–2009) for determining growth in use**

Diversion component	Long term average diversion – Plan limit GL/year	Long term average diversion – Current conditions GL/year
General and High Security	304	271.3
Supplementary Access	13.6	14
Floodplain harvesting	46.1	52.5
TOTAL	363.7	337.8
<b>TOTAL (less exempt rainfall runoff)</b>	<b>350.8</b>	<b>324.6</b>


The results show that while current conditions for floodplain harvesting has increased by 6.1 gigalitres per year (18%.) above that for the plan limit scenario, there has not been any overall growth in water use. Total long-term average diversions have decreased by 26.2 gigalitres per year, a decrease of about 7%. Conversely, without the tailwater exemption in place, these results show that floodplain harvesting has increased by 6.4 gigalitres per year and overall water use has decreased by 25.9 gigalitres per year.

As overall water use is below the plan limit, no reduction in current floodplain harvesting is required.

If you wish to discuss this further, please contact me.

Sincerely,

Michael Drum  
Executive Officer  
Macquarie River Food and Fibre



**Attachment 1 – Legal Advice**

***1. Holding Redlich – 2<sup>nd</sup> December 2021***

***“Floodplain Harvesting Advice – Transitional Arrangements”***

***2. Holding Redlich – 5<sup>th</sup> May 2021***

***“disallowance of Floodplain Harvesting Regulation – implications from a property perspective”***

***3. Holding Redlich – 4<sup>th</sup> August 2021***

***Advice in relation to the operation and necessity of the Water Management (General) Amendment (Exemption for Rainfall Run-Off Collection) 2021***







**Attachment 2 – Consultants Report**

***1. Sustainable Soils Management – 13<sup>th</sup> August 2021  
“Macquarie River System”***

