

INQUIRY INTO FLOODPLAIN HARVESTING

Organisation: NSW Farmers Association

Date Received: 13 August 2021



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Vice President

13 August 2021

Select Committee on Floodplain Harvesting
NSW Legislative Council
Parliament House, Macquarie Street
Sydney NSW 2000

RE: Submission to the Inquiry into Floodplain Harvesting

NSW Farmers Association (NSW Farmers) welcomes the opportunity to provide comment to the Select Committee Inquiry into Floodplain Harvesting. NSW Farmers is Australia's largest state farming organisation, representing the majority of commercial farm businesses in New South Wales, ranging from broad-acre livestock, dairy, wool and grain producers, to more specialised producers in the horticulture, egg, pork, oyster and goat industries.

NSW Farmers supports the implementation of the NSW Healthy Floodplains Project which aims to licence overland floodplain flow diversion to within 1994 limits in order to protect floodplains and landholder rights. NSW Farmers members, water users and the broader irrigation industry supports bringing floodplain diversions into the regulatory framework including floodplain harvesting being subject to licencing requirements, metering obligations and a sustainable diversion of floodplain events to provide for long term productivity and environmental and downstream outcomes. NSW Farmers is disappointed by the amount of politicised mis-information and mis-truths that have surrounded the implementation of this reform and the double disallowance of the floodplain harvesting regulations which would allow floodplain harvesting diversions to be measured, managed and brought into the regulatory framework like all other forms of water use.

NSW Farmers policy position

Floodplain harvesting is a component of the Healthy Floodplains Project (HFP), implemented by the NSW Government, which adopts a valley-scale, strategic approach to development in floodplains through the use of Floodplain Management Plans (FMPs). The stated use of FMPs, is to "minimise risks to life and property and maintain the connection of flood waters to and from flood-dependent ecological and cultural assets". The project aims to set clear rules and assessment criteria for new and amended flood works. They also define the works that can be built in specific parts of the floodplain setting limits for the local and cumulative impacts of these works.

There are two parts to the HFP, the creation of FMPs and the implementation of floodplain harvesting licencing, and the position of NSW Farmers policy closely aligns with the Governments policy purpose in these areas.

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The key policy positions of the NSW Farmers for water management in relation to floodwaters are:

- That floodplain works must be approved and that there are sufficient regular opportunities for all land owners who may have floodwater affected by the works to have visibility and input to the approval process;
- Water connectivity for downstream users and that the fair and equitable share of available water is respected in all water outcomes;
- That the hierarchy of water availability for agricultural use ensures continuity of supply where available;
- Floodplain management rules that prevent works accelerating water velocity onto neighbours land, or increase depth and duration of water, or obstructing historic beneficial flows.

This submission later highlights some of the challenges that are of concern in meeting these policy outcomes.

Legality of Floodplain Harvesting

Floodplain harvesting is a historically recognised and generally accepted form of water diversion. The floodplain harvesting reform is part of a larger transition for all forms of water take and water sources to be regulated within the current regulatory framework. This transition has already occurred for surface water and groundwater takes and floodwater remains the final step. Surface water and groundwater were prioritised as they are larger forms of water use, and floodplain harvesting was last, due to a range of factors (including size of water use, infrequency of water use, significance given floods are at times of water excess and not scarcity, and lack of data availability decades ago). It has always been the intent to regulate floodwater following these other water sources.

The Water Management Act 2000 lists floodplain harvesting as a category of access licence:

57 Categories of licence

(1) There are the following categories of access licences—

(a) regulated river (high security) access licences,

(b) regulated river (general security) access licences,

(c) regulated river (conveyance) access licences,

(d) unregulated river access licences,

(e) aquifer access licences,

(f) estuarine water access licences,

(g) coastal water access licences,

(h) supplementary water access licences,

(i) major utility access licences,

(j) local water utility access licences,

(k) domestic and stock access licences,

(k1) floodplain harvesting (regulated river) access licences,

(k2) floodplain harvesting (unregulated river) access licences,

(l) such other categories of access licence as may be prescribed by the regulations.

(2) Subcategories of any category of access licence may be prescribed by the regulations.

The Water Management Act 2000 also provides provisions for the conversion of floodplain water usage to floodplain harvesting access licences.

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57A Special provisions relating to floodplain harvesting access licences

(1) The regulations may make provision for or with respect to the conversion of actual or proposed floodplain water usage by landholders into any of the following categories or subcategories of floodplain harvesting access licences (replacement floodplain harvesting access licences)—

- (a) floodplain harvesting (regulated river) access licences,*
- (b) floodplain harvesting (unregulated river) access licences,*
- (c) any other categories or subcategories of floodplain harvesting access licences prescribed for the purposes of section 57 (1) (l) or (2).*

The legality of this form of water diversion has only been called into question since the recent attempts by the current government to licence and bring floodplain harvesting into the regulatory framework. The purpose of the floodplain harvesting reforms is to bring a long-standing and accepted practice into the current regulatory framework so that it can be measured and managed as all other forms of water use, which is accepted and supported by NSW Farmers members.

The legality of floodplain harvesting is a matter for government and the courts of law, and legal questions must only be addressed by suitably qualified and experienced legal professionals. The Committee should direct focus to what the ideal/preferred floodplain harvesting regulatory framework should be, and how to get that framework in place as a matter of urgency.

Floodplain Harvesting Regulations

Below is a summary of the three regulations gazetted and published by the Department of Planning, Industry and Environment (DPIE) following public exhibition and consultation.

Regulation	Purpose	Mechanism	Effect
Water Management (General) Amendment (Floodplain Harvesting Access Licences) Regulation 2021	To reduce floodplain harvesting so that total take from all water sources is within the 1994 Cap, or Long-Term Average Annual Extraction Limit (LTAAEL), whichever is the lower for each valley.	<ul style="list-style-type: none">Where the volume of floodplain harvesting has grown, irrigators would have faced a proportionate percentage cutback so that the total take in the valley is reduced to Cap or the LTAAEL.Licences are to be issued consistent with the reduced volume to ensure floodplain harvesting remains within limits into the future.	<ul style="list-style-type: none">The regulation would have meant less flood water could have been harvested by farmers, and more water must stay on the floodplain or in streams and creeks.This would have benefited native birds, fish, reptiles and other wildlife, as well as native vegetation.It would have reduced the amount of water farmers in the five northern valleys can access to

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		<ul style="list-style-type: none"> The regulation also defines 'eligible works' for storing flood water. Only works built before 3 July 2008 are eligible, so that no new floodplain harvesting structures can be created. 	grow food and fibre but these farmers embraced the reforms in the public interest.
Water Management (General) Amendment (Floodplain Harvesting Measurement) Regulation 2021	Imposes mandatory requirements for floodplain harvesting to be metered.	Floodplain harvesting would have required telemetry-enabled metering equipment (with tamper-evident seals), which must be installed by a duly qualified person. This is outlined in the Floodplain Harvesting Measurement Policy.	<ul style="list-style-type: none"> Provides accurate and reliable data on the volume of water take. Ensures strong compliance and enforcement with water laws.
Water Management (General) Amendment (Exemption for Rainfall Run-off Collection) Regulation 2021	<ul style="list-style-type: none"> This regulation was to cover circumstances where farmers do not floodplain harvest but catch rainfall runoff. It applies across NSW. This regulation is required because the definition of overland flow in the Water Management Act includes other sources of take such as rainfall runoff as well as floodplain harvesting. All landholders must capture rainfall runoff and tailwater (used irrigation water) from farmland to minimise the risk of 	The regulation says a licence is not required when irrigators are capturing rainfall runoff/tailwater.	<ul style="list-style-type: none"> This regulation is important for water users outside the five northern valleys who are not yet on a transition pathway to licensing take from overland flows. This regulation allows water users to continue managing water on-farm consistent with their works approval conditions.

	<p>contaminants such as fertilisers entering waterways. It is a condition of their works approvals under the Protection of the Environment Operations Act 1997.</p> <ul style="list-style-type: none"> • This regulation clarifies that capturing rainfall runoff/tailwater across NSW is exempt from requiring a licence. 		
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NSW Farmers supports the above regulations and bringing floodplain harvesting into the current regulatory framework, consistent with our policies. The above regulations have been disallowed twice, which has delayed the progress of this reform and created uncertainty for floodplain water users and valley landholders. NSW Farmers provided a submission to the amendments to the regulations following the first disallowance of the regulations (Appendix 1).

Through the metering and licencing of floodplain harvesting, confidence can be provided that this form of water take is properly regulated to reduce impacts on downstream water users and the environment, and ensure the sustainability of the industries and communities that rely on floodplain flows. It is within everyone's interest that floodplain harvesting is subject to tighter and clearer regulations to ensure that this form of water take is subject to the same licencing, metering and Sustainable Diversion Limits as all other forms of water take in New South Wales.

How Floodplain Harvesting can be Licensed, Regulated, Metered and Monitored

The Floodplain Harvesting Regulations published on 30 April 2021 were regulations required for the licensing and metering of floodplain harvesting. Unless regulations like these are allowed to pass through Parliament it will not be possible for floodplain harvesting to be licenced, regulated, metered or monitored as all other forms of water use are regulated.

Many of the concerns and hesitations of stakeholder in regards to floodplain harvesting are not matters that fall within the regulations. Many of these concerns relate to environmental and downstream impacts as well as valley specific Floodplain Harvesting Water Sharing Plan Rules. Implementing a regulatory framework to manage floodplain harvesting must be the priority as the critical first step of delivering the floodplain harvesting reform.

In order to protect downstream needs, there needs to be active measures in place to manage/restrict upstream extractions. These include end-of-system targets in Northern Basin Water Sharing Plans, the Resumption to Flows Rules in the Barwon-Darling and Individual Daily Extraction Components. In anticipation of the regulations being gazetted and floodplain harvesting licensing in place, DPIE has been conducting public consultation on the Water Sharing Plans Rules of Floodplain Harvesting in each northern Basin Valley, which may amend or introduce new downstream flow targets if required.

NSW Farmers understands that DPIE is undertaking separate but concurrent work program to design and deliver mechanisms focused on connectivity, as part of delivering the Government response to the recommendations of the Independent Assessment of the Northern Basin First Flush. Notably however there are a number of key work issues that must be addressed to meet the HFP objectives:

- Better representation of return flows;
- An inability to estimate downstream impacts on flow;
- Localised routing of flows within valleys;
- Within valley impacts on water availability.

NSW Farmers encourages DPIE to continue this work as a priority and undertake genuine consultation with water users and stakeholder.

Issues with implementation of Floodplain Harvesting

As our comments above indicate, NSW Farmers supports the goal of the New South Wales Government in the creating of healthy floodplain water management, and the licencing of floodplain harvesting as a vital component of that management. It is widely recognised that New Souths Wales is leading all other states in the progress of metering and monitoring of water resources and use, and hence the potential to better manage available water and to be able to adapt to changing supply of available water. There are however concerns as to the fair and equitable implementation of the Government policies. This is clearly a difficult process to implement, and NSW Farmers urges that a cautious and stepped approach is taken to the privatisation of floodplain water to ensure the policy positions of the Government and NSW Farmers are achieved.

It is an obvious statement that an unlicensed scenario that currently exists, leaving aside any legal uncertainties, is a substandard situation for the certainty for land owners and environmental and downstream water supply. It is however troubling to NSW Farmers that the implementation process is not meeting in all instances the outcomes the Government policy is intending to achieve. NSW Farmers, in supporting the need for licencing, recognises that, as there are important facets of measuring and understanding of water flows, that the Government must implement a review process to address the problems that are unavoidable in the implementation of this complex change to water allocations.

Specifically this review process for land owners should:

- Be accessible and communicated clearly to all land owners;
- Must address all non- compliant works;
- Include an ability to challenge and review the past authorisation of works;
- Include an ability to review and challenge the granting of licences due to either the incorrect application of Government policy, or inaccuracy of information that was provided for licencing approvals;
- An ability to adjust licencing to ensure any negative downstream water supply outcomes that were not considered are adequately addressed.

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The implementation of the above will ensure the fair and equitable implementation of the policies the Government has development, and strengthen the support for further development of monitoring and transparent allocation of water resources.

NSW Farmers are happy to provide further information about the issues raised in this submission, if this would be helpful.

Yours sincerely

Xavier Martin
NSW Farmers Vice President
NSW Farmers Water Taskforce Chair

Appendix 1.



Xavier Martin
Vice President

Ref: 202130C

18 December 2020

Healthy Floodplains Project

Via Email: floodplain.harvesting@dpi.nsw.gov.au

RE: Proposed legislative amendments for floodplain harvesting in NSW

NSW Farmers' Association (NSW Farmers) welcomes the opportunity to provide comment on the proposed regulation changes for floodplain harvesting and rainfall runoff in New South Wales. NSW Farmers is Australia's largest state farming organisation, representing the majority of commercial farm businesses in New South Wales, ranging from broad-acre livestock, dairy, wool and grain producers, to more specialised producers in the horticulture, egg, pork, oyster and goat industries.

NSW Farmers policy is supportive of the implementation of the NSW Government Floodplains Policy with volumetric licencing of overland flow extraction to cap use at a sustainable diversion limit level in order to protect floodplains and riparian landholder rights. However, there are also significant aspects of the New South Wales Floodplain Harvesting Policy that are contrary to NSW Farmers policy that we do not support, for example the decision to exempt work applications from the normal advertising and appeal provisions of the Water Management Act 2000 and the licenced obstruction or redistribution of historic beneficial flows on neighbours land.

NSW Farmers supports the important progress towards implementing the Healthy Floodplains Project including the floodplain harvesting being subject to licencing requirements, metering obligations and reducing floodplain harvesting to a sustainable level.

Through the metering and licencing of Floodplain Harvesting, confidence can be provided that this form of water take is properly regulated to reduce impacts on downstream water users and the environment, and ensure the sustainability of the industries and communities that rely on floodplain flows. It is within everyone's interest that Floodplain Harvesting is subject to tighter and clearer regulations to ensure that this form of water take is subject to the same licencing, metering and Sustainable Diversion Limits as all other forms of water take in New South Wales.

NSW Farmers provides comment on the four proposed draft regulation changes for floodplain harvesting and rainfall runoff below.

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Establish a State-wide Tailwater Drain Exemption

NSW Farmers agrees that there are complexities involved in separating rainfall runoff from used irrigation water in tailwater drains and agrees that used irrigation water is already measured and accounted for under a relevant licence. Landholders are also obliged to collect and store used irrigation water and rainfall runoff from irrigation fields to protect the environment, rivers and downstream water users from potential contaminants.

NSW Farmers supports a state-wide exemption for the need for a water supply work approval for the use of a tailwater drain and the exemptions for the need for a water access licence for the collection of rainfall runoff from an irrigation field into a tailwater drain when no other overland flow is being taken by works on the land, other than a tail water drain.

The proposed exemption to hold a water access licence does not apply during a period in which a work on the land, other than a tailwater drain, takes overland flow water. NSW Farmers understand that this is because during those periods where overland flow is present, a Floodplain Harvesting licence will be required. This intention is supported, however, the regulation may require further clarification as overland flow water includes rainfall runoff, as defined in the *Water Management Act 2000*. NSW Farmers suggests providing clarity that the tailwater drain exemption only applies outside of a nominated floodplain measurement period, and the tailwater drain work does not change the nature of the floodplain flow. This would clarify when the exemption applies and provide a link to the Floodplain Harvesting Measurement Policy.

Embed the Floodplain Harvesting Licence Determination Process

NSW Farmers understands that the purpose of this proposed regulation is to clarify the process of licence determination, according to the New South Wales Floodplain Harvesting Policy within the Healthy Floodplain Project. This proposed regulation is required to implement the Floodplain Harvesting licencing framework.

NSW Farmers supports a licencing determination process as the licencing framework is essential to determine the limits that will be placed on Floodplain Harvesting to reduce this form of take to be compliant with the Long-Term Average Annual Extraction Limit (LTAAEL). Through the establishment of an eligibility criteria to limit Floodplain Harvesting take to landholders with eligible works constructed on or before 3 July 2008, future growth of Floodplain Harvesting will be controlled. Where the volume of water take exceeds the LTAAEL, through this regulation, an adjustment to each water share component allocation will be applied to reduce the volume of water take, and ensure that the total usage of water from the water source does not exceed the LTAAEL.

NSW Farmers understands that the proposed Floodplain Harvesting Licensing system is to bring activities of Floodplain Harvesting back to legal limits and to manage growth. Legal limits were established as the 'baseline diversion limits' described by the Murray Darling Basin Authority (MDBA) in the Basin Plan.

While not the subject of this regulation, it should be noted that it is important that all licencing of water allocations must consider the cumulative impacts on connectivity requirements. This issue is clearly articulated by DPIE-W in the recent (October 2020) presentation of "NSW Border Rivers: Floodplain harvesting in water sharing plans". In this presentation it is noted that the models used do not include return flows into the river and then there are limitations on estimating downstream impacts on flows and that 'future work' needs to be done. This is very concerning to us when the Border Rivers licensing finalisation will precede the addressing of these issues.

Implement the New South Wales Government's Floodplain Harvesting Measurement Policy

NSW Farmers supports the implementation of the Floodplain Harvesting Measurement Policy, and this proposed regulation is an important step to bring the Policy into operation. The proposed regulation will impose a mandatory metering condition on the holder of a work approval for a storage that can be used to take water under a floodplain harvesting water access licence.

As outlined in the Policy, the policy aims to ensure a fair share of water for all: Aboriginal and First Nations peoples, irrigated and non-irrigated agricultural producers; downstream users and communities; the environment; and river systems throughout the Murray-Darling Basin. To ensure high-quality data informs compliance with state and federal legal limits, the NSW Government requires landholders receiving a floodplain harvesting access licence to contract a duly qualified person to install telemetry-enabled storage meters that meet the Minister's minimum specifications outlined in the policy. The move to automated storage meters for floodplain harvesting measurement aligns with other water reforms such as the NSW Non-urban Water Metering Framework (2018). This will create a foundation for delivering a strong compliance and enforcement framework for water taken in NSW.

NSW Farmers supports the key principle that water take should be measured and monitored. Therefore, we see this proposed regulation as a key step to enact the Healthy Floodplain Measurement Policy.

Establish a transitional exemption for Floodplain Harvesting that will cease on 30 June 2021

NSW Farmers recognises that this draft regulation follows from the previous *Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020* from February 2020, which carries history of a parliamentary inquiry, disallowance and an unsuccessful rescission motion.

NSW Farmers understands that this draft regulation addresses many of the concerns raised during the Parliamentary Inquiry including:

- The inclusion of a sunset clause; with the proposed transitional exemption applying until water supply works approvals and floodplain harvesting access licences have been issued for eligible works or 1 July 2021, whichever is sooner.
- Clarification that the proposed transitional exemption will only apply to eligible works that are already constructed in accordance with a relevant approval either prior to 3 July 2008, or after 3 July 2008 where a valid application for the work was lodged prior to this date.
- The inclusion of measurement and reporting requirements throughout the proposed transitional period.
- Clarification that the amendments do not override the power of the Minister under section 324 of the Act to direct that the taking of water from a specified water source is temporarily prohibited or subject to restrictions.

NSW Farmers understands that the sunset clause to repeal this proposed regulation is appropriate for the Northern Valleys captured in the Healthy Floodplains Project, however there is concern that this would leave a regulatory gap for floodplains outside of the Northern Valleys. Clarification of the regulatory arrangements for those outside of the Northern Valleys is required. The need for an exemption or licencing framework for those outside of the Northern Valleys should be investigated.

The inclusion of the date 3 July 2008 in relation to eligible works provides clarification to determine actual structure of eligible works and restrict future growth of Floodplain Harvesting as any works constructed after this date are excluded, including works subject to appeal.

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NSW Farmers supports the inclusion of measurement and reporting requirements within the proposed transitional period and recommend that these obligations align closely with those within the Floodplain Harvesting Measurement Policy.

NSW Farmers supports the progress towards implementing the Healthy Floodplains Project and understands that the proposed draft regulations are an important step towards floodplain harvesting being subject to licencing requirements, metering obligations and reducing floodplain harvesting to a sustainable level. NSW Farmers is also concerned that all licencing activity should consider the issue of connectivity requirements downstream of Floodplain Harvesting zones.

We are happy to provide further information about the issues raised in this submission, if this would be helpful.

Yours sincerely

Xavier Martin

Acting President and NSW Farmers Water Taskforce Chair