Submission No 149

INQUIRY INTO FLOODPLAIN HARVESTING

Organisation: Southern Riverina Irrigators

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Southern Riverina Irrigators submission to the Select Committee on Floodplain harvesting

Thank you for the opportunity to make a submission to the Select Committee on Floodplain harvesting.

Southern Riverina Irrigators (**SRI**) is a peak irrigation advocacy group representing 2,200 landholdings in the Southern Riverina of NSW.

The Southern Riverina region contributes around $24 billion annually to the Australian economy through agricultural production such as rice, wheat, corn, dairy, beef, fruit, nuts, wine and cotton. Directly supporting thousands of jobs, regional communities, and the environment. In addition to the direct economic benefit, there are substantial value adding industries, such as food manufacture, processing plants, and abattoirs. The viability of the entire region is directly reliant on the reliability of water to the region.

Our submission makes the following points:

1. Impact of floodplain harvesting;
2. Proposed volumes of floodplain harvesting licences will exceed legal limits;
3. Floodplain harvesting is illegal;
4. Inequity of the water reforms; and
5. DPIE has a culture of prioritising northern irrigators.
6. Regulations

All the claims in this report can be substantiated, should the Committee require further information.

1 Impact of floodplain harvesting

Floodplain harvesting in NSW has never been metered, measured, regulated or restrained.

Despite the 1995 agreement by Governments to implement the Murray-Darling Basin Cap, and subsequent other intergovernmental commitments, such as the National Water Initiative and the Basin Plan, floodplain harvesting has been allowed to occur and continue to grow unabated in NSW.

The ability to extract water via floodplain harvesting is strongly correlated to on-farm storage capacity. SRI commissioned a satellite imaging project that showed on-farm storages in the five northern NSW valleys have grown from 600 GL in 1994 to over 1,400 GL today. It is very clear there has been a substantial growth in floodplain harvesting take.

It is a hydrological reality that increased extraction upstream will reduce flows downstream.

NSW and Victoria share a commitment under the Murray-Darling Basin Agreement to deliver 1,850 GL to South Australia annually, except in very dry years.

The Murray-Darling Basin Commission undertook research in 2000, stating the northern Basin contributed an annual average of 39% of the South Australian entitlement. The Murray-Darling Basin Authority reported this statistic in its preparation of the Basin Plan.

This century, the northern basin has only contributed to the South Australian entitlement five years out of 21.

This impacts Murray General Security users by:

- a declining contribution from the Northern Basin means the NSW obligation to South Australia is met out of the Murray river, and
- increased conveyance losses in the Murray, as the South Australian entitlement is delivered from Hume Dam, rather than Menindee Lakes.

The average annual allocation to Murray General Security has dropped from 84% to 52% over the last two decades.

This year, NSW Murray has received above average inflows, Hume Dam is currently spilling and Menindee Lakes are two thirds capacity while NSW Murray General Security languishes at 30%. NSW Murray General Security reliability is directly affected by the increased extractions in the Northern Basin.

The NSW and Commonwealth Governments claim inflows into the Murray system have halved this century and impacts of floodplain harvesting on the Murray system are negligible.

The Governments attribute the decline in inflows to climate change.

Scientific reports in response to the Menindee Lakes fish kills in January 2019, by the Academy of Science and Professor Rob Vertessey, state increased extractions in the Northern Basin are partly responsible for the decline in inflows from the Northern Basin. That is, the decline in inflows are not explained by climate change.

If, however, the decline in inflows is solely attributable to climate change, there is even less rationale to issue floodplain harvesting licences in the volumes proposed.

2 Proposed floodplain harvesting licence volumes will exceed legal limits

The NSW Department of Planning, Industry and Environment (**DPIE**) propose to issue approximately 346GL of floodplain harvesting licences. The proposed accounting rules allow licences to be extract 500% of licenced entitlement in any one year, subject to account limits. That is, 1,729 GL could be extracted in any one year in northern NSW.

The proposed volumes and accounting rules for floodplain harvesting, will exceed the legal limits in the:

1. *Water Act 2007* (Cth); and
2. *Basin Plan 2012* (Cth).

2.1 Floodplain harvesting will exceed legal limits in the *Water Act 2007*

In 1995, governments agreed to limit extractions to the 1994 level of development including infrastructure (such as on-farm storages) and rules. This is the Murray Darling Basin Cap (the **Cap**) and is defined in the *Water Act 2007* (Cth) at Schedule 1 (the Murray Darling Basin Agreement). NSW are legally bound to ensure total extractions are lower than the Cap or the limits set in the water sharing plans.

In 1994 there was less than 600GL of storage capacity in the northern NSW Valleys. Today there is over 1,400 gigalitres of storage (a growth of 2.4 times) making it possible for a corresponding increase in floodplain water harvesting. It is simply not credible the volumes proposed to be licensed are within Cap, when it was impossible to store those volumes in 1994.

The *Water Act 1912* (NSW) (the **1912 Act**) regulated access to water in NSW in 1994. The 1912 Act did not permit floodplain harvesting. That is, floodplain harvesting was not permitted within the rules in 1994. Therefore, any water taken by floodplain harvesting cannot be within Cap.

NSW have since claimed floodplain harvesting was "treated as a freely available bonus to a farmer's licensed entitlement".

There is a significant difference between a "bonus" and a perpetual legal right to take water.

It was possible to obtain a licence for floodplain harvesting under the 1912 Act. Landholders failed to exercise this right and the opportunity has now passed.

The proposed volumes and accounting rules for floodplain harvesting will require a commensurate reduction of other forms of take for NSW to remain within the Cap limits mandated by the *Water Act 2007* (Cth) and *Water Management Act 2000* (NSW).

2.2 Floodplain harvesting licences will exceed legal limits in the *Basin Plan 2012*

The limits for water extractions under the *Basin Plan 2012* (Cth) are calculated by the baseline diversion limit less water recovery. The total amount of floodplain harvesting in the baseline diversion limits for the Northern NSW valleys is 46 GL.

The proposed volumes and accounting rules for floodplain harvesting will require a commensurate reduction of other forms of take for NSW to remain within the Basin Plan limit.

Recommendation: Floodplain harvesting volumes are limited to the Murray-Darling Basin Cap.

3 Floodplain harvesting is illegal

We outline the following:

1. Floodplain harvesting is illegal;
2. The Water Minister misled parliament over the legality of floodplain harvesting;
3. NRAR has not pursued illegal floodplain harvesting; and
4. NRAR would not clarify the legality of floodplain harvesting.

For these reasons, SRI has no confidence in the Minister or the Natural Resource Access Regulator.

3.1 Floodplain harvesting is illegal

NSW water sharing plans define the distribution of water within a valley. They do not identify any volumes of water allocated to floodplain harvesting.

No licences for floodplain harvesting have been granted pursuant to the 1912 Act or the Water Management Act 2000 (NSW) (**WMA**).

Minister Pavey received legal advice from DPIE (9 October 2020) stating there are no circumstances where floodplain harvesting is permitted under the 1912 Act.

The take of water by floodplain harvesting under the WMA without an exemption requires a water access licence and a meter. As of today, these do not exist for floodplain harvesting.

The Minister's October 2020 advice referred to two further advices from the Crown Solicitor's Office. These advices have never been made public. They are referenced in the Minister's advice at paragraphs:

> *2.36 - The Crown Solicitor's Office **(CSO)** has considered the meaning of "take" in the WM Act (advice dated 24 August 2009), and*
>
> *2.39 - In a subsequent advice (advice dated 2 August 2011), the CSO specifically considered the issue of "take" in the context of floodplain harvesting.*

Recommendation: The Crown Solicitor's Office advices referred to in the DPIE internal legal advice are made public.

3.2 The Water Minister misled parliament over the legality of floodplain harvesting

The Water Minister, Melinda Pavey, was asked in Parliament on 18 June 2020 whether floodplain harvesting was illegal. She answered *"there is advice and information… It is a legal practice."*

Correspondence between DPIE officers show they were concerned the Minister had given an incorrect answer to parliament.

Minister Pavey's internal advice said :

"... we think the better view is that generally, the taking of water in the course of floodplain harvesting, without an access licence, from an unregulated river water source that is covered by a water sharing plan would constitute an offence under s 60A of the Water Management Act 2000."

The Minister subsequently tabled a different advice in Parliament in November 2020 to support her motion to rescind the disallowance (of the floodplain harvesting exemption). This advice did not reflect her department's "view".

Minister Pavey released her internal legal advice to Justin Field MLC, who subsequently made it public. However, Minister Pavey has not corrected Parliamentary record.

Recommendation: The Water Minister resign.

Recommendation: Minister Pavey be asked to correct the Parliamentary record with respect to the legality of floodplain harvesting.

3.3 NRAR has not pursued illegal floodplain harvesting

Historically, floodplain harvesting in NSW was treated as:

"a freely available bonus to a farmer's licensed entitlement."

The Natural Resource Access Regulator (**NRAR**) was established in 2018 in response to several scathing reviews of a culture of non-compliance in NSW over several decades. It was meant to be an institution in which the people of NSW could trust and have faith that it would be the "independent policeman" for water regulation.

In January 2020, NRAR advised DPIE that floodplain harvesting was illegal.

In February 2020, the Minister for Water introduced the *Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020*, which exempted the practice of floodplain harvesting from requiring a water access licence.

The Exemption was disallowed by the NSW Upper House on 22 September 2020. Near midnight on the night of the disallowance, the Director of the Healthy Floodplains Project Delivery wrote to the Deputy Secretary of Water and Chief Knowledge Officer offering a suggestion to overcome the disallowance. This email is shown below:

Re: FPH regulation disallowed

From
:
To:

Cc:

Date: Tue, 22 Sep 2020 22:49:56 +0000

The only way to acheive the same intent of this regulation is if NRAR exerise their discretion. There are plenty of good reasons why they would do this, but there are considerable risks regardless of what decision they make. We (DPIE-W/NRAR) will need to have a clear position on this ASAP as all stakeholders will want to know.

Water | Department of Planning, Industry and Environment

It should be extraordinary that a DPIE officer dictated NRAR's regulatory position to the Deputy Secretary in a way to override the will of Parliament. However, the officer considered he had the authority to do so, because he did not consider NRAR to be independent from DPIE, as evidenced in grouping "DPIE-W/NRAR" and describing the combined entity as "we".

It is even more extraordinary, considering DPIE, and this officer, were subject to an Independent Commission Against Corruption (ICAC) investigation on similar behaviours. This is discussed further below at Section **0.**

At an Extraordinary meeting one week later, the NRAR Board considered its regulatory position with respect to floodplain harvesting. Board papers stated that strict enforcement of the law was:

> *"inconsistent with Government policy"*

and if they did not prosecute floodplain harvesting, NRAR would receive

> *"less resistance from water users",*

but be

> *"inconsistent with the will of Parliament…",*

The Board papers also stated NRAR would be

> *"criticised for allowing this activity to go on unconstrained, unmeasured and unlicensed activity to continue unabated"*

NRAR's ultimate position was to exercise its "regulatory discretion".

That is, their position is consistent with the DPIE officer's suggestion to overcome the disallowance. NRAR's Chief Regulatory Officer explained:

> *"As it currently stands, the law will be enforced in the event of serious, substantiated and wilful non-compliance."*

NRAR has never clarified:

1. Serious;
2. Substantiated; or
3. Wilful non-compliance.

An estimated 2,500 GL was extracted via floodplain harvesting during 2020 and 2021. There are no public prosecutions by NRAR relating to floodplain harvesting over that period. It follows that NRAR do not view the extraction of 2,500 GL as serious, substantiated or wilful non-compliance.

Recommendation: NRAR clarifies its criteria to assess 'serious' and 'wilful non-compliance.

Recommendation: NRAR publish the number of cases of it has investigated and dismissed on the grounds they were either not 'serious' or 'wilful non-compliance'.

Recommendation: NRAR is moved from the Water portfolio to a Ministry not controlled by the National Party.

Recommendation: The Board of NRAR is dissolved and former politicians and former political staffers are restricted from being appointed.

4 NRAR would not clarify legality of floodplain harvesting

The legality of floodplain harvesting has been a public debate since the attempted introduction of an exemption in February 2020. The Government narrative has been the legality of floodplain harvesting without an exemption is ambiguous.

SRI asked NRAR to clarify the legality of floodplain harvesting.

NRAR initially responded through the media with an Opinion Piece in the Land newspaper. NRAR reiterated the Government's narrative the legal situation was 'ambiguous'. This does not align with the internal legal advice and the *Water Management Act 2000* (NSW). NRAR has never clarified why they view the legal situation as 'ambiguous'.

This opinion piece in a regional newspaper is the only public statement NRAR has made on the legality of floodplain harvesting.

Immediately before a large rain event in late December 2020, DPIE advised irrigators to seek their own legal opinion in relation to floodplain harvesting, whilst also withholding their legal advice.

NRAR made no public statement to assist landholders in assessing their legal risks.

That is, the Government and the Regulator, who have carriage of the legislation, claim "plausible deniability" in failing to interpret and enforce the law. Instead, they abrogated the interpretation, and risk of enforcement, to individuals.

Recommendation: NRAR publish their position regarding the 'ambiguity' of the legality of floodplain harvesting.

Recommendation: An independent review be conducted into the independence of the Chief Regulatory Officer and NRAR staff.

5 Inequity of water reforms

Allowing floodplain harvesting to grow was identified as an unresolved pre-existing equity issue when the Murray Darling Basin Ministerial Council reviewed the operations of the Cap in 2000. This inequity has been allowed to grow. Rather than remedy the inequity, the proposed harvesting volumes and accounting rules will entrench it.

This inequity results from the:

1. Northern NSW valleys not limited to the Cap;
2. Free access to water in Northern NSW valleys; and
3. Volumes of water recovery.

5.1 Northern NSW valleys not limited to the Cap

Floodplain harvesting in NSW has been allowed outside the Cap. That is, the Cap has never been applied to Northern NSW.

The Cap has applied to Southern NSW valleys since it was first implemented in 1997.

5.2 Free access to water in Northern NSW valleys

All water extracted from regulated rivers incurs several fees and charges. Water extracted through floodplain harvesting is free, subsidising those landholders.

This creates an unfair advantage for northern irrigators over southern counterparts. This advantage has compounded over several decades of free water from floodplain harvesting.

5.3 Volumes of water recovery

85% of water recoveries for the Basin has been sourced from the Southern Basin and these communities have borne the brunt of the negative impacts of the Basin Plan.

It is completely against the spirit of the *Water Act 2007* (Cth) to issue floodplain harvesting volumes that offset the water recovery.

Recommendation: The inequity between the Northern and Southern Basin is remedied as a matter of urgency.

6 DPIE has a culture of prioritising certain irrigators

The ICAC report on the *Investigation into complaints of corruption in the management of water in NSW and systemic non-compliance with the Water Management Act 2000* and the Matthews report clearly show NSW water agencies have a culture of ignoring the law and misinterpreting the Water Management Act 2000 (NSW) in ways to prioritise certain irrigators above the rest of the State.

It is SRI's experience that these behaviours haven't changed. For example:

- the DPIE Water Relationships officer advised colleagues not to communicate with certain Southern NSW stakeholders on floodplain harvesting.
- the NRAR's Chief Regulatory Officer told NRAR staff not to communicate with SRI's lawyer.
- SRI is aware of Northern irrigator groups having direct access to modelling and briefings not available to other stakeholders.

SRI made several requests for the Southern Basin to have a representative on the Healthy Floodplains Project Committee, but this was denied.

If the people will not change, change the people.

Recommendation: Seek independent advice to change the culture of the NSW water agencies.

Recommendation: Removal and replacement of the DPIE Water executive and staff down to the position of Director of Healthy Floodplains project.

6.1 Healthy Floodplains Committee

DPIE appointed a Healthy Floodplain Committee to advise on the implementation of floodplain harvesting licensing. Each committee member was required to sign confidentiality agreements, despite DPIE committing to an ICAC recommendation to increase transparency in water management. If floodplain harvest licensing was implemented in a systematic and fair way, confidentiality would not be required.

The membership consisted of an independent Chair and representatives nominated from: The Nature Conservation Council, NSW Irrigators Council and the NSW Farmers Federation.

The NSW Farmers Federation asked DPIE to withdraw their nomination, on the basis that he was misrepresenting their policy. DPIE accepted an alternate representative from NSW Farmers Federation, but insisted upon retaining the former representative as an additional non-representative committee member.

Some committee members have significant conflicts of interest as they (or their families and associates) will financially benefit from compensable floodplain harvesting licences.

SRI made numerous approaches to DPIE about their concerns, which were not addressed.

Recommendation: Any advisory committees relating to floodplain harvesting include a representative from Southern NSW irrigators.

7 Regulations

NSW have introduced regulations which have the effect of allowing floodplain harvesting to occur by stealth. Permitting these regulations in their current form, undermines attempts by NSW to control and regulate take. In particular, the:

1. Water Management (General) Amendment (Exemption to Rainfall runoff collection) Regulation 2021; and
2. Water Management (General) Amendment (Emergency works exemption) Regulation 2021.

7.1 Rainfall runoff blanket exemption is not required or should be limited to storages up to 500 megalitres

Floodplain harvesting is not confined to flood events. It occurs after rain events and rainfall runoff harvesting is defined as a component of overland flow and must be controlled and regulated to prevent the exceedance of Cap.

This blanket exemption is on the premise that landholders are required to capture contaminated runoff into tailwater drains.

Significant land-forming and development has occurred over the past three decades which enable landholders to impound the majority of water that flows on their properties. As a consequence, less rainfall runoff persists through valleys.

The integrity of the system diminishes when blanket exemptions are supplied. Defined allowances and limits are the only way to control extractions and prevent inappropriate irrigator behaviour or growth in a form of take.

If an exemption is made for the harvesting and storage of this water in mixed-use dams, it should be limited to storages which are less than 500 megalitres in capacity. The small number of landholders in NSW with storages that exceed 500 megalitres are larger operations with the ability to meter their inflows and report on this activity. They are the landholders who are most high-risk to abuse the exemption and to harvest water in excess of what is required to be retained by law. Consequently, these landholders should be required to record all of the water they harvest and provide reports to WaterNSW from the Bureau of Meteorology to justify when, which paddocks, and the volume of water, that they wish to claim an exemption for. This allows NSW to monitor and control how much water is being collected via this method and regulate any growth in this practice.

In regard to the collection and reticulation of tailwater, landholders with storages greater than 500 megalitres should be required to submit a report demonstrating the drop in storage volume (from irrigation use) together with the volume that has been recaptured and returned to the storage.

Recommendation: Rainfall runoff harvesting is to be metered and reported on for all storages greater than 500 megalitres.

Recommendation: Collection of rainfall runoff is exempt from requiring a water access licence for storages less than 500 megalitres.

Recommendation: Collection of rainfall runoff is exempt from requiring a water access licence for storages greater than 500 megalitres pursuant to an application from the landholder with supporting documentation from the Bureau of Meteorology, field maps and metered volume records.

7.2 Water Management (General) Amendment (Emergency Works Exemption) Regulation 2021

This regulation allows individuals to make a self-determination of what constitutes an "emergency" and construct works to divert water with little oversight.

As noted above, NRAR have been very clear that it is willing to use its discretion when assessing breaches of the Water Management Act 2000 (NSW). Consequently, an unlimited exemption for self-determined "emergencies" is unnecessary.

Recommendation: The Emergency Works Exemption be amended to:

Limit the volume of take permissible without a licence to ten megalitres;

Introduce a public register of incidents which are reported;

Require a State Emergency Services local officer to declare and emergency before works can be performed and water diverted;

Require the water to be released in an accordance with environmental laws; and

Require the emergency works to be dismantled after the emergency event.

8 Conclusion

Any attempt to amend the legal limits of water take to include a volume of floodplain harvesting offends the Cap, Murray Darling Basin Agreement and *Basin Plan 2012* (Cth).

NSW has spent hundreds of millions of dollars in an attempt to legitimise a practice which has always been illegal. In doing so, the NSW taxpayer will also be liable for the provision of billions of dollars worth of compensable floodplain harvesting licences.

It is outrageous that individual and community groups such as SRI are forced to fund their own research because the Governments have acted dishonestly and improperly.

SRI is a not-for-profit organisation that relies upon the investment of volunteers' time. It is not afforded the luxury of large teams (such as those within DPIE and NRAR) to review and check the veracity of the process. DPIE have either been brazen and acted in bad faith, or are simply incompetent. NRAR have demonstrated that they are not truly independent from DPIE and are therefore complicit. These issues can no longer be overlooked and must now be addressed.

Despite being reprimanded by ICAC for being biased towards northern irrigator interests, this conduct continues unabated. An internal review of both DPIE and NRAR must be undertaken as soon as possible. If the people won't change, then it is time to change the people.

There should be no delay in changing the NRAR board and the Minister that it is responsible to. In order to ensure integrity and no bias, there must be a separation of politics from NRAR, including a restriction on ex-politicians and staffers.

The Water Minister must be held to account for her attempts to mislead Parliament. She must be called upon to correct the record. She must then resign or otherwise be removed from this position.

Finally, the regulations which provide exemptions to the collection of water in NSW without a licence, need to be reviewed and refined so that the take of water can still be managed by NSW and not allowed to grow unchecked.

Chris Brooks
Chairman of SRI
20 August 2021