

IN-CAMERA PROCEEDINGS BEFORE

SELECT COMMITTEE ON FLOODPLAIN HARVESTING

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Virtual hearing, Sydney, on Monday 20 September 2021

The Committee met in camera at 14:40.

CORRECTED

PRESENT

Ms Cate Faehrmann (Chair)

The Hon. Lou Amato

The Hon. Mark Banasiak (Deputy Chair)

The Hon. Sam Farraway

The Hon. Ben Franklin

The Hon. Rose Jackson

The Hon. Adam Searle

The Hon. Penny Sharpe

The Hon. Mick Veitch

Evidence in camera by **BEVERLY SMILES**, Nature Conservation Council Representative on the Healthy Floodplains Review Committee – Inland Rivers Network, affirmed

The CHAIR: Welcome to this virtual in-camera session of the inquiry into floodplain harvesting. I welcome Ms Beverly Smiles, who has agreed to give evidence in private today. Before we commence I would like to make some brief comments about procedures for today's hearing. Please note that this is an in-camera hearing. The evidence is confidential. This means that this session is not being broadcast and a transcript of today's session will remain confidential to the Committee. In certain circumstances the Committee may find it valuable to publish some of what you say. If so, the Committee secretariat will consult with you about this, taking into account your circumstances. Ultimately, the decision as to what is or is not published rests with the Committee. As you would be aware, your evidence is protected by parliamentary privilege. It is important to remember that privilege does not apply to what you say outside of your evidence at the hearing. To minimise disruption and to assist our Hansard reporters, may I remind members to please state their name when they begin speaking. We are now ready to begin. Ms Smiles, would you like to start by making a short opening statement to the Committee?

Ms SMILES: Thank you. I acknowledge the Wiradjuri nation, on whose land I am meeting today, and pay my respects to Elders past, present and emerging. I have represented the New South Wales Nature Conservation Council on the Healthy Floodplains Review Committee since its inception in 2014. Review committee members were required to sign a deed of confidentiality.

. My key concerns about the process has been the lack of transparency, lack of environmental assessment and changes to policy throughout the assessment and modelling process. Rainfall run-off is one of the key issues.

The Healthy Floodplains project has nothing to do with health of flood plains. It is giving retrospective approval to structures and works while granting new floodplain harvesting entitlements that are far too large. The only focus of the project has been to assess floodplain harvesting capability at the property level with the purpose of licensing works and volume of take to lock in history of use as much as possible and identify individual property entitlements that will become a compensable, tradable, private property right. The remit of the committee was to make sure that government policy was being implemented fairly; however, the policy kept changing over time. This made the decision-making task more difficult. The assessment and review process became very rushed, putting significant pressure on staff, modellers and committee members. The aim to have everything licensed by 30 June 2021 has proven to be unrealistic.

As the process wore on, more and more property owners appealed the on-ground assessments, particularly around pump rates, temporary storage volumes and modelling. Changes made to parameters in the models generally resulted in larger entitlements. Word obviously got out that it was worth hiring a consultant.

I lodged a number of dissenting reports to the deputy secretary, which have been overturned with a comment that my concerns were with the policy and not within the scope of the review committee. The lack of assessment of environmental impacts of floodplain harvesting structures and extraction has been a key concern of mine as the only representative of environmental issues with access to the assessment process. The floodplain harvesting policy as implemented fails the environment, First Nations interests and downstream water users. Thank you.

The CHAIR: Thank you very much, Ms Smiles. We will go straight to questions from the Opposition. Is that you, Ms Jackson?

The Hon. ROSE JACKSON: Yes. Thank you so much for coming along today. I wondered if I could start by asking if you could outline some more of your concerns about the modelling process. You alluded to that in your opening statement that you just provided, but I just wondered if you could go into a little more detail about what concerns you have in relation to the modelling process.

Ms SMILES: Yes. The models developed for each valley have significant flaws and the assessment process has concentrated entirely on individual property capability and the building of a model for each valley. These valley models have been reported as having significant data gaps. The Border Rivers, Gwydir and Macquarie model reports and outcomes have been released. The Macquarie went out for public comment before the modelling review had been completed and we are still waiting to see the results of the Barwon-Darling and Namoi modelling.

. There were changes made to the floodplain harvesting models that are different to the hydraulic modelling developed for the floodplain management plan process. The relationship between the floodplain management plans and the floodplain harvesting assessment is not apparent. The two processes appear to be separate and disconnected.

Changes in the rainfall run-off rate in the floodplain harvesting models have implications for water sharing plans and the shares made with lower run-off rates.

. The modellers have met with the irrigation industry constantly over the process. Nature Conservation Council has had only two consultations with the peer reviewer, Tony Weber, and one with project director, Dan Connor, over the assessment period. The rest of the modelling consultation has been within the committee process. I would just like to refer you to the Alluvium submission that identifies the poor consultation on modelling. Tony Weber says:

Unfortunately, other water users, such as those representing the environment, or downstream users, have not had the same opportunities for engagement in examining the data used in the model. We suggest that this needs to change.

He also says:

A wholesale change in stakeholder engagement, using openness, transparency, inclusivity and processes suited to contentious environments, is required if mutual trust and ownership in the process of floodplain harvesting licensing, regulation, measurement and monitoring are to be established.

The Hon. ROSE JACKSON: You also alluded in your opening statement to concerns that you had about changes to policy throughout the process. Could you just give a little bit more information in relation to what were those changes to policy and the impact of those policy changes?

Ms SMILES: Yes. Changes to the original 2013 policy were made in 2018 in regard to rainfall run-off and this has resulted in much larger floodplain harvesting entitlements. The policy in regard to assessment of unregulated and groundwater properties changed mid decision-making. This is particularly relevant to properties in the Namoi valley. The Inland Rivers Network's submission has a good outline of the policy changes since the draft policy was released in 2010 to the current policy updated in 2018. The addition of rainfall run-off above the 10 per cent harvestable rights rule has caused the modelled entitlements to increase dramatically. In some places, such as the Barwon-Darling, the bulk of floodplain harvesting is now from rainfall run-off rather than overbank flow. This is licensing the capture of water before it even enters the river.

The policy for assessing properties with unregulated licences started by considering that the volumetric conversion process included all water use and there would be no additional floodplain harvesting licences granted. This was overturned part way through the appeal process. There was then a flurry of appeals and changes made to properties that had already been assessed and this resulted in vastly greater entitlements. The unregulated policy does not include assessment of property storage capacity, rainfall, or flood events in the year chosen as the highest crop rate between 1993 and 1999. The only line of evidence used was satellite imagery that has been demonstrated to be a faulty process to determine crop areas. The result has been very large entitlements for these properties. The same method was used for properties with only groundwater licences and I objected to this process and was told it was not in the committee remit to question the policy.

The Hon. PENNY SHARPE: Am I okay to jump in, Ms Jackson? Thank you very much, Ms Smiles. Obviously the policy changes are problematic, but I am wanting to understand the actual process. There were allocations, then people appealed those allocations and then there was some sort of review process. Who is responsible for overseeing the appeals process that is getting individual properties looked at?

Ms SMILES: What occurred was government staff went out and assessed the individual properties—

The Hon. PENNY SHARPE: Sorry, just to be more specific: by government staff, was that Department of Planning, Industry and Environment [DPIE] staff? Who specifically?

Ms SMILES: Yes. It started with DPIE staff in [disorder]—

The Hon. BEN FRANKLIN: Point of order—

Ms SMILES: —concentrated on the Gwydir—

The Hon. BEN FRANKLIN: Point of order: I am not trying to disrupt this evidence. All I wanted to draw the Committee's attention to is that I believe that there was a confidentiality agreement signed with the department. Now, that will obviously mean that some things can be discussed and some things cannot, but I just

wanted to draw that to the attention of Committee staff because I did not want us inadvertently crossing a line into something that was inappropriate, and I did not want to put Ms Smiles at any sort of risk. That is all.

The Hon. ADAM SEARLE: To the point of order: This is a proceeding in Parliament. Parliamentary privilege is absolute unless there is some other statute in place that overrides it. My understanding of the law is that a confidentiality agreement between Ms Smiles and the department or any other person cannot override the privilege that attaches to the evidence she is now giving to this Committee. There is no issue. There is no line to be crossed legally in this confidential session.

The CHAIR: Thank you, Mr Searle. That is fine.

The Hon. BEN FRANKLIN: I was not suggesting that there was. I just wanted to draw attention to that.

The CHAIR: Thank you, Mr Franklin. That is my understanding, too. Ms Smiles has been well briefed by the secretariat and what the secretariat has advised you, Ms Smiles, still stands. Please continue with your evidence.

Ms SMILES: Thank you. Just quickly, the process was focusing on the Gwydir and Border rivers to start with. DPIE Water staff went out to individual properties and looked at storage volumes, pumps, pipes, channels and a range of different works on the ground and recorded all of those. Then that information started to be fed into the model. Then there was the change of policy and by that time we had the Natural Resources Access Regulator. NRAR staff went out and redid the work, so that slowed things down a little bit. Then it was basically NRAR staff that did the Macquarie, Barwon-Darling and Namoi on-ground assessments. That information was then provided to the landholders to check and they had the ability to come back through this review committee to challenge the veracity of the information from the government staff assessment of their property works.

The Hon. PENNY SHARPE: Just to be clear, presumably, whether it was NRAR or DPIE, they went out and did an assessment. Then there was, I suppose, a right of reply for individual landholders in relation to whether they had issues with that and that was then looked at. Who then adjudicated the differences between, say, NRAR and the individual property owner?

Ms SMILES: That was a task of the committee.

The Hon. PENNY SHARPE: The committee you are on?

Ms SMILES: Yes.

The Hon. PENNY SHARPE: Right.

Ms SMILES: We made a decision as to whether to accept the landholder's position or accept the NRAR position, or we often sent back for more information because there just was not enough information to make a decision on.

The Hon. PENNY SHARPE: Were there any examples where the water allocation was decreased?

Ms SMILES: All of that information about the works then went into the model. Then there were other parameters in the model as well around where the flood flows came from, what the rainfall run-off was, what the crop area was, the rainfall run-off from undeveloped areas—there was a whole raft of parameters that went into the model. The landholders also had the opportunity to appeal that information, so some of these properties came back to us numerous times.

The Hon. PENNY SHARPE: It is your understanding that there were not any decreases—once that modelling had been done, everyone who went through that process got an increased allocation?

Ms SMILES: The majority of it was increased. Occasionally even a landholder themselves would come back and say, "Well, actually you got it wrong. My storage is not as big as that." Yes, there were some people, but that was pretty rare. More often than not the outcome of the process was larger entitlements.

The CHAIR: Sorry, Ms Sharpe, I have just noticed, I am pretty sure, that Opposition time has expired. I just missed that message. I will just jump in now with questioning going to the crossbench. Ms Smiles, you just mentioned all of this different information that was put into the model. I wanted to get to environmental assessments as well. Was there anything in terms of environmental assessments that make up this model as well, when you are saying "raft of information", or has that been largely left out?

Ms SMILES: Yes, it has. I have been really concerned over the last seven years that I have been on this committee—and being the only representative for environmental considerations—that there has been absolutely no assessment of environmental impacts of floodplain harvesting activities at all. The eligibility criteria for works includes floodplain structures that had no prior requirement for environmental impact assessment or works that had no previous approval requirements—such as channels, pipes and pumps—are to be assessed, but that is after they have been given works approval for a floodplain harvesting licence. This environmental assessment has not been carried out in a transparent manner and there is no public record of the process. For me, the licensing of all these works for floodplain harvesting locks in their history of use with no analysis of their impacts on flood flows and on flood volumes.

I outlined my concerns in regard to illegal works in a report to the deputy secretary. The response is, "Whilst it is clear that some works may need to be decommissioned, this will not affect the determination of floodplain harvesting entitlements under the provisions of the NSW Floodplain Harvesting Policy. In such circumstances, the allocation may only be taken using other works that have secured the appropriate works approvals."

I asked, "Were unapproved works included in the model?" , the project manager, responded, "Yes, used in the model if they meet the three criteria for eligible works in the Floodplain Harvesting Policy. Where the works are not approved by NRAR, they may need to be modified or decommissioned. The landholder then has the option of trading their floodplain harvesting rights." It is clear that entitlement will be granted for works that should be removed. I feel this is entirely unsatisfactory and it must be addressed before the process can proceed to granting new licences.

The CHAIR: You just mentioned a report that you provided the deputy secretary. I assume that is the deputy secretary of DPIE?

Ms SMILES: Yes, sorry. It was Jim Bentley, Deputy Secretary of Water.

The CHAIR: Okay. In that you outlined a number—was it your concern about illegal works or were you detailing a list of illegal works? Are you able to expand a little bit about what was contained in that statement to Mr Bentley?

Ms SMILES: Actually, as Nature Conservation Council [NCC] representative on the committee, I lodged a number of what were called dissenting reports. We were required to come to consensus decisions and they were in some areas that I just really could not agree to a decision with the information that we were supplied. There was a range of different issues. Some were specific, to do with particular properties, and some were the wider problems that I have already outlined, such as the way that the unregulated and groundwater properties were being assessed. There was a range of issues that I raised.

The CHAIR: Just getting back to what the floodplain harvesting committee was told by the Healthy Floodplains Project in relation to illegal works or works without an approval, your understanding is that, from here, a fair degree of them will receive a licence?

Ms SMILES: The volumetric entitlement from what those works can capture will be licensed and then if, after the fact, NRAR decides that they need to be decommissioned the landholder still has that private property right with a volume of entitlement and, , then they can trade that entitlement on to somewhere else. I just find that really not a good way of proceeding with this process.

The CHAIR: There is also the situation then of landholders getting a lot more water, which is what you also referred to in terms of rainfall run-off; that potentially a fair amount of what we have considered to be floodplain harvesting and were thinking that this Floodplain Harvesting Policy would capture may now be considered to be rainfall run-off. Is that—

Ms SMILES: Well rainfall run-off, in some places, is a substantive volume now of what will be given a private property right entitlement. In some places, like the Barwon-Darling, it is the larger extent of what is now being called floodplain harvesting. While earlier this morning there was a lot of emphasis on what your pumping capacity was, there are quite a few properties that just get rainfall run-off coming into their works and into their structures from undeveloped land around their irrigated paddocks, and that has been included in the model for licensing.

The CHAIR: Yes, okay. Have you also heard anything about this kind of changing of the cap, if you like—the discussions now around a cap scenario? Would you like to comment on anything in relation to that, if you heard Ms Slattery's evidence earlier today?

Ms SMILES: None of that was a requirement of the committee and we did not discuss anything. We were really dealing with the nitty-gritty of an appeals process. But I do have concerns about the committee itself and the committee process itself. The Government had decided to set this committee up along the same lines as

they had for the volumetric conversion process in 2000, when with unregulated rivers the water was separated from the land and then licences were calculated using certain methodology. This committee, then, is comprised in a similar way as that review committee in 2000. There is the New South Wales Irrigators' Council, NSW Farmers Association, Nature Conservation Council and the independent chair.

Because we were required to sign this deed of confidentiality, for me, it was a first experience. I have been sitting on government committees dealing with water issues for over 20 years and this is the first time I have had to sign what I consider to be a gag order. It has caused me considerable concern about what I could actually report back to the organisation that I was representing on the committee and it has indicated a significant lack of transparency around the process of assessing floodplain harvesting capability and the ensuing entitlement.

The committee, we were put under a great deal of pressure at the end of last year when the Government was still attempting to get the whole process finalised by 30 June. Because the three other members of the committee were irrigators with a large crop to harvest, we had 11 weeks of out-of-session decision-making to a shared online document between October and January. This involved some 130 submissions with hundreds of individual issues to make decisions on over that time, in isolation. I found the process was extremely stressful and not really conducive to good decision-making. I have probably used up your time, Cate, but I do have a few other comments to make about the committee itself, if that works now or later.

The CHAIR: Thanks, Ms Smiles. We do need to get to Government questions though, so we may also be able to get some stuff on notice. Mr Franklin?

The Hon. BEN FRANKLIN: Yes, I was just going to say that if you did have other comments to make, Ms Smiles, you might like to just take that on notice and then put them in that way. That would be terrific.

Ms SMILES: Okay.

The Hon. BEN FRANKLIN: I have only got a couple of questions. What is your opinion on the difference between annual accounting and the five-year rolling average—you know, the 500 per cent thing? There has been suggestion that in fact will decrease the amount of take, the five-year rolling average, but I am just interested in your views about it and about that issue in its entirety.

Ms SMILES: Again, I think as you heard this morning in a lot of cases—and I think it has been reported in some of the documents that were put out on exhibition—these flood opportunities occur only about once every five years. The 500 per cent allocation every five years means a very large volume of water will be extracted every five years, whereas if it is a one-year allocation—and I still think it is modelling black-box stuff, myself, to say that, "Well, the one-year allocation is going to be a lot larger than a five-year allocation." Those decisions could be made fairly by government across all the catchments and I think a one-year allocation would be a much more sensible way of managing these intermittent opportunities.

The Hon. BEN FRANKLIN: But that is the issue, is it not, that they only happen every five to seven years and there is a lot of water coming then? Trying to average that out over the time, I guess, is the logic behind it. It is an interesting challenge. I would like to pull back a level and just look at your submission. It states:

We are very concerned that the current NSW FPH Policy 2018 has moved away from protecting the environment and has focussed on locking in history of use through a range of mechanisms.

I guess my question is, pulling right back from all of the things you have talked about today, can you not do both? Can you not regulate floodplain harvesting to ensure that it is metered and done appropriately by definition when there is a lot of water around, and it does not happen when it does? Do you believe that you can actually do both: Can you have floodplain harvesting and protect the environment? If so, what are the parameters under which you would be comfortable about seeing that happen?

Ms SMILES: My problem is there has been no assessment of the impact of particular structures. For example, there has been a lot of emphasis on the Macquarie catchment this morning. One of the three main flood flows into the Macquarie Marshes has quite a significant amount of floodplain harvesting structure on it. There has been no assessment of how those structures actually impede natural flows into the marshes. That is the issue with floods. The actual natural flows, with all the nutrients and all the requirements that fish breeding needs, getting that water to the wetlands that tend to be at the bottom of the system, we have already had major capture in the storages. The key issue is not really the very big floods; it is more the medium floods and the smaller ones that are intermittent in between your big five-year floods, and they are all being captured as well. There just has been no assessment of what that means for everybody else. That is my key concern.

The Hon. BEN FRANKLIN: Is it fair to say, then, that you are not necessarily opposed to the concept of floodplain harvesting for landholders but you would like to see, before that happened, a lot more environmental assessment to determine what the issues as you outline them are and how they would be affected?

Ms SMILES: Definitely. Some of the organisations I am involved with have been following this process for a very long time. We know that it is not going to go away. It is just not sensible to expect that every single structure on the floodplain is going to be removed—that is just not realistic. But we really would like to see a fair assessment with the same level of detail that has happened with each individual property. Years of work and a very large investment of public money has gone into one half of the process; nothing has happened with the other side of the process.

The Hon. BEN FRANKLIN: Thank you. That is all from me, Madam Chair. I am not sure if either of my colleagues have questions.

The CHAIR: Thank you all. We did go over time for this session. I am afraid that is all the time we have, Ms Smiles. Obviously we could have kept talking for longer. Thank you very much for appearing. We will be in touch with you later confidentially when the transcript is produced. Thank you very much.

Ms SMILES: Thanks for the opportunity. Thank you, everyone.

(The witness withdrew.)