

21 May 2019

FPH Review
Alluvium
C/- PO Box 423
Fortitude Valley QLD 4006

By email: fphreview@alluvium.com.au

Dear Sir/Madam,

Re: Independent review of NSW Floodplain Harvesting Policy Implementation

1. Thank you for considering our submission on the *Draft Independent Review of NSW Floodplain Harvesting Policy Implementation (8 April 2019)*.
2. EDO NSW is a community legal center specialising in public interest environmental law. We have many years experience engaging with water law and policy processes at both the State and Commonwealth level. We also have extensive experience advising a broad range of clients including irrigators, community groups and peak conservation organisations on state and federal water laws. We welcome the opportunity to provide further input on the Floodplain Harvesting Policy.

Introduction

3. We note that the focus of your review has been on ensuring that the modelling is technically robust, based on the best available information and that implementation of the NSW Floodplain Harvesting Policy (**Policy**) is consistent with relevant legislation and related policy. Our submission will focus on consistency with relevant legislation and policy.
4. Overall, our key concern is whether the modelling you have reviewed is adequate to support lawful decision-making under both the *Water Management Act 2000 (NSW)* and the *Water Act 2007 (Cth)*.
5. In assessing whether the implementation of this Policy, and in particular the modelling which was the focus of this review, is consistent with relevant legislation and policy, it is necessary to first identify the context within which this modelling will be used to support statutory decision-making.
6. There are two distinct, though inter-related, decisions which should be informed by this modelling:
 - i. The preparation of amendments to water sharing plans under the *Water Management Act 2000 (NSW)*, including account management and dealing rules for floodplain water access licences; and

- ii. The preparation of water resource plans under the *Water Act 2007 (Cth)* and *Basin Plan 2012*.
7. Water Resource Plans for every water management area in NSW are currently in preparation (and we understand that they are not expected to commence on time). The amendments to state-level water sharing plans are relevant to the preparation of water resource plans at the Commonwealth level due to the overlap in their content requirements and because water sharing plans made under the state Act will be incorporated into, or also constitute, water resource plans at the Commonwealth level. As a consequence, the ability of this modelling to inform the implementation of the *Basin Plan 2012*, through water resource plans, is a relevant consideration.
 8. Our second broad area of concern is with enforcement. The NSW Government has a tarnished history when it comes to enforcing water legislation¹. In order to restore public trust in the administration of water laws, it is important that enforcement not only be done, but also that it be seen to be done. The outcome of this Policy will be that certain structures for harvesting floodwater will be clearly unlawful and will need to be removed or modified. The proper implementation of this Policy must, therefore, necessarily involve a transparent enforcement process.
 9. Our detailed comments are outlined below under headings which correspond to the headings in your draft report. Our concerns can be summarised as follows:
 - (1) The need for transparency about the volume of take to be authorised and how that will relate to adjustments to Baseline Diversion Limits and Sustainable Diversion Limits under the *Basin Plan 2012 (Cth)*;
 - (2) The use of modelling which fails to incorporate climate change projections is a clearly flawed approach, which is likely to lead to:
 - (i) poor ecological outcomes which do not accord with the intent of the legislation; and
 - (ii) uncertainty for water users;
 - (3) The absence of a specific compliance and enforcement strategy to address unlawful works;
 - (4) The identified deficiencies in the model in relation to predicting downstream impacts both on floodplains and in-stream will mean that the model is unlikely to support lawful decision making in relation to water sharing plan amendments, particularly in relation to environmental watering rules;
 - (5) The formulation of water sharing plan rules apparently without first having set the environmental objectives the rules are intended to achieve; and
 - (6) The need for water shepherding rules to ensure that releases of held environmental water are protected from consumptive take.

¹ See, for example, the outcomes of the Matthews inquiry: <https://www.industry.nsw.gov.au/about/our-business/independent-review-water-management-and-compliance>

4.1.2: Interaction with BDL and SDL under the *Water Act 2007 (Cth)* and *Basin Plan 2012*

10. We are unsurprised by your observation (on page 11 in section 4.1.2) that there is confusion among stakeholders about how floodplain harvesting has been, and will be, accounted for in the Baseline Diversion Limits (BDL) and Sustainable Diversion Limits (SDL) set in the *Basin Plan 2012* under the *Commonwealth Water Act 2007*.
11. The NSW government has not been transparent about either the process or the timing for this to occur. We support the draft recommendation outlined on page 22, however, we would suggest adding that the recommended guideline be prepared jointly with the MDBA and that it specify timing and interaction with other processes underway to implement the Basin Plan, including preparation of water resource plans (particularly given the delay in finalising those plans and the interim measures specified in the bilateral agreement²).
12. The NSW government and MDBA should also be transparent about the volume of take being authorised through this process and how it compares to the assumptions which underpin the current SDL.

4.3: Climate change

13. The finding on page 57 that “no climate change scenarios have been considered in the modelling work and are not proposed at this stage” is quite extraordinary.
14. The findings of the recent inquiry into the fish deaths in the lower Darling included that:
*“The recent extreme not-dry weather events in the northern Basin have been amplified by climate change. Future changes in the global climate system are likely to have an even more profound impact on the hydrology and ecology of the Murray-Darling Basin and increase the risk of fish deaths in the future.”*³
15. This report makes it very clear that the Basin is already experiencing the effects of climate change and that those effects can only be expected to worsen in the future.
16. The draft recommendation on page 57 of your report appears to be limited to ensuring that the NSW government is explicit about the fact that it has ignored climate change impacts in implementing this policy. This is inadequate when it is quite clear that the effects of climate change are already being experienced in the northern Basin.
17. Failing to take climate change into account now, not only means that decisions about protections for the environment are being informed by inadequate science, it also means that water users will experience the

² See: <https://www.mdba.gov.au/publications/governance/bilateral-agreements-basin-state-territory-governments>

³ Vertessy R et al, 2019, Final report of the Independent Assessment of the 2018-19 fish deaths in the lower Darling, found at: https://www.mdba.gov.au/sites/default/files/pubs/Final-Report-Independent-Panel-fish-deaths-lower%20Darling_4.pdf

- uncertainty of knowing that the rules governing their water rights will need to be re-assessed yet again in the short term.
18. We submit that you should strengthen your recommendation to include modelling of likely climate change scenarios.

4.5.1: Does the model reflect the impacts of eligible works only and are other structures (illegal etc) assumed to be included or excluded from the model?

19. With respect, we think that the evidence reviewed and findings in this section are not an adequate investigation of this issue.
20. The questions which need to be asked to properly investigate this issue are:
- (1) Has the NSW government undertaken an audit of floodplain harvesting works or has it simply relied upon the registration of interest process under the Policy to identify works?
 - (2) Is there, or will there be, a process in place to ensure that illegal and ineligible works are removed?
21. If the NSW government has simply relied on the registration of interest process, this is tantamount to relying on self-reporting and is unlikely to identify works which are known by the owner to be unlawful or are covert (eg. 'roads' which just happen to collect overland flow). This must surely lead to a deficient model.
22. If there hasn't been an independent audit of all floodplain harvesting structures, or there isn't a process to ensure that unlawful structures are removed, then the implementation of the Policy lacks integrity and is unlikely to achieve its intended outcomes.
23. We have previously recommended⁴ a comprehensive audit of all works capable of floodplain harvesting and we remain of the view that this apparent lack is a key flaw in the implementation of this policy.
24. We submit that you should recommend:
- i. an audit of all structures capable of floodplain harvesting;
 - ii. a supporting compliance and enforcement strategy⁵ specific to unlawful floodplain harvesting works; and
 - iii. public reporting of aggregate numbers of unlawful works, volumes of unlawful take and progress towards removal of unlawful works.
25. The NSW Government is working to restore public trust in its ability to manage water resources. Failure to fully implement the floodplain harvesting policy with adequate and transparent enforcement would be a big step back.

⁴ See:

[https://assets.nationbuilder.com/edonsw/pages/6115/attachments/original/1550190485/180215 - Floodplain Harvesting Monitoring Auditing Strategy - EDO NSW submission.pdf?1550190485](https://assets.nationbuilder.com/edonsw/pages/6115/attachments/original/1550190485/180215_-_Floodplain_Harvesting_Monitoring_Auditing_Strategy_-_EDO_NSW_submission.pdf?1550190485)

⁵ The current draft Floodplain Harvesting Monitoring and Auditing Strategy is directed to compliance of authorised works and does not address unlawful works.

4.2.2: Do the models have due regard to downstream impacts such as MNES?

4.8.2: Appropriate simulation of downstream flows and assessing impacts arising from floodplain harvesting

4.8.3: What is the effectiveness of the account management rules to mitigate event based environmental risks?

26. The modelling being assessed will, as outlined in the Policy itself and your report, inform decisions the rules which will apply under the water sharing plans to take of water under such floodplain water access licences. As outlined above, this means that the modelling will inform the preparation of amendments to water sharing plans and, necessarily, preparation of the related water resource plan under the *Water Act 2007 (Cth)* and *Basin Plan 2012*.
27. Two key points need to be made about these statutory decisions which will be informed by this modelling:
 - i. Firstly, water sharing plans (including amendments to plans such as the introduction of account management and dealing rules for floodplain water access licences) must be prepared in a way that ensures that there is adequate water available for the water source and its dependent ecosystems⁶;
 - ii. Secondly, section 10.26 of the *Basin Plan 2012* requires water resource plans to provide for environmental watering to occur in a way that is consistent with the environmental watering plan and the Basin-wide environmental watering strategy and contributes to the achievement of the objectives in Part 2 of Chapter 8 of the Basin Plan.
28. These decision rules mean, at the state level, that the rules in the water sharing plan in relation to floodplain harvesting licences must ensure that adequate water is available for watering floodplains for soil health, adequate water available for floodplain vegetation and its associated ecosystems and adequate watering of wetlands.
29. At the Commonwealth level the obligations become more specific. The Basin-wide environmental watering strategy⁷ outlines the objectives for reinstating lateral connectivity, with the Gwydir, Macquarie and Barwon-Darling given as priority examples of areas for improved lateral connectivity⁸. In Part 2 of Chapter 8 of the Basin Plan, sections 8.04 - 8.07⁹ of the establish objectives for environmental watering, many of which will be relevant to the watering of floodplains and wetlands. We refer you in particular to s8.06(3)(b), (4) and (6).
30. The Policy itself contemplates (at page 10):

“In developing the floodplain harvesting provisions for water sharing plans, consideration will be given to ecological benefits of flooding in

⁶ see s5(3) and s9(1)(b) *Water Management Act 2000 (NSW)*

⁷ https://www.mdba.gov.au/sites/default/files/pubs/qld-mdba-basin-wide-environmental-watering-strategy-2014_0.pdf

⁸ see figure 9 for the lateral improvements sought under the Basin Plan and page 23 for the specific outcomes sought for lateral connectivity.

⁹ see also schedule 7 of the Basin Plan 2012 for criteria used to assess whether the objectives in these sections are being achieved.

the area, with particular regard to wetlands and other floodplain ecosystems. Plan amendments, or floodplain harvesting provisions in new plans, may include clauses establishing environmental water rules relating to floodplain harvesting, including event management rules such as commence to pump rules”.

31. The draft report concludes that:

“the models are not suitable to assess the benefits/impacts of floodplain harvesting licencing frameworks, including the entitlement and account management rule framework, on downstream flows, either in the rivers or on the downstream floodplains themselves”.
32. This conclusion indicates that the model is not adequate to inform decision makers about the environmental consequences of floodplain harvesting and that the information provided by the models is not adequate to ensure that amendments to water sharing plans and water resource plans are made in a lawful way.
33. We submit that the recommendation in section 4.8.3 should be amended to:
 - i. not refer to *“minimising impacts....on down floodplain environments”* and instead make reference to meeting statutory obligations in relation to protecting water dependent ecosystems at the state level and to relevant Basin Plan objectives at the Commonwealth level which include protecting and restoring ecosystem functions; and
 - ii. recommend that the model be updated in a way that has adequate regard to the environmental impacts of floodplain harvesting to allow it to support lawful decision making in relation to both water sharing plans and water resource plans, including in relation to establishing environmental watering rules; and
 - iii. recommend that the model be updated as necessary to allow for the development of water sharing plan rules which facilitate the environmental watering of floodplains.
34. We also note that, while the draft report discusses the preparation of rules to be included in water sharing plans, there is a conspicuous absence of any discussion of the environmental and other objectives those rules are intended to achieve. There is a considerable body of work available, in both the *Basin Plan 2012* and the Long Term Watering Plans (which are also currently under preparation¹⁰), which should inform environmental objectives for the new plan rules. The setting of specific and measurable objectives should precede the development of plan rules.

4.8.4: What is the effectiveness of account management rules, or other event based mechanisms, to protect held environmental water from floodplain harvesting? (ie. shepherding of environmental flows)

35. At the outset we observe that the following comment is, at the very least, a simplification:

¹⁰ <https://www.environment.nsw.gov.au/topics/water/water-for-the-environment/planning-and-reporting/long-term-water-plans>

"Environmental water holdings are generally managed to achieve in-channel outcomes (except for the Gwydir wetlands and Macquarie Marshes) within the regulated system"

36. The Commonwealth Environmental Water Holder is required to manage environmental water in accordance with the environmental watering plan¹¹ which incorporates both the objectives in ss8.04 to 8.07 (discussed above) and the Basin-wide Environmental Watering Strategy (also discussed above), both of which contain objectives relevant to the watering of floodplains. As a consequence, it is even more important that there be provision for held environmental water to be protected from consumptive take both in channel and on floodplains.
37. We strongly support your recommendation that water sharing plans include rules to protect releases of held environmental water from consumptive take. Those rules should be in addition to rules-based environmental watering to mimic natural flows on the floodplains to support ecological processes.

Conclusion

As you have noted in page 3 of your report, the implementation of this Policy will impact people's lives and livelihoods. The implementation of this Policy also has real consequences for our ability to restore the Murray-Darling Basin to an ecologically healthy state capable of supporting lives and livelihoods into the future. Good environmental and natural resource management laws so often go wrong at the implementation stage, which is why it is so critically important for models used in implementation to produce information which supports lawful decision-making in accordance with the broader scheme of the Act. For that reason, we strongly submit that you strengthen the recommendations in your draft report as outlined above to ensure that the model can support lawful decision-making within the broader goal of restoring the Basin to health.

Please do not hesitate to contact us on (02) 9262 6989 to discuss these matters further.

Yours sincerely

EDO NSW



Deborah Brennan
Senior Policy & Law Reform Solicitor

¹¹ s105(4)(a) *Water Act 2007 (Cth)*

