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## **SUBMISSION**

# **Proposed legislative amendments for floodplain harvesting in NSW**

December 2020



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## NSW Irrigators' Council

The NSW Irrigators' Council (NSWIC) is the peak body representing irrigation farmers and the irrigation farming industry in NSW. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton and horticultural industries.

Through our members, NSWIC represents over 12,000 water access licence holders in NSW who access regulated, unregulated and groundwater systems. NSWIC engages in advocacy and policy development on behalf of the irrigation farming sector. As an apolitical entity, the Council provides advice to all stakeholders and decision makers.

Irrigation farmers are stewards of tremendous local, operational and practical knowledge in water management. With more than 12,000 irrigation farmers in NSW, a wealth of knowledge is available. Participatory decision making and extensive consultation ensure this knowledge can be incorporated into best-practice, evidence-based policy.

NSWIC and our members are a valuable way for Governments and agencies to access this knowledge. NSWIC offers the expertise from our network of irrigation farmers and organisations to ensure water management is practical, community-minded, sustainable and follows participatory process.

NSWIC welcomes this opportunity to provide a submission on the proposed legislative amendments for floodplain harvesting in NSW.

NSWIC sees this as a valuable opportunity to provide expertise from our membership to inform the Inquiry. Each member reserves the right to independent policy on issues that directly relate to their areas of operation, expertise or any other issues that they deem relevant.

## NSW Irrigation Farming

Irrigation farmers in Australia are recognised as world leaders in water efficiency. For example, according to the Australian Government Department of Agriculture, Water and the Environment:

*“Australian cotton growers are now recognised as the most water-use efficient in the world and three times more efficient than the global average”<sup>1</sup>*

*“The Australian rice industry leads the world in water use efficiency. From paddock to plate, Australian grown rice uses 50% less water than the global average.”<sup>2</sup>*

Our water management legislation prioritises all other users before agriculture (critical human needs, stock and domestic, and the environment), meaning our industry only has water access when all other needs are satisfied. Our industry supports and respects this order of prioritisation. Many common crops we produce are annual/seasonal crops that can be grown in wet years, and not grown in dry periods, in tune with Australia's variable climate.

Irrigation farming in Australia is also subject to strict regulations to ensure sustainable and responsible water use. This includes all extractions being capped at a sustainable level, a hierarchy of water access priorities, and strict measurement requirements.

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<sup>1</sup> <https://www.agriculture.gov.au/ag-farm-food/crops/cotton>

<sup>2</sup> <https://www.agriculture.gov.au/ag-farm-food/crops/rice>



## NSW Irrigators' Council's Guiding Principles

Integrity	Leadership	Evidence	Collaboration
Environmental health and sustainable resource access is integral to a successful irrigation industry.	Irrigation farmers in NSW and Australia are world leaders in water-efficient production with high ethical and environmental standards.	Evidence-based policy is essential. Research must be on-going, and include review mechanisms, to ensure the best-available data can inform best-practice policy through adaptive processes.	Irrigation farmers are stewards of tremendous knowledge in water management, and extensive consultation is needed to utilise this knowledge.
Water property rights (including accessibility, reliability and their fundamental characteristics) must be protected regardless of ownership.	Developing leadership will strengthen the sector and ensure competitiveness globally.	Innovation is fostered through research and development.	Government and industry must work together to ensure communication is informative, timely, and accessible.
Certainty and stability is fundamental for all water users.	Industry has zero tolerance for water theft.	Decision-making must ensure no negative unmitigated third-party impacts, including understanding cumulative and socio-economic impacts.	Irrigation farmers respect the prioritisation of water in the allocation framework.
All water (agricultural, environmental, cultural and industrial) must be measured, and used efficiently and effectively.			Collaboration with indigenous nations improves water management.



## Introduction

NSWIC welcomes the public exhibition of the proposed legislative amendments for Floodplain Harvesting (FPH) in NSW, and supports these regulations as important steps to finally implement the NSW Healthy Floodplains Project<sup>3</sup> (HFP).

NSWIC fully supports subjecting FPH to licensing requirements, metering obligations and reduction to sustainable levels – as is being delivered through the Healthy Floodplains Project. These are fundamental principles of best-practice water management.

## Overview

- NSWIC fully **supports** the Healthy Floodplains Project. We see this package of regulations as necessary steps to deliver this Project to subject FPH to licensing and metering, and reduction to sustainable limits. Specifically:
  - NSWIC **supports** the establishment of a state-wide exemption for tailwater return drains.
  - NSWIC **supports** embedding the floodplain harvesting licence determination process in regulation, to detail this process clearly and transparently, and facilitate the commencement of the licensing framework under the Healthy Floodplains Project.
  - NSWIC **supports** establishing regulation to implement the NSW Government's *Floodplain Harvesting Measurement Policy*, which was finalised in July 2020 and separately consulted on.
  - NSWIC **supports** the need for transitional FPH arrangements, as is best-practice for any reform, and is pleased to see this amended version addresses the concerns raised by the Parliamentary Inquiry.

## Submission

### [Establish a state-wide exemption for tailwater return drains](#)

#### Support

NSWIC agrees with the complexities in distinguishing between rainfall run-off and 'used' irrigation water in a tailwater drain, and supports the need for uniform, state-wide legal recognition. NSWIC agrees that 'used' water is already measured and accounted for under a relevant licence.

NSWIC supports a state-wide exemption for the need for a **water supply work approval** for the use of a tailwater drain, and for an exemption from the need for a **water access licence** for the collection of rainfall run-off from an irrigated field into a tailwater drain when no other overland flow is being taken by works on the land, other than a tailwater drain.

NSWIC notes that the need for this regulation to manage existing practice is poorly understood, and there is an assumption that the practice is covered by harvestable rights, licence conditions or other regulations. Whilst NSWIC is aware of the grey area that this regulation seeks to address, a 'case for change' must be established by Government and communicated to all stakeholders to manage the risk of misunderstanding, and ensure stakeholders are appropriately engaged.

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<sup>3</sup> <https://www.industry.nsw.gov.au/water/plans-programs/healthy-floodplains-project>



NSWIC notes that this exemption to hold a water access licence does not apply when a work on the land, other than a tailwater drain, takes overland flow water. NSWIC understands that this is because during those periods when overland flow is present, an FPH licence will be required. This intention is supported.

However, NSWIC is of the position that greater clarity is required as to when this exemption switches on and off. Given ‘overland flow water’ is defined in the WMA (4A) to include rainfall run-off, the current wording of the regulation is unclear of the exact points at which this exemption ceases and recommences.

To address this problem, NSWIC recommends linking this regulation to the subsequent regulation on FPH measurement, so that this exemption applies only outside of nominated FPH measurement periods (and thus applies constantly for those users who do not take other forms of overland flow – e.g. FPH). For example, this could be done by inserting at 17B (2) “*during a nominated measurement period*” to clarify when this exemption ceases to apply. The recommencement would thus need to be at the conclusion of the measurement period, once no water is left.

NSWIC seeks clarification in the regulation on whether the intention is to include reticulation, such as where rainfall runoff is diverted from a tailwater drain back into a storage.

### [Embed the floodplain harvesting licence determination process](#)

#### **Support**

NSWIC understands that the purpose of this proposed regulation is to set out the process for how FPH licences will be issued, in accordance with the Healthy Floodplains Project. This regulation is a necessary regulatory step to implement a central component of the Healthy Floodplains Project, in establishing the licensing framework.

The licensing framework is essential to determine the volumetric limits to be imposed on FPH, so that **FPH is reduced to comply with the Long-Term Average Annual Extraction Limit (LTAAEL)**, and to control future FPH growth by **establishing an eligibility criteria** to limit FPH take to only landholders with eligible works constructed on or before 3 July 2008. This draws a firm line.

Through this regulation, where the volume of water take exceeds the LTAAEL, an adjustment to **reduce the volume of water take** is proportionally allocated to each relevant landholder, to ensure the total usage of water from the water source does not exceed LTAAEL.

### [Implement the NSW Government’s Floodplain Harvesting Measurement Policy](#)

#### **Support**

NSWIC sees this proposed regulation as the necessary regulatory step to implementing the requirements of the Floodplain Harvesting Measurement Policy, which was published in July 2020, following public consultation. 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.”<sup>4</sup>*

*“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).”<sup>5</sup>*

*“This will create a foundation for delivering a **strong compliance and enforcement framework** for water taken in NSW.”<sup>6</sup>*

It is a key NSWIC principle that all water must be measured and used efficiently and effectively. If it can’t be measured, it can’t be managed. NSWIC sees this regulation, to enact the *Floodplain Harvesting Measurement Policy*, as critical to subjecting FPH to these requirements.

NSWIC seeks clarification of what the approved form of reporting will involve, and suggests working with water users to ensure a practical, efficient and reliable platform is developed.

NSWIC is of the view that the current wording of clause 238E(6)(b) requires clarification, as water users are being asked to notify the Minister of the commencement of a measurement period. This necessarily would involve the taking of water, which then makes 238E(6)(b) a given or assumed factor in the commencement of a measurement period. Clarification is required, as 238E(6)(a) may make 238E(6)(b) redundant.

[Establish a transitional exemption for floodplain harvesting that will cease on 30 June 2021](#)

## Support, noting amendments

NSWIC notes that clear transitional arrangements are best practice during any policy reform process. The need for transitional arrangements has long been foreshadowed in the NSW Floodplain Harvesting Policy, which describes the implementation framework to include (see P6):

*This framework will include the following:*

...

- *Providing a temporary exemption for floodplain harvesting from specified licensing and approvals requirements of the WM Act – An exemption is required so that floodplain harvesting by works constructed on or before 3 July 2008 can continue while the policy is being implemented. The **exemption will apply only for the time required to issue work approvals, amend water sharing plans and issue floodplain harvesting access licences**. Once implementation has concluded for a given floodplain, **the exemption will no longer apply to that area and all floodplain harvesting activities will require a water supply work approval and a floodplain harvesting water access licence authorised under the WM Act.***

<sup>4</sup> [https://www.industry.nsw.gov.au/\\_data/assets/pdf\\_file/0005/317093/floodplain-harvesting-measurement-policy.pdf](https://www.industry.nsw.gov.au/_data/assets/pdf_file/0005/317093/floodplain-harvesting-measurement-policy.pdf) [P 1].

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.



NSWIC supports this transitional regulation, as an interim measure, because:

- It ensures implementation of the NSW Floodplain Harvesting Policy follows the due process as outlined clearly and transparently in the Policy itself.
- It provides clarity of the interim transitional arrangements, as is best practice for reforms. This is important for both water users and the regulator to understand the interim arrangements. NSWIC understands that a major reason for this regulation was because NRAR required clearer laws to guide its actions as the regulator and enforcer of water laws in NSW. NSWIC refers to NRAR to provide advice on what it requires to be an effective, fair and modern regulator in this transitional period.
- It establishes a clear line to immediately control FPH growth, by specifying in regulation that eligibility is restricted to only works developed on or before of 3 July 2008.
- It provides protection to valleys not included in the Healthy Floodplains Project and are thus not on a 'pathway to compliance' (e.g. all other valleys except the five northern valleys).

This regulation is long overdue and would have reasonably been expected to come into effect many years ago, as was foreshadowed in the implementation framework. It is ultimately a failure of Government that (1) this regulation did not come in sooner, and (2) that when this regulation was introduced in February 2020<sup>7</sup> it was rushed, poorly communicated and poorly implemented with no consultation. This led to confusion and suspicion, which ultimately led to disallowance, and then an unsuccessful recission motion.

However, despite that poor history, NSWIC is pleased to see that this draft regulation **addresses the concerns raised** through the Parliamentary Inquiry and is now substantially improved. This includes:

- Inclusion of a sunset clause to ensure this regulation will not delay or impact the commencement of the new regulatory framework of licensing and metering on 1 July 2021.
- A detailed explanatory note to clarify the objects and purpose of this regulation.
- Clarification that the proposal will not override the power of the Minister under section 324 of the WMA to direct that the taking of water from a specified water source is temporarily prohibited or subject to restrictions.
- Measurement and reporting requirements and obligations.

These amendments ultimately strengthen the regulation and enforce stricter requirements and obligations on both water users and government. It will be important for this regulation to be considered objectively and fairly on its merits, now there is an improved understanding and greater information available on the intent and purpose, and in light of these amendments.

NSWIC raises a concern that whilst the sunset clause to repeal this regulation on 30 June 2021 is suitable for the five northern valleys subject to the Healthy Floodplains Project, this would then leave a regulatory gap for other valleys. As DPIE-Water recently confirmed, five designated floodplains are in the northern NSW Basin, but also 10 designated floodplains in the southern NSW Basin. **Clarification for the regulatory arrangements for those outside of the five Northern valleys after 30 June 2021 is required.**

As detailed in the below section, NSWIC recommends that the sunset clause of 30 June 2021 (which was inserted to prevent delaying the commencement of licensing), only applies to those valleys to which the licensing framework will apply. For all other valleys, NSWIC recommends the sunset clause is extended by two years, to allow time to investigate the scope of the issue

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<sup>7</sup> *Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020.*



for other valleys, and consult with water users to determine the transition pathway to a long-term regulatory framework. Failure to do this will leave all other valleys without an adequate regulatory framework after 1 July 2021.

NSWIC strongly supports the addition of metering and reporting requirements in this regulation. NSWIC recommends that these requirements are aligned as much as possible with the requirements of the *Floodplain Harvesting Measurement Policy*<sup>8</sup>, published in July 2020. This is due to (1) avoiding the confusion of introducing new rules which then change only months later when this new measurement policy commences; and (2) this measurement policy has been subject to separate public consultation to determine community accepted measurement and reporting requirements. For this reason, **NSWIC calls for the fast-tracking of as many elements of the *Floodplain Harvesting Measurement Policy* that are feasible to commence.**

### Pathway for all other NSW valleys (outside the HFP)

NSWIC is acutely aware of the implications of transitioning overland flow management into the WMA, for valleys not included in the HFP (i.e. outside the five northern valleys). NSWIC is of the position that a transitional pathway (of some form) is needed for non-HFP valleys, to provide appropriate regulation to protect historic practice, and to control future growth.

For non-HFP valleys which do not have a transition pathway, the status quo fails to provide an adequate regulatory framework. This will leave water users vulnerable to legal penalty for undertaking historic and accepted practice, and leave valleys exposed to the risk of future growth. NSWIC notes that under the draft regulations in current form, transitional licence exemptions will expire for southern valleys at the onset of the licensing framework for northern valleys on 1 July 2021, despite southern valleys having no subsequent transitional pathway to follow. For this reason, NSWIC does not support status quo arrangements continuing, and seeks a transition pathway to regulatory certainty and clarity to protect users in southern valleys undertaking historic practice.

NSWIC understands that under the WMA all forms of take must be subject to a licence, licence exemption, or a right. NSWIC members in non-HFP valleys have discussed which of these pathways would be most preferable.

At this stage, NSWIC recommends an assessment to determine the scope of the issue, to inform whether a full licensing framework or a licence exemption is best suited. There is a need to balance having a consistent framework across the state, and having a proportionate regulatory framework to the size and extent of the practice in unique areas, and greater data is needed to inform this decision. As key principles, the regulatory approach must control future growth so take remains within legal limits, and maintains the security and reliability of legitimate existing historic practice (e.g. works constructed prior to 3 July 2008).

Therefore, NSWIC recommends the following:

- The 1 July 2021 sunset clause should only apply in valleys which are included in the HFP, which are set to transition to a licencing framework by that date.
- For other valleys, the sunset clause should be extended by two years (1 July 2023) to allow time to assess the scale and scope of overland flow take in non-HFP valleys, and improve understanding of the issues, to determine the most appropriate long-term regulatory framework, in consultation with local water users.

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<sup>8</sup> [https://www.industry.nsw.gov.au/data/assets/pdf\\_file/0005/317093/floodplain-harvesting-measurement-policy.pdf](https://www.industry.nsw.gov.au/data/assets/pdf_file/0005/317093/floodplain-harvesting-measurement-policy.pdf)



- By 1 July 2023, based on the above, a determination must be made on the preferred long-term regulatory framework (licensing framework, licensing exemption, a right, or other), and a transition pathway must commence.

NSWIC emphasises that the implications of transitioning overland flow management into the WMA for non-HFP valleys is poorly understood. There was long a general view that this historic practice is securely covered by licence conditions, harvestable rights, BLRs or other regulations.

Given the significant risks posed to non-HFP valleys to undertake historic practice if left with no transition pathway and an incomplete regulatory framework, Government must (i) communicate this risk to water users, and (ii) proactively manage the risk by establishing the necessary regulatory framework and transition pathway to protect historic practice.

### General

NSWIC is aware of claims the volume of licensed FPH should be set at 210GL based on an early (and now outdated) FPH estimate at the time of the Basin Plan Baseline Diversion Limits (BDLs) were initially formed a decade ago. Following enquiries to the MDBA and DPIE-Water, we have been informed that:

- All data in the Basin Plan is required to be best available.
- The data at the time the 210GL figure was estimated was acknowledged as best available for that time, but is no longer considered the best available as new technology advances have improved data accuracy.
- Significant work has been undertaken to explore and improve FPH data and models. This includes the 2019 Independent Peer Review which provided numerous recommendations to which NSW has committed.
- BDLs are written as a description (rather than a fixed number) to allow better information to be incorporated, to better reflect the legal requirements of the Basin Plan. If it was a fixed number, it would lock in the data available at the time, which has been admitted as limited.
- **Increasing the BDL does not lead to decreased end of systems flows**, because it is just a better indication of where things were at the time, and a better representation of the legal requirements of the Basin Plan.

The MDBA has a range of information available on its website to clarify these concerns:

- <https://www.mdba.gov.au/basin-plan/sustainable-diversion-limits/current-diversion-limits-basin>
- <https://www.mdba.gov.au/basin-plan-roll-out/sustainable-diversion-limits/changing>

As a principle, NSWIC fully supports using the best available data and information. The impacts of the incorporating any new and improved data must be fully communicated so it does not lead to misunderstandings or unnecessary concern/confusion.

NSWIC is highly concerned by the substantial misinformation and misunderstandings about FPH. NSWIC understands that, even if hypothetically floodplain harvesting was abolished, the total take from northern valleys (and thus downstream flows) would not materially change, as the Cap/SDL remains at the same level. This means the loss of floodplain harvesting take would be offset by greater river diversions (within the parameters of the water access rules).

NSWIC is conscious of the significant environmental impact likely if river diversions are substantially increased at non-flood times, and the subsequent impacts on connectivity. NSWIC seeks that information investigating the scope of this environmental impact, in such a hypothetical situation, is included in subsequent reports to contribute important information



to public discussions. NSWIC hope that such information could lead to more constructive and informed public debate.

NSWIC also wishes to emphasise that FPH is a historic practice, and these regulations would not be creating new water take, but regulating and reducing historic take of water.

NSWIC welcomes the recent communications from DPIE-Water to clarify some common misconceptions of FPH<sup>9</sup>, and also welcome the videos explaining these four regulations.

## Conclusion

NSWIC strongly supports subjecting FPH to firm licensing requirements, metering obligations and reduction to sustainable levels, as is proposed through the Healthy Floodplains Project.

NSWIC is of the position that these draft regulations are critical to implementing the Healthy Floodplains Project, in which the individual policy components have all been subject to significant public consultation over many years. This final regulatory step to deliver the policy into regulation is a high priority.

NSWIC and our members are available at your convenience, if you have any questions or would like any further information.

Kind regards,

NSW Irrigators' Council.

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<sup>9</sup> <https://www.industry.nsw.gov.au/water/plans-programs/healthy-floodplains-project/about/impact-of-floodplain-harvesting-growth-in-the-northern-basin>