



FLOODPLAIN HARVESTING

Legislative amendments: Floodplain harvesting transitional exemption

What we heard report

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Introduction

The NSW Government, through the Floodplain Harvesting Action Plan, is committed to licensing, regulating and measuring floodplain harvesting. Floodplain harvesting is the last substantial form of water take to be licensed in the Murray–Darling Basin (the Basin). The government is managing this process in a way that improves trust, confidence, and transparency with stakeholders.

In 2008, the NSW Government declared that water users taking water directly from floodplains need to hold a licence and a water supply work approval. Licences will specify the volume of water that users can continue to take legally. Measurement requirements, meanwhile, ensure that floodplain take remains within legal limits. Accurate and reliable data enables compliance.

To make the rollout of the licensing and measurement framework possible, the Department of Planning, Industry and Environment developed the NSW Floodplain Harvesting Policy and the NSW Floodplain Harvesting Measurement Policy. Together, these policies provide a framework for licensing and measuring floodplain harvesting extractions.

These policies must be incorporated into the legislative framework if they are to have legal force and be enduring. As part of the legislative process, the department consulted the public and stakeholders on four packages of proposed amendments to the Water Management (General) Regulation 2018.

This report details consultation outcomes for **one of the four packages** of legislative amendments: the draft Water Management (General) Amendment (Floodplain Harvesting Exemptions) Regulation, which provided a temporary, transitional exemption for floodplain harvesting. The report summarises what the NSW Government heard from written submissions.

Based on submissions received and the limited period to which it would apply, the NSW Government has decided not to proceed with the making of the proposed transitional exemption.

Transitional exemption for floodplain harvesting

What the transitional exemption does

The department is currently rolling out the licensing and approval regulatory framework for floodplain harvesting. There is a need to clarify the legality of using certain works for floodplain harvesting in the period before we finalise the framework. We proposed using a transitional arrangement that would ensure water users and the Natural Resources Access Regulator are confident about what can and cannot be legally taken from a floodplain.

This transitional arrangement was similar to that put in place in February 2020 through the Water Management (General) Amendment (Exemptions for Floodplain Harvesting) Regulation 2020. However, this exemption came to an end after it was disallowed by the Upper House of the Parliament of NSW on 22 September 2020. There were four key reasons for this disallowance:

- a lack of consultation on the exemption before it began
- uncertainty about how long the exemption would last
- concern over the volumes of water users were taking under the exemption
- concern that the exemption legalised works that are considered illegal under the current regulatory framework.

Because the transitional exemption was disallowed, the lawfulness of floodplain harvesting once again become unclear.

Increased uncertainty is a poor outcome for landholders who rely on access to a highly variable and historically legitimate resource. Floodplain access happens, on average, once every five years. Landholders take water in 'wetter' periods when high flows or rainfall create overland flow events. Landholders who have engaged with the department to have their historical access formally recognised under the *Water Management Act 2000* are unsure what their current access to floodplain harvesting is. This uncertainty also affects the Natural Resources Access Regulator, which is tasked with upholding the law. It also concerns other stakeholders who have an interest in how much water is being taken upstream.

The department acknowledges that since the transitional exemption was disallowed, there is continuing need to clarify the legal nature of floodplain harvesting in this period before licensing begins. To resolve this, we proposed a new transitional exemption that addressed the four key reasons for the original exemption's disallowance.

Elements of the revised transitional exemption

- **Consultation**
The proposed transitional arrangement was publicly exhibited and the public had the opportunity to give feedback. The department considered this feedback.
- **Duration**
We clearly defined how long the exemption would last. The proposed amendment would apply until water supply work approvals and floodplain harvesting access licences have been issued, or on 1 July 2021, whichever is sooner. The duration of the exemption acknowledged that the approval and licensing process in the northern Basin is almost complete.
- **Reporting and measurement**
Water taken under the proposed exemption would be subject to reporting and measurement requirements. This would ensure a level of accountability about the volume of water taken by floodplain harvesting. Floodplain harvesters must:
 - notify the Natural Resources Access Regulator within 12 hours of floodplain harvesting

- confirm that an eligible work is being used or has been used for floodplain harvesting, in line with the exemption
- give relevant measurement information to the Natural Resources Access Regulator within 28 days of each occasion of floodplain harvesting using an eligible work
- give this measurement information to the Minister for Water, Property and Housing within 28 days of the end of the water year.
- **Eligibility**

The proposed exemption only applied to eligible works that are already constructed in accordance with a relevant approval either:

 - before 3 July 2008, or
 - after 3 July 2008, where a valid application for the work was lodged before this date.

This means that the exemption would only apply to works that are constructed on a floodplain in accordance with a relevant approval under the *Water Management Act 2000* or the *Water Act 1912*. Narrowing the scope of this exemption directly addressed the concern that the exemption legitimised unapproved works.
- **Volumetric limits**

Existing water sharing plan rules constrain total water use to legal limits. If floodplain harvesting licences are not in place, then growth in floodplain harvesting will be offset through reductions in supplementary water access licence allocations. These provisions would make sure that the growth in floodplain harvesting does not affect downstream water users and the environment.

Public exhibition

We publicly exhibited the proposed amendments to the Water Management (General) Regulation 2018 from 23 November 2020 to 20 December 2020. This consultation consisted of a formal submission process.

The purpose of public exhibition was to:

- communicate the proposed amendments to the Water Management (General) Regulation 2018
- seek public feedback on the proposed amendments
- ensure we gave all stakeholders the opportunity to comment on the proposed amendments before finalisation
- allow for effective implementation of the licensing framework for floodplain harvesting
- allow the department to respond to issues and concerns raised by stakeholders and, where appropriate, make changes before the finalising the amendments.

Stakeholders engaged

To ensure broad and equitable engagement, we notified the following representative groups about the submission period:

- irrigators and other peak water users
- Traditional Owners
- environmental interests
- business interests
- Australian Government, NSW Government and other state government agencies
- individuals who had made submissions before or had attended previous engagement sessions
- regional councils
- local, state and federal politicians.

Final amendment regulation for the transitional exemption of floodplain harvesting

Based on submissions received and the limited period to which it would apply, the NSW Government has decided not to proceed with the making of the proposed transitional exemption.

The focus of the NSW Government remains licensing floodplain harvesting within legal limits in the northern Basin.

What we heard from stakeholders

Submissions received

The department received a total of 236 submissions. Submissions were about the transitional arrangements, the other proposed amendments, as well as floodplain harvesting more broadly.

Several submissions were pro-forma, with repeated support of a particular viewpoint by multiple stakeholders belonging to the same group.

Stakeholders also gave feedback that did not specifically relate to the proposed transitional exemption. This feedback was on floodplain harvesting more generally or on the broader water management framework. This commentary, while out of scope for this report, is important to the department and was shared with the appropriate division within the department.

General submission themes

Table 1 outlines general, recurring feedback stakeholders raised in submissions.

Table 1. General feedback

Description	Government response
<p>There was general stakeholder concern that floodplain harvesting in the northern Basin has affected downstream systems.</p>	<p>By licensing floodplain harvesting and returning diversions to within legal limits, we are returning water to rivers and floodplains. This will improve downstream flows.</p> <p>The department is committed to demonstrating the anticipated downstream outcomes of licensing floodplain harvesting. The <i>Modelled downstream effects of licensing floodplain harvesting in the Border Rivers and Gwydir valley</i> report provides an initial analysis of downstream outcomes from licensing floodplain harvesting in the Border Rivers and Gwydir valleys. We will update this report once we finalise the modelling for the remaining valleys.</p> <p>Of particular note, the downstream outcomes assessment for the Border River and Gwydir valleys indicates that the current growth in floodplain harvesting above legal limits in these valleys is not having a significant impact on allocations and diversions in the southern Basin.</p>
<p>Many of the submissions expressed a lack of confidence in the NSW Government. This concern was repeated through comments.</p>	<p>Stakeholder confidence in NSW Government processes is critical. The lack of confidence shown in submissions is of concern to the department.</p> <p>The department is committed to managing water equitably and transparently and is engaging with stakeholders broadly. We regularly meet with stakeholders on key projects and give stakeholders and the broader public opportunities to provide input on policies, plans, and other relevant documents.</p> <p>The department, together with the Murray–Darling Basin Authority, commissioned an independent peer review of implementation of the NSW Floodplain Harvesting Policy. The key aim of this independent review was to provide greater transparency and increase stakeholder confidence.</p>

Description	Government response
<p>Many stakeholders did not support floodplain harvesting in any form and believe the activity should be illegal.</p>	<p>In 2013, the NSW Government introduced the NSW Floodplain Harvesting Policy to stop unconstrained floodplain harvesting by bringing it into a licensing framework that will be the basis for a compliance and enforcement regime.</p> <p>Implementing the NSW Floodplain Harvesting Policy will restrict current floodplain diversions so that they return to within legal limits and as a result we will return water to rivers and floodplains.</p> <p>There is a misconception that not licensing floodplain harvesting will mean less water use in the northern Basin through the cessation of that activity. Instead, the water historically taken by floodplain harvesting within legal limits would be taken by other licence categories, significantly affecting river connectivity and downstream water users.</p> <p>The department acknowledges the current media attention on floodplain harvesting and is committed to bringing this form of take into a licensing framework.</p>

In support of the proposed amendment

Table 2 outlines themes raised in submissions that were supportive of the proposed transitional exemption. Stakeholders emphasised the lack of certainty that water users experienced when the original exemption was rejected.

Table 2. Feedback in submissions supportive of the proposed amendment

Feedback	Government response
<p>The proposed transitional exemption improves clarity and certainty</p>	<p>The department agrees with this feedback.</p> <p>Because the government's regulation amendment was disallowed, the lawfulness of floodplain harvesting has become unclear once again.</p> <p>By providing a transitional arrangement, up until the licensing framework is in place, or 1 July 2021, whichever is sooner, both water users and the Natural Resources Access Regulator would have been confident about what can and cannot be legally taken from a floodplain during the short period up to 1 July 2021.</p>
<p>The proposed transitional exemption improves transparency</p>	<p>The NSW Government is committed to improving transparency in water management.</p> <p>The proposed amendment would have provided a temporary exemption from the need to hold a water access licence and water supply work approval when undertaking floodplain harvesting using an eligible work.</p> <p>For the purpose of this regulation, eligible works were limited to approved works only.</p> <p>Further transparency can be seen in the reporting and measurement requirements included in this proposed amendment, along with penalties for failing to meet those requirements.</p>
<p>Need to extend or modify the proposed transitional exemption to consider the southern Basin</p>	<p>The NSW Government is currently implementing the NSW Floodplain Harvesting Policy across five northern NSW valleys. Once implemented, the department will consider rolling out a floodplain harvesting licensing program in southern NSW.</p> <p>This feedback was not strongly represented in submissions.</p>

Not in support of the proposed amendment

Table 33 outlines themes raised in submissions that were not supportive of the proposed amendments. Stakeholders raised concerns about the legality of floodplain harvesting and of structures that currently exist on the floodplain.

Table 3. Feedback in submissions not supportive of the proposed amendment

Feedback	Government response
Measurement and metering should be implemented first	<p>The NSW Government has used multiple lines of evidence to estimate current and historical floodplain harvesting. Licensing will allow the department to control the growth that has already happened.</p> <p>The data generated following the rollout of floodplain harvesting measurement will provide an additional source of evidence to inform planning and policy decisions in the future. Measurement data will allow the legal limit to be re-estimated into the future, with any necessary adjustments made through available water determinations. This situation is not unique to floodplain harvesting licences.</p>
The proposed transitional exemption will result in illegal structures being given legal status	The proposed exemption applied only to approved eligible works.
The department needs to demonstrate downstream effects of floodplain harvesting first	<p>The department is committed to demonstrating the anticipated downstream outcomes of licensing floodplain harvesting. The <i>Modelled downstream effects of licensing floodplain harvesting in the Border Rivers and Gwydir valley</i> report provides an initial analysis of downstream outcomes from licensing floodplain harvesting in the Border Rivers and Gwydir valleys. We will update this report once we finalise the modelling for the remaining valleys.</p> <p>Of particular note, the downstream outcomes assessment for the Border River and Gwydir valleys indicates that the current growth in floodplain harvesting above legal limits in these valleys is not having a significant impact on allocations and diversions in the southern Basin.</p>

Feedback	Government response
<p>General concern about the legality of floodplain harvesting</p>	<p>Floodplain harvesting is a historically legitimate form of take accounted for in the limits established in NSW water sharing plans and the Australian Government's <i>Basin Plan 2012</i>.</p> <p>Unfortunately, this form of take has not yet been fully transitioned under the <i>Water Management Act 2000</i> and this situation has created regulatory uncertainty. That is, while the <i>Water Management Act 2000</i> envisages floodplain harvesting licences being created within legal limits, we have not yet completed the process.</p> <p>There is a misconception that not licensing floodplain harvesting will mean less water use in the northern Basin through the cessation of that activity. Instead, the water historically taken by floodplain harvesting within legal limits would be taken by other licence categories, significantly affecting river connectivity and downstream water users.</p>

Next steps

The NSW Government expects the licensing framework for floodplain harvesting to be operational in all water sharing plans from 1 July 2021.

The department will manage growth in water use for floodplain harvesting annually through NSW water sharing plans and the Australian Government's *Basin Plan 2012*.