

Kristanne Andersen  
Manager, Floodplain Harvesting Coordination  
Department of Planning, Industry and Environment – Water  
Locked Bag 5022  
PARRAMATTA NSW 2124

By email: [floodplain.harvesting@dpi.nsw.gov.au](mailto:floodplain.harvesting@dpi.nsw.gov.au)  
[kristanne.andersen@dpi.nsw.gov.au](mailto:kristanne.andersen@dpi.nsw.gov.au)

18 April 2021

Dear Ms Andersen,

**Proposed changes to floodplain harvesting rules in the Macquarie Valley –  
NTSCORP submissions**

Thank you for providing NTSCORP Limited (**NTSCORP**) with the opportunity to comment on the proposed changes to the floodplain harvesting licence rules in the water sharing plans for Macquarie valley being developed by the Department of Planning, Industry & Environment (**DPIE**).

1. NTSCORP has statutory responsibilities under the *Native Title Act 1993* (Cth) (**NTA**) to protect the native title rights and interests of Traditional Owners in NSW (**NSW**) and the Australian Capital Territory (**ACT**).
2. NTSCORP is funded under Section 203FE of the NTA to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Peoples who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA.
3. In summary, the functions and powers of NTSCORP under sections 203B to 203BK (inclusive) are:
  - Facilitation and assistance, including representation in native title matters;
  - Dispute resolution;
  - Notification;
  - Agreement-making;
  - Internal review;
  - Certification; and
  - Other functions.
4. The comments provided in this letter are focused on the impacts of the floodplain harvesting licencing rules on native title claimants, holders and those who may hold

native title in the Macquarie Valley. This submission is made by NTSCORP and is informed by our experience working with Aboriginal Traditional Owners (**Traditional Owners**) of lands and waters within NSW and the ACT.

5. The impact and interests of the broader Aboriginal and First Nations communities across NSW and the ACT is beyond the scope of this correspondence.

### **Native Title and Water rights claimed by the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People**

6. Native title is an important recognition of the rights and interests of Traditional Owners. Native title rights and interests are defined in accordance with the laws and customs by which they are held. The laws and customs of a native title holding group may provide that a native title holder has the right to take resources, including water, for any purpose, including to trade, share, exchange or to take for a commercial purpose. The NTA defines 'native title rights and interests' as being communal, group or individual rights and interests of Aboriginal Peoples or Torres Strait Islanders in relation to land or waters.
7. A native title determination by the Federal Court provides legal recognition of the rights and interests that are, and always have been, held by the Traditional Owners in accordance with traditional law and custom.
8. The native title rights claimed by the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People (**NNWW People**) in their native title determination application (NSD 38 of 2019) which are exercisable on or in relation to waters are as follows:
  - the right to access;
  - the right to use and enjoy;
  - the right to move about the area;
  - the right to fish in the area;
  - the right to have access to and use the natural water resources of the application area;
  - the right to have access to share and exchange resources derived from the land and waters;
  - the right to participate in cultural and spiritual activities on the area;
  - the right to gather natural resources of the area;
  - the right to maintain and protect places of importance under traditional laws, customs and practices on the area;
  - the right to participate in cultural and spiritual activities on the area;
  - the right to conduct ceremonies on the area;
  - the right to transmit traditional knowledge to members of the native title claim group including knowledge of particular sites on the application area;

- the right to speak for and make non-exclusive decisions about the area in accordance with traditional laws and customs;
  - the right to speak authoritatively about the application area among other Aboriginal People in accordance with traditional laws and customs; and
  - the right to control access to or use of the lands and waters within the application area by other Aboriginal People in accordance with traditional laws and customs.
9. Native title rights that are exercisable on or in relation to land may be impacted by floodplain harvesting where the land is physically or culturally connected with the waters. Floodplains hold high cultural significance for Aboriginal People, and harvesting of floodplains may have detrimental effects for Traditional Owners via the disconnecting of plains from rivers or impacts on the surrounding ecosystems. Over-harvesting of floodplain waters may result in impacts to sites of significance, food security, water security and the general wellbeing of Aboriginal Peoples living in affected areas.
10. Native title rights and interests claimed by the NNWW People exercisable on or in relation to land that will be affected where the land is physically or culturally connected to waters include but are not limited to the following:
- the right to possession, occupation, use and enjoyments of the lands and waters;
  - the right to camp in the area;
  - the right to erect shelters and other structures;
  - the right to live in the area;
  - the right to hold meetings; and
  - the right to hunt in the area.
11. The NNWW People have a registered native title claim over the subject area of the Macquarie floodplain harvesting policy and water sharing plan. The Plan and Policy should include a detailed list of the NNWW People's claimed rights and interests with the inclusion of mapping for context, and make effective provisions for these rights in policy.

### **Recognition of native title in water policy/legislation**

12. The recognition of native title rights and interests in water requires, as a starting point, a legislative and policy setting which ensures that native title holders are able to *exercise* their rights and interests. As such, Commonwealth, State and Territory legislation and policy should provide for, amongst other things, access to water and waterways, cultural flows, and water allocations to be made to native title holders.

13. It also requires that rivers, floodplains and water resources are managed in a way that ensures they are not depleted, which of course impacts on the exercise of native title. This requires that water systems are not overallocated, that monitoring and compliance regimes are adequately resourced, and that responsible Departments and Agencies undertake monitoring, conduct investigations and use enforcement mechanisms available to them in order to deter non-compliance.
14. Section 211 of the NTA provides that where a licence, permit etc. is required for a certain activity, native title holders are not required to obtain the licence, permit etc. for hunting, fishing, gathering or cultural and spiritual activities, where they do so for the purpose of satisfying their personal, domestic or non-commercial communal needs.
15. The Macquarie floodplain harvesting policy should also include a statement in relation to section 55 of the *Water Management Act (NSW) 2000* which provides:
  - (1) *A native title holder is entitled, without the need for an access licence, water supply work approval or water use approval, to take and use water in the exercise of native title rights.*
  - ...
  - (3) *The maximum amount of water that can be taken or used by a native title holder in any one year for domestic and traditional purposes is the amount prescribed by the regulations.*
16. The priorities and provisions of the *Water Management Act 2000*, the *Water Act 2007* and the Basin Plan, including those which relate to native title, must be adhered to in the implementation of floodplain harvesting rules and activity. Specifically, this requires policy guarantees that water access licences and allocations will neither impact expected outcomes and rights under these legislative instruments for Traditional Owners, nor affected downstream communities nor the environment.
17. NTSCORP supports the implementation of guaranteed flow targets to protect downstream communities. These guarantees must take into account cultural, ecological, stock and domestic water needs, with the effect that floodplain harvesting can only occur when these needs are met. This may be enhanced with an effective scheme of targets for flow in each part of the river and water system across the interconnected waterways of NSW.
18. Further, it is imperative that any changes to the floodplain harvesting rules are properly monitored, regulated and enforced. If water is taken from the floodplains from both allocated licences and by unlawful, non-compliant persons or organisations, this would have a highly detrimental impact on Traditional Owners,

downstream communities and the broader environment and ecosystem. This is particularly important in relation to the Macquarie Valley floodplain harvesting rules, as there has been no reductions in current take based on downstream modelling<sup>1</sup>.

19. We also encourage the NSW Government and its agencies to explore options wherever possible to establish (and adequately resource) programs that allow native title holders to actively participate in the management of rivers and water resources, such as programs for river rangers.
20. It should be acknowledged that the nature of native title rights and interests in water and therefore the manner in which Commonwealth, State and Territory policy and legislation should recognise, protect and accommodate these native title rights and interests is a developing area of the law. We expect further decisions and commentary from the Courts on these issues in the coming years. Notwithstanding the limited judicial guidance, we expect that Commonwealth, State and Territory Governments will continue to give serious consideration as to how these issues should be addressed in policy and legislative reform processes.

#### **Inadequate recognition in water policy/legislation**

21. NTSCORP continues to be dissatisfied with policies and legislation implemented by the Commonwealth and State Government for their inadequacy in effectively recognising and protecting native title rights and interests in land and waters.
22. The mismanagement at a Commonwealth and State level, including through the overallocation of water from rivers and a lack of effective monitoring and compliance, has meant that in recent years, some rivers in NSW have either not flowed, run dry, and/or have had poor water quality for extended periods, which has also resulted in a number of fish kill incidents across the State.
23. The various and complex factors contributing to these events are beyond the scope of these comments, but in our view, the policy and legislative setting which allowed this to occur constituted – and continues to constitute – an impairment and in some cases suppression of the native title rights and interests held by Traditional Owners along those rivers.
24. In July 2020, the NSW State Government entered the National Agreement on Closing the Gap (**Closing the Gap Agreement**). Clause 62 of the Closing the Gap Agreement states:

---

<sup>1</sup> <https://www.industry.nsw.gov.au/water/plans-programs/healthy-floodplains-project/water-sharing-plan-rules/macquarie-valley>

*When Government Parties change, design or deliver policies and programs that impact on the outcomes of this Agreement, they will do so in line with this Agreement.*

25. Outcome 15 of the Closing the Gap Agreement is:

*Aboriginal and Torres Strait Islander people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters*

26. Under Outcome 15, Targets 15a and 15b of the Closing the Gap Agreement are:

*By 2030, a 15 per cent increase in Australia's landmass subject to Aboriginal and Torres Strait Islander people's legal rights or interests.*

*By 2030, a 15 per cent increase in areas covered by Aboriginal and Torres Strait Islander people's legal rights or interests in the sea.*

27. Through the Closing the Gap Agreement, the NSW Government has committed to designing its policies to achieve the outcome of a 15 per cent increase in Aboriginal and Torres Strait Islander people's legal interests in Australia's land and waters.
28. The obligations which the NSW Government took on in the Closing the Gap Agreement directly impact the content and preparation of NSW water policy. At present in NSW, native title holders are generally unable to obtain allocations on the water market, as it is prohibitively expensive. It is NTSCORP's position that recognition of native title rights and interests requires that the NSW Government put in place measures, policies and funding to enable native title holders to obtain allocations of water within their determined or claimed areas.
29. An allocation of water from the Macquarie portion of the Healthy Floodplains Program should be set aside for Traditional Owners where floodplains are within their claim areas.

### **Consultations with Aboriginal People and Traditional Owners**

30. NSW Government has an obligation to enable Aboriginal and Torres Strait Islander people to maintain a distinctive culture. This can be achieved through the proper engagement with Traditional Owners in decision making and planning processes that concern their traditional rights to land and waters.
31. We acknowledge the consultation that has been undertaken thus far by Government with Aboriginal People and support ongoing engagement with Aboriginal People,



communities and organisations in the development of water policy in NSW. However, to date, the method of consultation in relation to the multiple different areas of water policy has not been adequate to allow for proper consultation with Aboriginal People and, in particular, native title holders and Prescribed Bodies Corporate (**PBCs**).

32. NTSCORP emphasises that consultation with Aboriginal People must be comprehensive and culturally appropriate. Aboriginal People, including native title holders, must be involved in the development and implementation of all water policy, legislation, schemes, and grants. Aboriginal People have been the Traditional Owners of country for over 60,000 years, and with the benefit of the wealth of environmental and cultural knowledge amassed over this time, have sustainably managed land and water resources throughout history. It is crucial that Aboriginal People are included and represented in all decision-making processes relating to water policy in NSW.
33. Furthermore, the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**), which Australia accepted on 3 April 2009, declares that:

*Article 32(2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent prior** to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, **water** or other resources. (emphasis added)*

34. Effective and culturally appropriate consultation has to date been limited by the short and rigid timeframes adopted by the Department for the development of water policy such as the floodplain harvesting rules in the Macquarie Valley, which has prevented NTSCORP from facilitating effective consultations with native title holders.
35. We encourage the Department to take a more flexible approach with these timeframes and to not finalise any policies until Aboriginal People and Traditional Owners confirm that they have been adequately consulted and their comments addressed, in line with the UNDRIP requirement for free, prior and informed consent of Aboriginal People to measures that may affect them.
36. A significant barrier to Aboriginal People and Traditional Owners participating in these processes is the complexity of water policy and law. The Department has provided materials to assist people to 'make an informed submission' on the floodplain harvesting licence rules in the water sharing plans for the Macquarie Valley, being a series of technical reports totalling 165 pages. The extent and technical complexity of these materials is prohibitive and limits meaningful engagement by Aboriginal

People.

37. We support the development of educational resources, such as fact sheets, notices and videos, tailored to the needs of Aboriginal People and Traditional Owners, to ensure the purpose and content of any policy Aboriginal People are being consulted in relation to is understood to enable effective participation in these processes.
38. In our experience, consultation meetings with Government Departments and Agencies on water can be ineffective because Government representatives can speak only to very specific policies or aspects of policies, which does not enable a wide-ranging discussion on water and on the issues that affect Aboriginal People and Traditional Owners. We recommend that for consultation meetings, Government representatives are equipped to answer questions across a range of region-specific water policies and legislation – including, but not limited to, the floodplain harvesting rules, Regional Water Strategies, fisheries management, and others - and are able to contextualise the policy being discussed, to enable these conversations to be more productive.
39. Further, development of water policy under the floodplain harvesting licence rules and water sharing plans for the Macquarie Valley should include the establishment of an Indigenous employment strategy to ensure the creation and maintenance of Aboriginal Identified Positions.

### **Summary of NTSCORP Recommendations**

In relation to water legislation and policy generally, NTSCORP recommends that:

- Commonwealth, State and Territory legislation and policy should acknowledge the existence of native title rights and interests, and provide for, amongst other things, access to water and waterways, cultural flows, and water allocations to be made to native title holders. Under the Macquarie water sharing plan and floodplain licencing rules, this should include specific water allocations for the Traditional Owners;
- Floodplain harvesting rules should incorporate adequate protections for downstream flows and targets for different parts of the river system that take into account cultural water needs;
- Effective enforcement and regulation must be implemented to ensure floodplains waters are not over-allocated or unlawfully overused;
- Employment opportunities for Indigenous peoples should be explored and maintained wherever possible, to allow native title holders to actively participate in the management of rivers and water resources; and



- DPIE reconsider its current method of consultation with Aboriginal People and, in particular, native title holders and Prescribed Bodies Corporate (**PBCs**) to allow for comprehensive, culturally appropriate and genuine engagement with Traditional Owners in the drafting of water policy and legislation, with a view to obtaining the free, prior and informed consent of Aboriginal People.

If you require any further information or would like to discuss this submission, please do not hesitate to contact Sarah Bartrim, Solicitor ([sbartrim@ntscorp.com.au](mailto:sbartrim@ntscorp.com.au)) and Laura Melrose, Paralegal ([lmelrose@ntscorp.com.au](mailto:lmelrose@ntscorp.com.au)) at NTSCORP.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Natalie Rotumah", written over a thin horizontal line.

**Natalie Rotumah**  
**Chief Executive Officer**  
**NTSCORP Limited**

