



FLOODPLAIN HARVESTING

Legislative amendments: Tailwater drain 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 Water Management (General) Amendment (Exemption for Rainfall Run-off Collection) 2021, which provides an exemption for licensing and approval requirements related to rainfall run-off collected in a tailwater drain. The report summarises what the NSW Government heard from written submissions. The report also outlines the final proposed amendments and the reasons for these.

Tailwater drain exemption

What a tailwater drain is

A tailwater drain is a channel or trench that collects excess water from an irrigated field. When water is applied to a field, the water that does not soak into the soil runs off the field and is collected in a tailwater drain so it can then be reused. This irrigation water has already been measured and accounted for under a relevant licence before it is applied to a field.

Why the tailwater drain exemption is needed

When it rains, rainfall run-off that comes from the irrigated area of land mixes with the used irrigation water in the tailwater drain. At this point, it is impossible to confidently and accurately measure and account for the rainfall run-off separately from the used irrigation water and then attribute this volume to the appropriate water access licence.

Further, because of the high soil moisture content of an irrigated area of land, run-off usually occurs to a greater degree and a tailwater drain will generally be the first structure to start collecting rainfall run-off when it rains. While at first this issue was identified in floodplain areas, it is now recognised as a state-wide problem.

The tailwater drain exemption recognises that measuring rainfall run-off collected in a tailwater drain is complex. It also acknowledges that much of the run-off may be used irrigation water that has already been measured under an existing water access licence.

What the tailwater drain exemption does

This regulation will mean that a water user can use a tailwater drain without having a water supply work approval. The regulation will also mean that a water user does not need a water access licence to collect rainfall run-off from an irrigated field into a tailwater drain in situations where no other overland flow is being taken by works on the land, other than a tailwater drain.

This regulation will clarify when rainfall run-off must be measured by providing an exemption during specified periods. During times when this exemption does not apply, the volume of water collected in a tailwater drain must be measured and accounted for under a licence.

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 to the proposed regulation before making it final.

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 proposed amendment regulation for the tailwater drain exemption

Based on submissions received, we have finalised the proposed regulation amendment as listed in Table 1. This exemption will clarify when water collected in a tailwater drain does and does not require measurement.

Table 1. Final proposed amendment

Exemption	Details
Scope of the exemption	This is a state-wide exemption. The exemption from approval requirements applies continuously, while the exemption from licensing requirements only applies during periods when no other works (other than a tailwater drain) are taking overland flow.
Exemption from the requirement to hold a water supply work approval	An exemption from the requirement to hold a water supply work approval to use a tailwater drain for the purpose of collecting rainfall run-off from an irrigated field
Exemption from the requirement to hold a water access licence	An exemption from the requirement to hold a water access licence to take water from a tailwater drain for the purpose of collecting rainfall run-off from an irrigated field

What we heard from stakeholders

Submissions received

The department received a total of 236 submissions. Submissions were about the tailwater drain exemption, 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 tailwater drain 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 2 outlines the general themes stakeholders raised throughout the submissions we received.

Table 2. General themes raised

Description	Government response
<p>There was general stakeholder concern that floodplain harvesting in the northern Basin effects 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 have finalised 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
Many stakeholders who made a submission were against floodplain harvesting and believed it should be illegal.	<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, causing significant effects on 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 amendments

Table 3 outlines themes raised in submissions that were supportive of the proposed tailwater drain exemption. There was strong support for the exemption, with stakeholders believing that the regulation will clarify what was a 'grey' area.

Table 3. Feedback in submissions supportive of the proposed tailwater drain exemption

Feedback	Government response
The exemptions provide uniform, state-wide consistency and legal recognition for the collection of rainfall run-off in tailwater return drains, which is a requirement of many water access licences and approvals.	<p>The department agrees.</p> <p>The tailwater drain exemption regulation complements the rules that already exist on some water access licences and approvals, clarifying the measurement of these volumes for licence holders.</p>
The capture of on-farm water after an irrigation or on-farm rain event is essential. This prevents contaminated water from returning to natural creeks or rivers in accordance with the <i>Protection of Environment and Operations Act 1997</i> .	<p>The department agrees.</p> <p>Not discharging contaminated water is a legal requirement. While this exemption regulation does not affect this requirement, it does clarify how this water is to be measured and accounted for in different circumstances.</p>

Feedback	Government response
<p>Water that comes through the tailwater system is water that has already been accounted for.</p>	<p>This is largely correct. Best available literature suggests that up to 75% of the rainfall runoff collected in irrigation tailwater systems would have been water that naturally infiltrated the soil moisture profile before the irrigation development. The two primary reasons for this increased runoff are that, irrigation rather than rainfall is now filling a proportion of the soil moisture profile and that irrigation fields have been specifically designed to run water into the tailwater drain. As a result, it is not yet resolved whether all or part of the rainfall runoff water collected in irrigation tailwater systems constitutes a diversion.</p> <p>The department has committed to the development of a state-wide policy for assessing and managing the growth in runoff collected through tailwater drain that will also consider the response that other Basin States are taking. This will then be managed as an interception activity through water resource plans.</p>
<p>This exemption fills the need to regulate an existing practice that is poorly understood. All stakeholders should be made aware of the grey area this regulation seeks to address, and the compliance risks if it does not progress.</p>	<p>The department agrees.</p> <p>This regulation fills an existing gap, providing clarity to water users and the Natural Resources Access Regulator.</p>

Not in support of the proposed amendment

Table 4 outlines themes raised in submissions that were not supportive of the proposed amendments. Stakeholders raised concerns about existing harvestable rights orders and the potential for floodplain harvesters to use this exemption to take more water than they are entitled to.

Table 4. Feedback in submissions not supportive of the proposed tailwater drain exemption

Feedback	Government response
<p>Stakeholders stated there may potentially be a lack of clarity, transparency, and compliance if tailwater drains are used to capture rainfall run-off, reuse irrigation water and harvest floodplain water.</p>	<p>The exemption was created to improve clarity and certainty for water users about when and how they must account for rainfall run-off collected in tailwater drains. The regulation amendment sets out clearly that the exemption stops when structures other than tailwater drains, such as channels or dams, start to take overland flow.</p> <p>When the exemption is in effect, rainfall run-off collected in a tailwater drain can be transferred to a storage without the need for measurement. When the exemption does not apply, rainfall run-off will need to be accounted for under a relevant licence.</p>

Feedback	Government response
<p>Creating an exemption because of the difficulty measuring take is not a valid or socially acceptable reason. This exemption would allow floodplain irrigators to take above and beyond what they are entitled to.</p>	<p>There are many forms of take where licensing is not in place because it is not practical to achieve and/or to enforce compliance. All regulations have a life of 5 years with a review built in for currency.</p> <p>The Basin Plan requires that all forms of taking water are accounted for whether they are licensed or not. The NSW Government is committed to working with the Murray–Darling Basin Authority to ensure that all forms of take are properly accounted and managed through water resource plans.</p>
<p>Rainfall run-off take must be consistent with the existing harvestable rights order.</p>	<p>Harvestable right orders allow the construction of a dam on a first- or second-order stream to catch a proportion of rainfall run-off.</p> <p>Run-off from irrigation areas is typically not captured in harvestable rights dams.</p> <p>The reasons for this proposed exemption are outlined in this report.</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 government remains committed to bringing floodplain harvesting into a licensing framework, underpinned by robust measurement rules, and compliance and enforcement measures. This is a new regulatory regime and the government is committed to working with:

- all stakeholders to ensure that they understand the rules and their intent
- water users to ensure that they understand their obligations.