31 July 2020

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Submission to the NSW First Flush Assessment Draft Report

Dear Dr Craik and Mr Claydon

Please accept this submission in response to your *Draft Report Assessment of the Management of the 2020 Northern Basin First Flush Event* released on 13 July 2020.

Firstly I would like to thank you and your team for the detailed work to inform NSW residents of the circumstances in the lead up to, decision making during and outcomes form the January and February first flush event. I have found it extremely valuable given the limited information publicly available prior to the release of this report.

I have been following the issue of the management of the first flush event closely since the rains started falling in the Northern Basin in January 2020.

For your background, I asked questions about the management of the event in the March Budget Estimates hearings and moved a motion in the NSW Legislative Council earlier this year to disallow the floodplain harvesting exemption regulation. This disallowance motion was referred to the NSW Legislative Council Regulation Committee for consideration. Hearings were held in early July and the report is due in September.

I participated in this Regulation Committee inquiry which included questioning of the NSW Water Minister Melinda Pavey and Departmental officials. Detailed Supplementary Questions were put to the Department following the hearings and the answers to those questions are referred to below and can be found here:
https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2584#tab-otherdocuments

My focus in this submission relates to floodplain harvesting take during the first flush event and the introduction of the exemption regulation.

Clarifying the level of floodplain harvesting take during the first flush event.

The draft assessment report provides an excerpt from a DPIE website outlining the department's figures in relation to take from the event (pp 42,43). Your report makes no comment in regards to the accuracy or reliability of these figures specifically but you raise questions about the adequacy of metering, monitoring and reporting of floodplain flows and take in other areas of the report.

The volume of take, especially from floodplain harvesting, is a critical point of public interest. There is significant distrust in the NSW Government's figures.

Since your draft assessment report was published, DPIE have published an *Assessment of take and protection during first flush flows in the Northern Basin*. This Assessment largely aligns with the DPIE figures quoted in your report.

However it is clear that the DPIE figures have a number of potentially significant limitations.

Firstly, the figures on the DPIE website, and confirmed in their assessment of take, do not make assessments of the volume of licenced take versus floodplain harvesting take. It may well be that DPIE lacks the measuring tools or data to make a judgement about the volumes of take, however this question is not clearly addressed.

Secondly, the assessment of take is focussed on volumes captured in large on-farm storages. Floodplain harvesting under the *NSW Floodplain Harvesting Policy* has a significantly broader definition:

Floodplain harvesting is the collection, extraction or impoundment of water flowing across floodplains, including rainfall runoff and overbank flow, but excluding the taking of:

- *water under a water access licence that is not a floodplain harvesting access licence water under a basic landholder right,*
- *including water taken under a harvestable right*
- *water under an applicable water access licence exemption under the WM Act*
- *used irrigation water.*

Answers received by the Legislative Council Regulation Committee to Supplementary Questions from the recent inquiry hearings makes clear that the NSW Government has begun to draw a significantly narrower definition for the purposes of future licencing. Answers to Q29 (pp12-14) outline how the capacity of **interception** works such as embankments and roads,

where water captured is not transferred into large storages, has not been assessed and will not be required to be licenced for floodplain harvesting.

It is 100 per cent clear from the evidence provided to the inquiry and in the DPIE assessment of take, that the figure of 30GL of water captured by mid February (as per the DPIE website referenced on page 42 of your report) does not include water held back on farms as a result of works like embankments and roads that was not transferred into on-farm storages.

What kinds of floodplain harvesting is and isn't included in the licencing scheme will no doubt be an area of future policy dispute between stakeholders, but for the purposes of your report, the volume of both the water transferred to large storages and water held back by so called interception activities, and how these volumes are addressed in currently published figures, if at all, should be addressed.

Thirdly, in assessing water balance, the DPIE Assessment of Take report notes, "*Floodplain harvesting take from catchment run-off prior to the water entering the regulated system is not considered in the balance, but by nature, would reduce inflows." (p14).*

It seems to me that a significant portion of take referred to as interception (mentioned above) would fall into this category.

By reducing the inflows into the water balance assessment, this water effectively disappears from the assessment take. It is as if it never fell from the skies at all.

The failure to measure the capacity of these interception works and exclude this water from inflows used as the basis of assessing water balance undermines the integrity of the entire assessment of take from the first flush event.

I ask that your report addresses the above and seeks to make some assessment of the level of floodplain take, including both stored and held back water, or makes clear the limitation of the current figures provided by DPIE.

Clarifying the legal basis of the floodplain harvesting exemption regulation

The practical and legal reasons for the Floodplain Harvesting Exemption Regulation has been subject to significant public debate since it was gazetted.

As mentioned in the introduction, I have moved in the NSW Legislative Council to disallow this regulation.

The Regulation Committee heard many different explanations from stakeholders as to what this regulation does in effect and why it was needed or remains necessary.

Despite repeated questions of the Government, including the Water Minister, there remains a lack of clarity around the purpose of and need for the regulation. Minister Pavey said in relation to one question that the regulation "was putting an authorisation around a process to ban it." (transcript p44)

However, on page 26 of your report you say:

"....DPIE Water took steps to commence the floodplain harvesting regulation on 24 January 2020. However, as the temporary water restriction in place at the time did not restrict floodplain harvesting, the regulation was put on hold to ensure that floodplain harvesting would be temporarily restricted under section 324 of the WM Act consistent with other forms of take when the regulation commenced."

This suggests that DPIE water had sufficient powers to embargo floodplain harvesting without the regulation being in place.

This position is supported by the Environmental Defenders Office submission to the inquiry which says:

"...we note that it has been asserted that the Regulation was made to allow the Minister (or their delegate) to impose an embargo on floodplain harvesting under s.324 of the WM Act. We are intrigued by this assertion as based on our interpretation of s.324, the Minister already had broad discretion to impose an embargo, including in relation to the diversion of water from floodplains. Specifically, under s.324(1), the Minister may declare that '…the taking of water from a specified water source is prohibited, or is subject to specified restrictions, as the case requires.'" (p3)

Many stakeholders are convinced that the exemption regulation was introduced in part because there was a view amongst some within government, including within NRAR, that there was uncertainty around the legality of unlicensed floodplain harvesting and this would lead to enforcement actions unless this legal ambiguity was resolved.

On page 24 of your report you say:

"The renewed focus on water compliance since the Matthews Inquiry and creation of NRAR increased the importance of codifying the exemption, but drought conditions meant there was no floodplain water harvesting.

This suggests there may be some basis to these questions around the legality of unlicensed floodplain harvesting.

Putting aside that the NSW Floodplain Harvesting Policy process had flagged the creation of this regulation for many years, this is not a satisfactory argument in and of itself and does not explain the content or timing of its gazettal.

I also note that in answers to Questions on Notice from the Regulation Committee hearing,the Water Minister confirmed that:

"The regulation will continue until licences are created or it is repealed." (p5)

Given the challenges to date of finalising the floodplain harvesting policy, there is every real chance that this regulation becomes a long-term licencing exemption. Clarity around its legal purpose is critically important for all stakeholders to understand and will be vital for Legislative Councillors to know in making a judgement on the Disallowance Motion.

I ask that you attempt to make more clear in your final assessment report the legal basis and practical effect of the exemption regulation.

Thank you for your consideration of this submission.

Kind regards,

Justin Field

Justin Field MLC