

NSW Border Rivers: Floodplain harvesting in water sharing plans



Commonwealth Environmental Water arriving down the Barwon at Walgett June 2019 after many months of a completely dry Barwon River. Photo Vanessa Hickey Dharriwaa Elders Group.

Submission from Dharriwaa Elders Group, Walgett

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Dharriwaa Elders Group

Dharriwaa Elders Group is an association of Aboriginal Elders who live in Walgett, a river town of about 2,100 people, the majority Aboriginal. Walgett is where the Baawan (Barwon) and Ngamaay (Namoi) Rivers meet, upstream of the town of Bourke. Walgett is in Gamilaraay Country, close to the borders of Ngiyambaa and Wayilwan Countries, and is now home to Gamilaraay, Yuwaalaraay, Ngiyambaa and Wayilwan Aboriginal Nations, as well other Aboriginal and non-Aboriginal people.

Rivers have always been, and remain central, to Walgett culture and life. Rivers provide drinking water and food (particularly regular fish meals), water for birds and animals, gardens and food security. For Aboriginal people the health of the river and the health of people come first.

In recent times Walgett's Aboriginal community has suffered from drought, climate change and the river drying up. The lack of water and food security is of great concern to Elders. It's our belief that Walgett's current situation is due to the way water is managed, and that irrigators upstream of Walgett have been favoured, over people downstream. It is a failure of a system that is required by law to manage the rivers in the interests of all Australians.

Introduction

Dharriwaa Elders Group (DEG) welcomes the opportunity to comment on the proposed licensing of floodplain water harvesting in the Border Rivers. DEG acknowledges the importance of licensing and regulating floodplain water harvesting, and enforcing compliance with the law.

Since the early 1990s the NSW and Commonwealth governments have recognised floodplain water harvesting as a threat to the environment, licensed shares, and communities. During this time governments have repeatedly pointed out that floodplain water harvesting should be licensed, measured, and the law enforced. Despite this, the statement below, in a policy advice to River Management Committees (circa 2003), still applies.

The Water Act 1912 provided powers to license floodplain harvesting. However, this was never applied...Harvested floodplain water has been treated as a freely available bonus to a farmer's licensed entitlement.¹

Matters of general concern to DEG include;

- The variation and unreliability of estimates of the amount of water take from floodplains. It is DEG's view that the volume taken should be known before floodplain water harvesting is licensed,
- The poor standard and unreliability of the hydrological models, and the numbers in them, used in the Northern Basin.

...the models are not suitable to assess the benefits/impacts of the floodplain harvesting licensing framework...on specific downstream flows, either in the rivers or on the downstream floodplains themselves. Within the models, flows downstream of any flood outbreak are highly insensitive to variation of the amount of floodplain harvesting

¹ NSW Government (n.d. circa 2003). *Advice to Water Management Committees, No. 3 Floodplain Harvesting.*

*diversions allowed, including timings and volumes. The main potential unknown risk as a result of this is the impact of floodplain diversions on downstream floodplain flows and the downstream floodplain environment.*²

DEG has no confidence in the models used by government agencies, and distrusts assertions based on claims of *best available knowledge* or *improved accuracy*, considering them not fit for the purposes for which they are used,

- The legality of floodplain structures, in particular levees and storage dams. It is DEG's understanding that storage capacity in the Border Rivers has grown by 70 percent since 1994,
- The significant damage to the environment from the diversion of large volumes of water from floodplains,
- The damage to the Aboriginal Cultural Values of floodplains, rivers and wetlands caused by floodplain water harvesting.

Comment on summary of proposed rules for floodplain harvesting (regulated river) access licences contained in "NSW Border Rivers: Floodplain harvesting in water sharing plans - Report to assist community consultation, NSW Dept of Planning, Industry and Environment, October 2020"

Account limit

Dharriwaa Elder Group (DEG) **assumes** that 1 unit share is equivalent to 1 megalitre. DEG **opposes** accounts holding 5 megalitres *per unit share at any time*. This would mean that the account could hold 5 times the face value of the licence at any time.

DEG **understands** that the face value of licences to be issued in the Border Rivers will be approximately 40 gicalitres. This means that licence holders will be able to hold about 200 gicalitres in their accounts.

DEG **opposes** any 'carryover.'

DEG **disputes** the use and meaning of the term *carryover* as misleading and deceptive. The term has been adopted from regulated systems where it is applied to accounts with water held in large public dams. The provision applied to floodplain harvesting, called 'carryover,' is a different thing. It is not carryover of unused water, but a claim to take future river flows. In practise it will mean that the river will owe water to irrigators even when the river has not flowed, or its flows are insufficient to meet the demands of the irrigation industry, even if that lack of flow is caused by irrigation take upstream.

² Weber, T. and Claydon, G. 2019. *Independent review of NSW floodplain harvesting policy implementation; Draft report for consultation*. Alluvium Consulting for NSW DPI

Claiming the right to take future flows **is inconsistent** with the Principles of the *NSW Water Management Act 2000*, which places the needs of the river, and communities along the river, ahead of take by irrigation.

Available water determination

DEG **assumes** that unit shares are the face value of the volume of licences to be issued.

DEG **opposes** an initial available water determination of 5 megalitres per unit share.

DEG **understands** that the face value of the licences to be issued in the Border Rivers will be approximately 40 gegalitres. This means that licence holders will start with about 200 gegalitres in their accounts when floodplain harvesting is licensed.

DEG **requires** that whatever method is used to determine available water, or amounts of water that may be available for extraction from the floodplains into private hands, that this available water determination does not occur to the detriment of the water source and the ecosystem that depends on it³. **The rivers always come first.**

Permanent trade

DEG **does not support** any trade of floodplain harvesting licences.

Access rules

DEG **believes that the Minister must be able to stop water extraction and issue embargoes to protect the river and its dependent ecosystems, without conditions imposed.** That is the Minister must be enabled in the provisions to uphold the water sharing principles of the *Water Management Act 2000*.

Protection of environmental flows

It is **unacceptable** to DEG that environmental flows are not explicitly protected from take by floodplain harvesting.

Findings of the Independent Commission Against Corruption

The NSW Independent Commission Against Corruption released its report, *Investigation into complaints of corruption in the management of water in NSW and systemic non-compliance with the Water Management Act 2000*, in November 2020.

The Commission found instances where the *department's decisions and approach were manifestly partial towards irrigators and industry.*

The Commission formed the opinion that this approach was motivated by a misguided effort to redress a perceived imbalance caused by the Basin Plan's prioritisation of the environment's needs...It was directed to protecting as much as possible the existing entitlements of productive water users from any further reduction or adverse socio-

³ The first water sharing principle of the *Water Management Act 2000* states that *"a) sharing of water from a water source must protect the water source and its dependent ecosystems"*

economic effects that may be occasioned by the state's obligations to implement the Basin Plan requirements in each of the water resource plan areas in NSW falling within the Basin.

The Commission formed the opinion that, in many of the matters it investigated...the evidence established that the rights of productive water users were given priority over the rights of other stakeholders and that there was a clear alignment between the department's strategies and goals and those of the irrigation industry.

Notwithstanding the fact that the Commission has made no findings of corrupt conduct, it is satisfied that those matters it found established on the evidence...have rightly had a detrimental effect on the public's confidence in the ecologically sustainable, equitable, transparent and efficient management of the water sources of the state and in the integrity and good repute of public administration, more generally.

Were irrigator interests favoured in the drafting of the BDWSP?

The consistent approach of the department to the development of the BDWSP was not to push for reforms that met the requirements of the WMA's water sharing priorities, but to codify existing arrangements even where this had adverse implications for the environment and downstream users. This was contrary to the duty to give priority to the water sharing principles in the order in which they are set out in the WMA.⁴

Because we know this partiality for irrigators' interests has been found by the ICAC, the NSW Government in all its future work needs to prove to DEG and voters that it will guard against any future perceptions and actions that indicate this partiality continues. DEG is very concerned about how this partiality may have excluded the river from the water it needs, and may have prevented our community from accessing the water we require. We seek resources and time to examine the findings of the ICAC closer, and what they mean for the Walgett Aboriginal community.

The NSW Water Management Act 2000

The *Water Management Act 2000* is clear that water sharing is not about balancing uses and values, it is about firstly providing for the environment and secondly recognising basic landholder rights above other uses. These water sharing principles are found in section 5(3) of the *Water Management Act 2000*. It states that:

- . *a) sharing of water from a water source must protect the water source and its dependent ecosystems, and*
- . *b) sharing of water from a water source must protect basic landholder rights, and*
- . *c) sharing or extraction of water under any other right must not prejudice the principles set out in paragraphs (a) and (b).*

⁴ NSW Independent Commission Against Corruption, 2020. *Investigation into complaints of corruption in the management of water in NSW and systemic non-compliance with the Water Management Act 2000*, NSW ICAC, Sydney.

Further, section 9(1) of the Act provides that “It is the duty of all persons exercising functions under this Act:

- . a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and
- . b) as between the principles for water sharing set out in section 5(3), to give priority to those principles in the order in which they are set out in that subsection.⁵

The Dharriwaa Elders Group considers that the actions that led to the findings of the Independent Commission Against Corruption, in the matter of the Barwon-Darling Water Sharing Plan, are being repeated in the licensing of floodplain harvesting.

Consultation

Dharriwaa Elders Group considers the lack of consultation and engagement with Aboriginal communities in its area of concern unacceptable. The report provided by DPIE, notionally to assist community consultation, is almost entirely impossible for any community person not deeply versed in water policy to understand or follow. As ordinary member of the community we found it very difficult to engage with.

Despite the many years during which the NSW Government could have attempted to explain adequately what the proposals for floodplain harvesting are, and what they mean for the river, and the communities of the river, it has failed to do so. This is not acceptable for DEG.

Conclusion

Before any floodplain harvesting is licensed, DEG wishes to see;

1. The identification and publication of all permanent and ‘temporary’ floodplain harvesting structures, their locations, storage volumes and contributions to diversions.
2. Substantiated information relating to the historic levels of level of development at 30 June 1994 and at the Plan Limit date,
3. Multiple lines of evidence to correlate current and historic levels of floodplain water harvesting,
4. The inclusion in the NSW Water Register of a publicly-available database of floodplain harvesting structures, their ownership, licence conditions and approvals.
5. An updated and refined Basin-wide water accounting framework to include floodplain harvesting, and the effects of climate change on river flows.
6. That licences are issued on a temporary basis and subject to review (against legal requirements in the Water Act and Basin Plan and Aboriginal Cultural requirements) every year.
7. Licence conditions and water sharing plan rules that include downstream flow targets, stipulating the volume of water flowing downstream before floodplain harvesting can occur.

⁵ NSW Natural Resources Commission. 2019. *Final report, Review of the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012*. NSW Government, Sydney.

8. Information regarding the number of unlawful structures and their location made publicly available by the NSW Government.
9. Clarification of when all unlawful structures will be removed.
10. Aboriginal people must be part of decision-making processes (consistent with internationally recognised Indigenous rights), including in relation to floodplain harvesting, rather than merely being 'consulted' after a policy and legal framework has been developed. DEG wants negotiation, not consultation. DEG is happy to contribute advice for how to resource and support this process, as would other Aboriginal organisations and their peak organisations.
11. Allocation of water to Aboriginal people with the method to be determined by Aboriginal people.
12. Licence conditions and water sharing plan rules that include 'Aboriginal Cultural flow targets' to ensure that – at a minimum – sites of Aboriginal Cultural Value receive water before floodplain harvesting can occur.
13. Increased penalties for non-compliance with water laws, including conditions and rules governing diversions from floodplains, to a level sufficient to serve as a deterrent to unlawful behaviour.