



environmental defender's office new south wales

Submission on the NSW Floodplain Harvesting
Policy: Draft for community consultation –
April 2010

28 May 2010

The EDO Mission Statement:

*To empower the community to protect the environment
through law, recognising:*

- ◆ *the importance of public participation in
environmental decision making in achieving
environmental protection*
- ◆ *the importance of fostering close links with the
community*
- ◆ *the fundamental role of early engagement in
achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in
protection of the environment*
- ◆ *the importance of providing equitable access to
EDO services around NSW*

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Introduction

The Environmental Defender's Office NSW (EDO) is a community legal centre specializing in public interest environmental law. We have over 20 years experience in public interest environmental law matters, and have commented regularly on water law and policy reform. We are therefore pleased to provide comments to the NSW Office of Water ("NOW") on the Draft NSW Floodplain Harvesting Policy ("Draft Policy").

In light of the previous comments made by the EDO to the NOW in late 2008 on the previous draft policy on floodplain harvesting, our current remarks will be limited to specific issues relevant to our expertise and highlighting concerns that the EDO previously raised and that have not been adequately addressed in the Draft Policy.

General Comments

The EDO strongly supports the development of the Draft Policy, as it addresses the need to manage and regulate floodplain harvesting activities in NSW. Until now, floodplain harvesting activities have effectively gone on unregulated and unlicensed, to the detriment of the ecological health of floodplains. This has been a significant gap in water regulation in NSW, and so the EDO welcomes the introduction of this much-needed policy development, and welcomes improvements in the latest Draft.

However, the EDO remains concerned that there are some deficiencies with the Draft Policy that have not been adequately addressed.

Protection of environmental water

In particular, the Draft Policy does not adequately provide for the protection of environmental water. The EDO submits that this should be more explicitly and thoroughly addressed in the Draft Policy, and should in fact form the basis of the purpose of the Draft Policy. While the current stated purpose of the Draft Policy (at paragraph 2) includes managing floodplain water extractions 'more effectively in order to protect the environment' and as a way to meet the objectives of the National Water Initiative,¹ our position is that the overarching objective of the Draft Policy must be to ensure the protection of the environment, through the regulation of floodplain harvesting.

The Draft Policy does not adequately identify how floodplain harvesting rules will ensure that harvesting activities do not occur to the detriment of environmental flows. This concern was highlighted by the EDO in relation to the previous draft policy. We therefore reiterate that the Draft Policy should clearly establish the basis for developing robust harvesting rules that govern when and under what conditions floodplain harvesting can occur, in recognition of the fact that not all flood events (particularly those that occur after prolonged dry periods) should necessarily be open to harvesting.

In particular, the Draft Policy should contain strong requirements to include relevant rules in water sharing plans. Currently, for example, part 4.3.1.3 of the Draft Policy simply mentions that 'plan amendments, or floodplain harvesting provisions in new plans, may include clauses establishing environmental water rules relating to floodplain

¹ Which includes, amongst other things, to 'complete the return of all currently overallocated or overused systems to environmentally-sustainable levels of extractions': 23(iv)

harvesting, including event management rules such as commence-to-pump rules'. This is not an adequate response to the need for rules to govern harvesting that ensures the protection of environmental water flows. Instead, the Draft Policy should be amended to include a clear recognition that robust harvesting rules *will* be incorporated into each water sharing plan (for example, through appropriate amendments to the Act/Regulations). This is necessary to adequately ensure protection of those critical environmental flows and to deliver the objectives of the Draft Policy, the Act and the NWI, through the sustainable and equitable sharing of water between users and the environment.

Compliance and enforcement

We also note that the Draft Policy continues to lack adequate detail concerning compliance and enforcement mechanisms for the proposed regime. As we noted in our previous submission, compliance and enforcement mechanisms will be critical to ensure that floodplain harvesting operates within the limits identified by NOW. The Draft Policy should therefore clearly identify the proposed strategy and mechanisms for ensuring compliance with the Draft Policy. For example, in respect of the proposed 'on-farm monitoring strategy' that will require an applicant to demonstrate how they will monitor the volume of water to be taken by works subject to a floodplain harvesting licence, the Draft Policy should be explicit in setting out how the NOW will ensure compliance with these types of requirements, as well as for instances where decommissioning of works is required.

Finally, we note that the EDO is particularly interested in ensuring that the policy commitments established by the Draft Policy are incorporated in robust legislative requirements through the *Water Management Act 2000* ('the Act'). While the Draft Policy is a step in the right direction, the EDO emphasizes that it must be incorporated into the Act in a robust way in order to adequately fulfill its intended objective.

We now comment on the following specific aspects of the Draft Policy:

- Implementation of the policy (4.1, 4.2 and 4.4)
- Characteristics of floodplain harvesting licences (5.1, 5.2 and 5.3)

Implementation of the policy

In general, the EDO supports the implementation steps that the Draft Policy proposes. We make the following comments about specifics in the Draft Policy.

4.1 Implementation stage 1 – determining eligibility for assessment

The EDO notes that in general terms it is not desirable to confer retrospective approvals or licences for activities that previously were not regulated or were impermissible. However, given the practical situation that has developed whereby works have been approved which have enabled floodplain harvesting activities to be undertaken, the EDO does accept that 'retrospective' regulation of these activities is required, and that this is appropriately done by bringing floodplain harvesting within the purview of the licensing scheme establishing by the Act, as the Draft Policy proposes.

Regarding the proposed eligibility categories, we submit that NOW should not consider as potentially eligible works that have already been constructed and were undertaking floodplain harvesting activities prior to 3 July 2008, and are now currently awaiting approval pursuant to Part 2 or 8 of the *Water Act 1912*. Our objection is based on the fact that in effect, this would lead to the retrospective approval of works constructed illegally. Floodplain harvesters who were conducting activities using infrastructure for which they did not have a works approval for should not be ‘rewarded’ by potential grant of a licence, which ultimately will be a tradable commodity. This establishes a poor precedent, and further, is inconsistent with other areas of environmental regulation such as the inability to retrospectively be granted development consent for works conducted without the necessary planning approvals.

4.2 Implementation stage 2- work assessments

In relation to the capability assessment (4.2.1), our view is that this should be conducted by independent consultants or NOW staff to ensure accurate assessment of the capacity of existing works, in order to accurately determine the appropriate disaggregation of the total floodplain harvesting volume available to individual licence holders.

In relation to the proposed environmental assessment of applications (4.2.3), we note that the EDO called for greater consideration of environmental assessment in our previous submission. The EDO therefore supports the fact that the Draft Policy foreshadows that all works will be assessed in relation to considerations that focus on cumulative impacts of water management activities, and the impacts of the works on impacts on connectivity, wetlands and flood-dependent ecosystems.

However, we submit that the Draft Policy continues to lack significant detail on environmental assessment requirements, that should be explicitly set out in the Draft Policy to ensure that environmental assessment of works and licence applications is rigorous. The Draft Policy should establish in greater detail the minimum level of information that must be used to inform an environmental assessment, and the environmental impacts that must be considered. It should also explicitly require the environmental assessment process to assess ways to mitigate possible impacts. Additional guidelines detailing specific assessment processes would be useful.

4.4 Implementation stage 4 – issuing water supply works approvals and water access licences

The EDO strongly supports the Draft Policy’s position that not all works and licence applications will receive approval. In particular, we support the explicit recognition that refusals may be made on environmental grounds, and that even if works have been previously approved, they still must be assessed and this may lead to requirements to remove works, or to modify works to restrict harvesting to a specific volume.

In relation to how share components for individual licences will be determined (4.4.2), the EDO’s view is that while the capability of the works that received valid work approvals will be a relevant consideration, share components should not be determined solely on this consideration. Section 4.4.2 of the Draft Policy should therefore be clarified such that it is absolutely clear that share components will also be linked to environmental assessments, and more broadly a consideration of the overall objectives of the Draft Policy including ensuring the environmental protection of floodplains.

However, we do support the position adopted by the Draft Policy that the share component determinations are not linked to history-of-use information.

We also reiterate our previous objection to the carry over of entitlements, notwithstanding the limitations added in the revised Draft Policy. As we noted in our earlier submission, this may lead to unsustainable harvesting of floodwaters as it is not based on considerations of environmentally sustainable levels of harvesting. We therefore reiterate our suggestion that it may be more appropriate to use an event-based licensing system, where licence holders are allocated a certain share of the available water in different size events. This would be regulated and managed through harvesting rules, as discussed previously in this submission. To proceed with the carry over of entitlements, in our view, may create unrealistic expectations for licence holders. With greater climate stresses in the future and the likelihood that there will be more infrequent flood events as a result, the inclusion of carry over entitlements simply means that floodplain harvesting is likely to occur at the expense of environment.

5. Characteristics of floodplain harvesting licences

5.1 Tenure

The EDO strongly objects to the proposed position that will assign floodplain harvesting licences perpetual tenure. This represents a change of position from the earlier draft policy in 2008, in which it was proposed that licences would have non-perpetual tenure.

Floodplain harvesting licences must not be issued in perpetuity because, as acknowledged in our previous submission, floodplain harvesting must be regulated in a manner that focuses on, and ensures the protection of floodplains and river systems from irreversible over-allocations of water. With the impacts of climate change increasing into the future which is predicted to lead to exacerbated dry periods, as well as current uncertainty about what levels of floodplain harvesting are in fact sustainable, it may simply not be feasible to permit broad floodplain harvesting in the future. Floodplain harvesting licences must therefore have non-perpetual tenure to allow for the regime to adapt in the future. The EDO therefore submits that floodplain harvesting licences should be managed in similar way to supplementary licences (and therefore be non-perpetual in nature), given the rights that they provide are only contingent on opportunistic allocations of water.

5.2 Compensation

The EDO submits that it is important to ensure that changes to the bulk access regime would not attract compensation rights for holders of floodplain harvesting licences, particularly as these are opportunistic rights. The availability of compensation may interfere with decision-making about allocations, focusing it away from the need to protect the environment, and towards the financial implications for changing water access rights.

The EDO therefore supports the position that floodplain harvesting licences will not attract rights to compensation, particularly as the rights acquired through these licences in any event are essentially ‘windfall gains’ from the current status quo.

5.3 Trading Arrangements

The Draft Policy currently leaves open the possibility that allocations may be traded in the future, if suitable procedures for regulating such kinds of trades can be determined. The EDO is concerned about the potential environmental impacts of allowing trading. The location of floodplain harvesting structures and extractions may mean that even within the same valley, there are vastly different environment impacts of the same level of extraction, which is a risk that is sufficient to warrant the exclusion of allocation trading. It is important that the Draft Policy emphasise that approval will be required for entitlement trades to occur, and this must include rigorous environmental assessment of the potential impacts of the trade.

For more information relating to this submission please contact Rachel Walmsley on (02) 9262 6989 or at rachel.walmsley@edo.org.au