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Final Report

To

[REDACTED]
[REDACTED]
Legal Services
Department of Planning and Environment
[REDACTED]

Date

6 December 2023

Subject

Probity review of the process for issuing floodplain harvesting licences in Gwydir Valley

Questions

We have been asked to undertake a probity review into the process for issuing the replacement floodplain harvesting access licences in the Gwydir Valley (**Gwydir**), which were formally granted on 22 February 2022. In particular, you have asked us to consider whether the process:

1. was properly documented and transparent;
2. was fair and afforded landholders procedural fairness;
3. enabled the Department of Planning and Environment (**Department**) to obtain relevant information to support evidence-based recommendations to the decision-maker; and
4. managed any conflicts of interest appropriately.

Summary of advice

Below is a summary of our advice. Please read it in conjunction with the detailed advice that follows.

Based on our review of the documentation provided and interviews undertaken with key staff members, in our view the processes adopted by the Department for issuing the final replacement floodplain harvesting access licences in the Gwydir:

- were properly document and transparent;
- afforded landholders procedural fairness;
- enabled the Department to obtain relevant information to support evidence-based recommendations to the decision-maker; and
- managed any conflicts of interest appropriately.

Our detailed analysis is set out in the attached report.

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Introduction

1. Background and context

- 1.1 For many years, the Water Group of the Department has been rolling out its floodplain harvesting licensing framework in the Northern Valleys of NSW. Floodplain harvesting is the capture and use of overland flow across a floodplain. Historically, this activity had been unlicensed in NSW. However, in July 2008, the NSW Government announced that no new works would be permitted, and all existing activities would need to be accounted for under a water access licence, basic landholder right or licence exemption under the *Water Management Act 2000 (WM Act)*.
- 1.2 The reforms started with the NSW Government's Floodplain Harvesting Policy (**Policy**) (which was first published in May 2013 and amended and updated in September 2018) and a pilot program in the Gwydir and Border Rivers. The purpose of the Policy was to manage floodplain water extractions more effectively in order to protect the environment and the reliability of water supply for downstream water users, ensure compliance with the requirements of the WM Act, and meet the objectives of the National Water Initiative.
- 1.3 These reforms were a component of a broader program collectively known as the 'Healthy Floodplains Project'. However, this aspect of that project (the issuing of replacement of floodplain harvesting access licences in the Northern Valleys (**Program**)) is now largely regulated under Part 2A of the *Water Management (General) Regulation 2018 (Regulation)* (which commenced in February 2023). The Regulation sets out both the process for the grant of an access licence and the determination of a landholder's entitlement.
- 1.4 In the Gwydir, the final determinations of the replacement floodplain harvesting licenses was made on 22 February 2022, by delegation under the Regulation. On that date, the Executive Director, Regional Water Strategy of the Department (**Executive Director**) approved five briefing packages (as detailed in Schedule B and herein referred to collectively as the 'packages'), and:
 - 1.4.1 determined that certain landholders were eligible for a replacement floodplain harvesting access licences in the Gwydir Unregulated River Water Source as well as the share components for those licences;
 - 1.4.2 adopted models for the purpose of determining the share components for the replacement floodplain harvesting access licences in the Gwydir Regulated River Water Source under s 23G of the Regulation; and
 - 1.4.3 determined that certain landholders were eligible for a replacement floodplain harvesting access licences in the Gwydir Regulated River Water Source and share components for those licences using the models adopted.

2. Scope of the review

- 2.1 We were instructed by the Department to conduct a probity review of the process undertaken by the Department to issue these licences. As part of this review, the Department asked us to look at whether the processes it took to implement the Program in the Gwydir (i.e. the key steps taken as described in Schedule A) (**Relevant Processes**):
 - 2.1.1 were properly documented and transparent;
 - 2.1.2 were fair, and afforded landholders with procedural fairness;

2.1.3 enabled the Department to obtain relevant information to support evidence-based recommendations to the decision-maker (the Executive Director); and

2.1.4 managed any conflicts of interest appropriately,

(together, the **Questions**).

2.2 Our review does not look at any earlier processes from a probity perspective, which have been the focus of other probity reviews and independent assessments. However, it is important to remember that the floodplain harvesting provisions in the Regulation (and any decisions made under them particularly in the Gwydir) were underpinned by those earlier processes. As such, in some circumstances, it will be necessary for the review to touch on aspects of those earlier processes where they directly relate to or underpin the final decisions made by the Executive Director.

3. Assumptions and limitations

3.1 In accordance with our instructions, our review comprised of:

3.1.1 a detailed examination of the documents outlined Schedule B which were provided to us by the Department and also obtained from the Department's website (**Documents**); and

3.1.2 interviews with the key Departmental staff (**key staff**) involved in the Relevant Processes are set out in in Schedule C (**Interviews**). For privacy purposes, the key staff are identified only by their current title.

3.2 We note that the decisions the subject of this review were made under changes to the Regulation facilitated by the *Water Management (General) Amendment (Floodplain Harvesting Access Licences) Regulation 2022*, which was disallowed 6 days after the decisions were made by the Executive Director.

3.3 It is important to again note that this review focuses solely on the probity aspects of the Relevant Processes. It does not seek to review the merits or legality of any decisions made and what effect (if any) the disallowance of the Regulation had on the licences that were issued. Accordingly we have also assumed that all relevant delegations were in place in relation to any decisions made as part of the processes being reviewed and that staff complied with the Code of Ethics and Conduct that was in force during the relevant period.

Our approach

1. For the 128 properties that were assessed for a floodplain harvesting (regulated) water access licence, the approach we adopted in undertaking our review was to:

1.1 review all the material provided by the Department for registrations of interest (**ROI**)¹ that were identified as ineligible (14 ROIs listed in rows 116 to 130 in Attachment A of BN22/380); and

1.2 sample the same number of ROIs (i.e. 14) from the ROIs that were identified as eligible for a replacement floodplain harvesting licence from rows 2 – 115 in Attachment A of BN22/380.²

¹ In this regard, we note that landholders/properties were identified and referred to in the Program by the Department by their ROI number.

² The intent being to review the 14 properties selected first and then make a decision about whether the information in the sampled warranted a further sample of ROIs being selected. However, we did not identify anything in the first lot of ROIs samples that warranted an additional sample being selected.

2. The 14 eligible properties that we sampled as part of our review (as per paragraph 1.2 above), were randomly selected by Maddocks from the listed ROIs in Attachment A of BN22/380 before we reviewed any of the other material provided by the Department in the packages.
3. The outcome of this was that approximately 22% ROIs (including ROIs deemed both eligible and also ineligible by the Department in the Gwydir regulated river water source) were reviewed by Maddocks. The properties sampled are outlined in Schedule D and are identified by their ROI number.
4. For properties that were assessed for a floodplain harvesting (unregulated) water access licence, all of the Documents were considered as part of our review. These properties are also captured in Schedule D.
5. We further note that, in undertaking our review, it became apparent to us that it would only be possible to evaluate the Relevant Processes from a probity perspective by systematically working through all the steps undertaken by the Department in the Gwydir, to understand how the Program had been implemented. As such, in this report, we have:
 - 5.1.1 addressed each of the Questions; and
 - 5.1.2 in **Schedule A**, outlined the key steps and processes involved in the Program, our analysis of which has formed the basis of our response to the Questions.

Response to Questions

1. Were the Relevant Processes properly documented and transparent?

- 1.1 In our view, yes.
- 1.2 Based on our review of the Documents and the Interviews, we consider that the Relevant Processes adopted and then followed by the Department in issuing the replacement floodplain harvesting access licences in the Gwydir (as outlined in **Schedule A**) were well documented and transparent overall.
- 1.3 Based on the Documents and our Interviews it is clear that:
 - 1.3.1 from the very beginning of the Program, the Department:
 - (a) developed a set of criteria to determine whether a water supply work would be potentially eligible for a replacement floodplain harvesting licence and then outlined the process that it would follow to make any decisions; and
 - (b) had a process for implementation – this included its ‘Floodplain Harvesting Technical Manual (April 2010)’ (**Technical Manual**), which:
 - (i) documented the technical processes for staff to follow when implementing the Policy; and
 - (ii) was intended to be a guide to help the community in understanding how the floodplain management plans and floodplain harvesting provisions were developed and would be implemented on the ground.³

³ While this manual does not appear to be easily accessible on the Department’s website, we understand that it was previously made available on the Department’s website and was used by key staff to guide them in the steps that needed to take to make any decisions when implementing the Policy.

- 1.4 This criteria and the Department's process for implementing the Program was captured in the Policy and then made available to landholders and the public more generally on the Department's website. It was also communicated to landholders in the Gwydir through the invitation the Department sent to them seeking expressions of interest in relation to participating in the Program and in other correspondence the Department sent to landholders.ⁱ
- 1.5 There was also guidance given to key staff and forms developed for them to complete to ensure that there was an accurate record of the steps taken and to demonstrate that the criteria was consistently applied.
- 1.6 It is also clear from the Documents and our Interviews that key staff understood the Relevant Processes, their role in them, and the importance of recording the steps taken and the decisions made throughout the Program. Based on our Interviews with key staff, we are confident they understood the importance of recordkeeping to the Program to ensure appropriate governance and oversight.
- 1.7 Examples in the Documents which show the Department's commitment to recordkeeping include:
- 1.7.1 the desktop assessments undertaken by key staff in respect of each ROI;
 - 1.7.2 the site inspection reports that were completed by the field officers for each property;
 - 1.7.3 the outcomes of the Department's further volumetric conversion process in the Gwydir unregulated water source; and
 - 1.7.4 the records of submissions that were made by landholders to the Healthy Floodplain Review Committee (**HFR Committee**) and the record of the decisions made by the HFR Committee; and
 - 1.7.5 the steps and records made by the Department when it went through its audit of its eligibility decisions.
- 1.8 While there may be instances of small gaps in the Department's documentation, in our experience these are typical of the running of such a large program over many years. However, despite these gaps, we are of the view that the Department put in place a number of processes to ensure that the steps it had taken over the years in the Gwydir were well documented, the process transparent and that the information collected was appropriate and would support any recommendations it made to the Executive Director in respect of individual landholders.
- 1.9 The implementation of the floodplain harvesting framework in the Gwydir was one of the pilots for the Program as a whole, and the approach the Department took in respect of the Relevant Processes did change, evolve and adapt overtime. However, this did not appear to impact upon the proper documentation of the Program or its transparency as the Department was conscientious in:
- 1.9.1 keeping landholders informed of the steps that it was taking in implementing the Policy, and advising them when things changed, either through letters, emails, telephone conversations and other engagement activities (examples of which are contained in the Documents and was also confirmed through the Interviews);
 - 1.9.2 outlining how any information it obtained would be used to make any decisions – examples of this can be found in the Documents including in letters the Department sent to landholders as well as the guideline the Department released about its implementation of the Policy (i.e. the Guideline for the implementation of the NSW

Floodplain Harvesting Policy (published in June 2021) [**Policy Implementation Guideline**]); and

- 1.9.3 making sure that the public could easy access Program information through the Department’s website (which was regularly updated throughout the process). The Department’s website included information about the process, what data would be used in determining the entitlements, modelling reports as well as peer reviews.
- 1.10 The change and improvement in the Department’s approach in relation to the Program can also be seen in its response to the recommendations made by Alluvium Australia Pty Limited (**Alluvium**) in its report dated July 2019 (**2019 Report**) following its independent review of NSW’s Floodplain Harvesting Policy Implementation in 2018 (**Alluvium Review**).⁴
- 1.11 In this regard, we note that Alluvium identified that ‘further work is needed to place the implementation of the Policy on a firmer foundation and to achieve and demonstrate the overall success factors for implementation of the Policy’. Some areas that were identified as areas for improvement included:
 - 1.11.1 further data collection and documentation and justification of the models used, and the parameters chosen in each valley having regard to things like soil types and farm enterprises;
 - 1.11.2 making this documentation publicly available and holding workshops with industry, community and other stakeholders to explain it;
 - 1.11.3 preparing a comprehensive guideline outlining in detail the process steps used, or that will be used, for implementing the Policy, including matters for decision-making, and for defining and calculating floodplain harvesting volumes and share components; and
 - 1.11.4 ensuring that on-farm information used in the modelling, and the assumptions around water use and management, was communicated back to landholders to provide greater transparency around how a landholder’s entitlement has been calculated and evaluated, and opportunity for those landholders to verify that it is correct and appropriate.
- 1.12 It is evident from the Documents and the Interviews that the Department undertook this work prior to any final decisions being made by the Executive Director. This work was driven by the Floodplain Harvesting Action Plan (September 2019) (**Action Plan**) that was prepared in response to the 2019 Report, and resulted in the implementation of measures such as:
 - 1.12.1 the Policy Implementation Guideline which provided landholders with information about how the Policy was being implemented by the Department; and
 - 1.12.2 the establishment of the licensing farm-scale validation process in which the HFR Committee’s⁵ remit was expanded, including to enable them to engage with affected landholders regarding the on-farm information used by the Department in its decision-making. Under this process, landholders could make submissions to the HFR Committee about the decisions being made in respect of their properties and the data relied upon by the Department, and to submit additional information. This additional data and evidence would then assessed against the data and information relied upon by the Department and the HFR Committee would make a

⁴ This review arose after landholders had raised concerns about the draft entitlements that they had been notified of in or around 2017, which raised questions about the integrity of the data that had been relied on to inform the Department’s decisions about the licences including the quantum of the entitlements.

⁵ We note that this Committee was first established under the Policy in 2013 as the independent body to allow for decisions to be made at arm’s length from the Department and to give landholders more confidence that decisions would be made without prejudice and on the basis of the best available evidence.

recommendation to the Department about whether it's draft decisions should stand or be changed.

1.13 These additional measures and steps taken by the Department enabled it to further refine the Relevant Processes to make sure that they were well documented and fully transparent as at the time the final decisions were made. It also ensured that when the Executive Director came to make her final decisions about a landholder's eligibility and entitlements, it was with the knowledge that the Department had robust documentation that had been obtained through transparent processes and procedures, and also that the Department had appropriately engaged with landholders in respect of the decisions it was recommending to the Executive Director.

1.14 As a result, it is reasonable to conclude that the Relevant Processes were well documented and transparent and we have not been able to identify any substantial probity concerns about this aspect of the Program as part of our review.

2. Were the Relevant Processes “fair” and did they afford landholders with procedural fairness?

2.1 In our view, yes.

2.2 Procedural fairness in administrative decision-making relates to the fairness of the procedure by which a decision is made. Generally speaking, a decision will be regarded as fair where it is made in accordance with the relevant statutory requirements as well as the requirements of natural justice. The two primary rules of natural justice are:

2.2.1 the hearing rule which requires that a person who may be affected by a decision be given the opportunity to present their case prior to the decision being made; and

2.2.2 the bias rule which requires that the decision-maker be objectively considered to be impartial and not to have pre-judged the decision.

2.3 In our view, the Department took steps throughout the Program to:

2.3.1 give affected landholders the opportunity to engage with the process and have any issues that they had with it heard before a decision was made;

2.3.2 ensure the Policy was implemented in a fair and consistent way that was impartial and not prejudged.

Landholders engagement in the process

2.4 From the Documents and the Interviews it is clear that, in both the initial and subsequent phases of the Program, the Department sought to engage with landholders about the work that it was doing, and provided landholders with opportunities to input into this process and be heard in respect of the changes that would ultimately affect their rights to harvest water from a floodplain.

2.5 Examples in the Documents which support this conclusion include:

2.5.1 the expression of interest letter that was sent to affected landholders by the Department on 1 November 2012, which outlined the process that would be followed, the criteria upon which the Department's decision would be made and also informed landholders of the opportunity to have a preliminary determination reviewed by a review panel;

2.5.2 the draft eligibility letters that were sent by the Department on 18 November 2013 to landholders that were initially deemed ineligible for a replacement floodplain harvesting licence in the Gwydir regulated water source, in which the Department

informed affected landholders that their ROI did not comply with the eligibility criteria prescribed in the Policy, the reasons why and invited them to make a submission if they disagreed; and

- 2.5.3 the draft determination letter that was sent to landholders in the Gwydir unregulated river water source in March 2020, which outlined the key information that would be used by the Department to determine their floodplain harvesting entitlement for their properties. It also provided them with a link to the Policy Implementation Guideline, outlined their draft entitlements and then encouraged landholders to make a submission if they believed the calculations were incorrect or the information relied upon to make these calculations incomplete.
- 2.6 It is also clear from the Documents that landholders took the Department up on the opportunity to input into the Relevant Processes and that their feedback was taken into account. Some examples in the Documents that support this conclusion include:
- 2.6.1 the summary of the submission made in relation to ROI G018 in the Gwydir unregulated water source in which the landholder contested the information used to calculate their draft entitlements and the HFR Committee's determination;ⁱⁱ
 - 2.6.2 email discussions between key staff and landholders in which the Department's decisions are recorded and the landholder's position and responses were captured;ⁱⁱⁱ and
 - 2.6.3 the summary and minutes of the HFR Committee's consideration of the submissions made by landholders in the Gwydir during the farm scale validation process as well as in earlier or subsequent reviews (Attachment G to BN22/380 and Attachment D to BN22/382).
- 2.7 In our view, therefore, the Documents show that landholders were provided with procedural fairness throughout the Program and as such, it is reasonable to conclude that landholders were given the opportunity to be heard throughout the Relevant Processes.
- 2.8 We could also find no evidence in the Documents or from the Interviews that:
- 2.8.1 landholders were not afforded with the opportunity to make a submission in the Program;
 - 2.8.2 landholders were not listened to, or had their views or concerns arbitrarily dismissed; or
 - 2.8.3 showed the Department had not given a landholder an extension to lodge a document or submission where they wanted to outside of the original specified timeframes.
- 2.9 Rather, the Documents and the Interviews demonstrate that the Department had extended submission timeframes on many occasions throughout the Program and also directly followed up with individual landholders when they did not respond to requests to input into the process.
- 2.10 In our view, it is also clear that the Department's various attempts to implement the Policy over the life of the Program, afforded landholders with further opportunities to input into Relevant Processes. This enabled the Department to test the information it intended to rely on and further refine its thinking ahead of making any recommendations as to what the final decisions should be.

Objective and impartial decision-making

- 2.11 It also clear from the Documents and the Interviews that the Department sought to ensure that its decision-making was objective, impartial and without bias throughout the Program. This was achieved through:
- 2.11.1 the development of:
 - (a) criteria that was to be applied by key staff;
 - (b) the Technical Manual to guide key staff in the step by step process for gathering relevant information and evidence to make any recommendations/decisions in respect of a landholder's eligibility for a licence and the licence's entitlement; and
 - (c) the various forms that key staff were required to complete while they were stepping through the various stages of the Relevance Process;
 - 2.11.2 the procedures that the Department put in place to ensure that no individual staff member was being relied on for the recommendations, and the checks and balances that were undertaken throughout the Relevant Processes as a result. For example, when a staff member undertook a site inspection, this information was then validated by a second staff member. Similarly, the staff who did the desktop assessments had their work checked and signed off by an approving officer;
 - 2.11.3 the Department's establishment of the HFR Committee to provide it with advice and an independent and arm's length assessment and recommendation on issues raised by landholders; and
 - 2.11.4 the regular reviews undertaken of any historical decisions it made. A good example of this is the audit that the Department undertook in February 2022, prior to finalising the packages for the final decisions. This audit facilitated the cross checking of information which had been gathered over a long period of time, (which in some cases was over 10 years old at the time), before any final decisions were made to test the robustness of those decisions.
- 2.12 In our view, it is clear from the Documents and the Interviews that these arrangements were substantially followed in a fair and consistent manner by key staff, and helped the Department to ensure the integrity of its decision-making. We were also not able to find any evidence that suggested that the decisions were not objective or impartial or made with any bias.
- 2.13 It is relevant to note that it is evident from the Documents and Interviews that, early in the Relevant Processes, there was a perception that there were shortcomings in the quality of the information and evidence relied upon by the Department. However, this appears to have been due to the Department's failure to test the information it had collected with landholders before sending out its draft decisions to landholders, rather than issues related to the objectiveness or impartiality of the Relevant Processes.
- 2.14 In addition, in our view, by the end of the Program (and at the time of the final decisions), the Department had sought to address these concerns and achieved the buy-in of the affected landholders. This is because, by the time the Executive Director made her decisions, there had been more extensive engagement with landholders and better testing of the evidence and information that the Department was then relying on to make the recommendations that it did.

3. Did the Relevant Processes enable the Department to obtain relevant information to support the evidence-based recommendations that were made to the decision-maker?

3.1 In our view, yes.

3.2 Firstly, from our review of the Documents and the Interviews, there was sufficient information in the packages to support the evidence based recommendations that were made to the Executive Director.

3.3 The packages contained within them all of the key evidence that the Department had collected to support its recommendations in the Gwydir. This information had been collected by the Department from a variety of sources (including from affected landholders) over the different phases of the Program's implementation and had been vetted, rechecked and tested with those landholders many times in lead up to the preparation of the packages.

3.4 This was evident in Documents as well as the Interviews with the key staff who prepared the packages who all confirmed that, while the information had come together over time, the decisions had been revisited and prosecuted through the subsequent processes.

3.5 The Interviews also made it clear that the Department was conscious of the need not to simply rely on what had been historically collected, it was not 'one time, one collection and then a determination – there were quite a number of steps involved in the process and people were always coming back and forward with new information that informed the final recommendations'.^{iv}

3.6 This was evidenced in a number of filenotes within the Documents that were prepared by the Manager, Floodplain Licensing. In most instances, these filenotes were made at a later stage in the process and were commenting on what had occurred at a particular time as opposed to being made contemporaneously with the relevant step. When the Manager, Floodplain Licensing and the Director, Floodplain Management were questioned about this in the Interviews, they informed us that this was done to give the Executive Director a clear narrative to explain the inconsistencies or gaps that had been found and why these were not significant and would not prevent a final decision from being made.

3.7 We note also that a complete audit of all eligible works was undertaken by the Department before the final packages were provided to the Executive Director to both test and reconfirm the eligibility status positions that had been made many years earlier for each of the landholders' work. While this audit did highlight some inconsistencies in those decision and led to changes in the eligibility status of some of the existing eligible works particularly in the Gwydir regulated water source,^v this was not considered by the Department to be an example of any systematic failure, but simply the result of a process that had taken place over a large period of time which can result in small differences in approach occurring.^{vi}

3.8 All of this information was then tested and interrogated by the Executive Director, who indicated during her Interview that she spent a substantial amount of time reading through each iteration of the entire package, doing a sample of the decisions made in relation to landholders and going through that sample information to ensure that everything was 'consistent and logically held together' in line with the Regulation's requirements.

3.9 It is our view that this process helped the Department to ensure that any gaps, inconsistencies, inaccuracies and other issues with the information in the packages were addressed so that the final packages were accurate, consistent, and ensured that the Executive Director had the information that she needed to make the final decisions.

3.10 While the Documents we reviewed did not include any earlier iterations of any of the packages, or any of the requests from the Executive Director for additional information, clarifications or changes to be made to the packages, we are satisfied from the Interviews that the process for the development of the packages was as described and that the

necessary interrogation did occur, given the consistency in the responses to our questions about this.

- 3.11 As a result, from our perspective, we have not been able to identify any probity concerns arising out of evidence submitted in support of recommendations to the Executive Director or the decision-making process adopted by the Executive Director to interrogate that information in the lead up to the final decisions made for the issue of replacement floodplain harvesting licences in the Gwydir.

4. Were any conflicts of interest managed appropriately?

4.1 In our view, yes.

4.2 Firstly, while we note that the Program itself did not have any specific conflict of interest requirements, we understand from the Interviews that conflicts were managed as follows:

4.2.1 in the initial phase, key staff were required to notify their line manager of any potential conflicts of interest when they became involved in the Program; and

4.2.2 in subsequent phases, key staff were required to declare conflicts in respect of their duties generally on an annual basis. Further, key staff were also required to update their conflict of interest declaration if their situation changed during the year, and this conflict had not been the subject of their annual declaration (Department's Code of Ethics and Conduct). This was a result of machinery of government changes that resulted in Program staff moving from the Department of Industry to the Department. This led to a more formal process around managing conflicts of interest through the requirements for annual declaration, as well as updating these on a needs basis.

4.3 While we hold the view that it may have been better practice to adopt a program specific conflict of interest process given its scale, in our view, these processes were appropriate to manage conflicts of interests arising over the course of the Program.

4.4 It is also important to recognise that there were, in fact, no substantive conflicts of interest identified by key staff who participated in the Program. This is despite its long history. The Interviews did however identify that there were staff who had declared conflicts but that these conflicts were not were not relevant or related to this Program.

4.5 The only issue that was raised during our Interviews was that some staff did have difficult relationships with some landholders because of their previous interactions from a regulatory perspective. While not a conflict of interest perse, where this was identified, the Interviews confirmed that appropriate procedures were put in place to ensure these staff had no involvement in assessing or determining the subject landholder's case.

4.6 In addition, in our view, the HFR Committee, also assisted in ensuring that conflicts of interest did not arise in the implementation of the Program. This is because the HFR Committee provided an arm's length assessment and recommendation in relation to each landholder's case. In our view, this meant that landholders could have more confidence in the integrity and transparency in the process, because the decisions were not being made by the key staff who they had been regularly interacting with or had made the draft decisions and determinations the subject of the landholder's submission.

4.7 Finally, we were told in one of the Interviews that there was direct criticism of some staff involved in the Program made during the Parliamentary Select Committee Inquiry into Floodplain Harvesting. This involved some staff having their character directly attacked. However, again these accusations did not extend to any purported conflicts of interest, and we were told that the Department took appropriate steps to manage the issues. This included engaging the Department's internal governance team and asking them to review what had occurred and make recommendations as to appropriate steps.

Review conclusion

- 4.8 Based on our review of the Documents and our Interviews, we are of the view that the Relevant Processes and the final decisions made raise no concerns from a probity perspective. In addition, taking into account the entirety of the Program's implementation it is our view that the decisions that were made by the Executive Director in relation to the packages:
- 4.8.1 were properly document and transparent;
 - 4.8.2 afforded landholders procedural fairness;
 - 4.8.3 enabled the Department to obtain relevant information to support evidence-based recommendations to the decision-maker; and
 - 4.8.4 managed any conflicts of interest appropriately.
- 4.9 From a probity perspective, it is evident from the Documents and our Interviews that the Department sought to undertake a fair, transparent and robust process in determining an eligible landholder's share component for a replacement floodplain harvesting access licence in the unregulated water source that had regard to probity principles to ensure that any decisions made were based on the best available evidence.
- 4.10 While the Department's initial approach to information gathering and landholder engagement may have not been as ideal or as comprehensive as it could have been, by the time the Executive Director made the final decisions, the processes and procedures the Department had put in place and the information relied upon to make final decisions was as sufficient as it could be in the circumstances, and based on the best available information and evidence.
- 4.11 In addition, it is clear that, following the Alluvium Review, the Department took a much more pragmatic approach to risk assessment and management, governance, engagement with landholders and the information it was using to inform its decision-making and recommendations in relation to both a landholder's eligibility and share component.
- 4.12 In our view, the robustness of the final outcome was enhanced by the Department's decision to revisit and reconfirm its conclusions around eligibility from the earliest part of the Program through its audit in February 2022. This enabled it to ensure that any positions that had been taken had been more thoroughly vetted, and the information provided to the Executive Director was appropriate and could support the decisions that were ultimately made.

Contact

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SCHEDULE A: Key steps and processes considered

Introduction

1. General

- 1.1 In order to undertake our review, it was necessary for us to thoroughly review the Program's implementation as a whole from its inception up to the final decisions that were made by the Executive Director.
- 1.2 This Schedule provides an overview of those key steps and processes and our observations on them from a probity perspective. We have drawn on these observations to inform our responses to your questions and the key findings in the report.
- 1.3 The Program's implementation and delivery was a combined effort by a number of key divisions within the Department including the Healthy Floodplains Project Delivery unit, the Floodplain Harvesting Licensing and Approvals unit, as well as the Water Modelling Unit.
- 1.4 The Program's implementation also had two distinct phases:
- 1.4.1 the initial phase, which involved a registration process, desktop assessments, site inspections, and a draft notification to landholders; and
 - 1.4.2 the second phase, which followed the Alluvium Review and included the farm scale validation process, reviews of further landholder submissions by the HFR Committee, draft determinations, the making of the Regulation and then the final decisions under that Regulation by the Executive Director.
- 1.5 From our review of the Documents and, in particular, the Interviews, it is apparent that the Relevant Processes were often difficult and sometimes a very technical exercise for the Department to navigate. This was because of complexities created by, among other things, the passage of time, poor and patchy data, and the variability of individual farms and their works.
- 1.6 This meant that to enable the Relevant Processes to move forward, the Department had to accept that it would not be able to overcome all the uncertainties and had to develop robust and iterative processes in order to gather the necessary evidence upon which the final decisions could be made.
- 1.7 It is also noted that the Executive Director who made the final decisions in relation to the replacement floodplain harvesting licences in the Gwydir had been involved in the Program originally from 2018, when she was the line manager for the Healthy Floodplains Project. However, following an internal restructure in 2021, she moved to another part of the Water Division in the Department and no longer had any functional responsibility for the Program. However, a decision was made that she would remain the final decision-maker to ensure consistency in decision-making for the Program.
- 1.8 In our view, this approach provided additional independence and integrity to the final decisions that were made. This is because it meant that towards the end of the Program there was functional separation between key staff working on the Program and preparing the packages and the final decision-maker, who was now managing a separate team and did not have any further responsibility for the day-to-day running of the Program.
- 1.9 Set out below is a more detailed examination of those steps and our observations.

2. **Eligibility**

2.1 In order for a landholder to participate in the Program, the landholder needed to meet certain eligibility criteria. This criteria was the same for both the regulated and unregulated water sources.

2.2 Under the Policy this criteria was as follows:

2.2.1 works would be considered eligible works if, on or before 3 July 2008, they were:

- (a) constructed on a floodplain in accordance with an approval granted pursuant to Part 2 or Part 8 of the *Water Act 1912* or the WM Act;
- (b) subject to a pending application for an approval to construct the work on a floodplain under Part 2 or Part 8 of the *Water Act 1912* or the WM Act;
- (c) constructed on a floodplain and it can be established to the satisfaction of the Minister that it did not require an approval under Part 2 or Part 8 of the *Water Act 1912* or the WM Act.^{vii}

2.3 The process for assessing a landholder's eligibility for participating in the Program, initially comprised the following steps:

2.3.1 ROIs;

2.3.2 desktop assessment against the criteria provided for in the Policy;

2.3.3 site inspections to confirm the on-ground works;

2.3.4 consultations; and

2.3.5 an appeals process (where applicable).

2.4 Eligibility under the Regulation was as set out under s 23B(2) of the Regulation which provided:

(2) A landholder is eligible if the Minister is satisfied that, on 3 July 2008, a water supply work capable of floodplain harvesting—

(a) was fully constructed on the landholder's land and a relevant approval was in force that specified—

(i) the work, or

(ii) a related or connected work, or

(b) was fully constructed on the landholder's land without a relevant approval and an approval under the *Water Act 1912*, Part 8 was not required to construct the work, or

(c) was fully or partially constructed, or proposed to be constructed, on the landholder's land and an application for a relevant approval that specified the work was made but not determined.

2.5 For this purpose of this section, the term 'relevant approval' was defined in s 23B(6) to mean either:

(a) an approval under the Act, Chapter 3, Part 3, or

(b) a licence or permit within the meaning of the *Water Act 1912*, Part 2, or Part 8 as in force immediately before the repeal of that Part.

- 2.6 The Regulation also required that:
- 2.6.1 the Minister (or delegate) in making a decision about whether a landholder is eligible, consider any relevant information provided by the landholder in relation to the water supply work (cl 23B(3)); and
 - 2.6.2 prior to making a decision about whether a landholder is not eligible, the Minister was also required to provide each landholder with written notice of their proposed decision, 28 days in which to make submissions about the decision and then undertake consideration of any submissions received from the landholder (cl 23B(4)).

Steps followed by the Department throughout the Program

3. ROIs

- 3.1 Landholders in the Gwydir were first asked to participate in the program in November 2012, when they were invited by the Department to lodge a ROI for this purpose.^{viii}
- 3.2 157 ROIs⁶ were received from landholders in the Gwydir in response to that invitation, and following an initial assessment by the Department, those ROIs were further categorised into the following:
 - 3.2.1 15 properties should be further assessed for eligibility for a floodplain harvesting (unregulated) water access licence;
 - 3.2.2 128 properties should be further assessed for eligibility for a floodplain harvesting (regulated) water access licence; and
 - 3.2.3 14 properties⁷ should be further assessed for eligibility as part of the program dealing with the Namoi Valley (these properties are therefore not considered as part of this review).^{ix} We understand that this was because a large proportion of these properties straddled more than one floodplain, but the Department determined that it was more appropriate to assess them as part of the Namoi Valley aspect of the Program.

4. Desktop assessments

- 4.1 At the beginning of the Program, the Department had sought to ensure that it had engaged with all landholders who had the potential to be eligible to participate in the Program. To do this, the Department worked very closely with the Gwydir Valley Irrigation Association, and it also used remote sensing to separately identify properties with works who may have been eligible to participate in the Program but had not put in an ROI. The Department then actively engaged with those landholders about participating in the Program and was confident that it had fully captured all eligible landholders.^x
- 4.2 A desktop assessment was then conducted by the Department of the information submitted by each landholder as part of their ROIs, which was supplemented by information obtained by the Department (or otherwise held by it) such as aerial photographs, satellite imagery and the Department's licensing and approval system.^{xi}

⁶ We understand that this number is different to the number of ROIs that were ultimately determined by the Executive Director. From the Documents this appears to be because two ROIs for a landholder were ultimately merged into the one ROI.

⁷ We have sighted BN22/7670, which has confirmed that this number changed from 14 to 13 properties during the course of the Program. This was because one of the ROIs that had been transferred to the Namoi part of the Program was then reassessed as being more appropriate for a Gwydir floodplain harvesting (unregulated) water access licence. This, however, did not occur until 7 February 2023.

- 4.3 The Department quickly realised during this process that it was unlikely that a desktop assessment would be sufficient to assist it in determining eligibility given the gaps in the information they had to work with. As a result, a decision was made that all properties in the Gwydir would be subject to a site inspection.^{xii}
- 4.4 However, there is evidence in the Documents that a small number of properties were not subject to a desktop assessment (3 out of 15 properties in the unregulated water source and 16 out of 128 properties in regulated water source).
- 4.5 The Documents show however that this issue was brought to the Executive Director's attention, and it is also clear from the Interviews that the Department undertook work to ensure that the other information gathered for the relevant properties was robust enough for decisions to be made in relation to their eligibility and share components of any replacement floodplain harvesting access licences.^{xiii}
- 4.6 BN22/380 indicates that the desktop assessment of the ROIs resulted in the following:
- 4.6.1 112 properties being considered potentially eligible for a floodplain harvesting (regulated) water access licence;
 - 4.6.2 16 properties being considered potentially ineligible for a floodplain harvesting (regulated) water access licence, including one property that withdrew from the Program prior to the proposed share components being communicated;
 - 4.6.3 15 properties being considered potentially eligible for a floodplain harvesting (unregulated) water access licence (see BN22/378); and
 - 4.6.4 14 properties being confirmed as more appropriately assessed under the Namoi valley part of the Program.⁸

5. Site inspections

- 5.1 Another key step in determining a landholder's eligibility was the site inspections undertaken by the Department to confirm the works on the ground. This gave the Department data about what was in-situ on the property and whether it had the ability to undertake floodplain harvesting. It was also a further opportunity for landholders to provide additional information to the Department in relation to their eligibility.^{xiv}
- 5.2 To assist staff in undertaking the inspections and ensure a consistent approach, the Department developed the Technical Manual, which key staff were required to consider and follow for each site inspection. Staff also received training in undertaking the inspections and how to interact with landholders.^{xv}
- 5.3 The interviews confirmed that, in most cases, the site inspections were attended by at least two Departmental staff and the landholder (approximately 95% of the time) and staff were required to make contemporaneous notes about the inspection. A formal inspection report was then completed by that staff member.^{xvi}
- 5.4 The information provided by the Department however shows that in the regulated water source and site inspection reports were not completed for 3 of those properties. However, again the reasons for this were clearly outlined in the packages provided to the Executive Director for the final decision.^{xvii}
- 5.5 Our Interview also confirmed that, although a formal inspection report was not completed for these properties, there were contemporaneous notes by the staff who had attended those properties to confirm that a site inspection had been undertaken and the outcome of those

⁸ We note that aside from this reference these ROIs were not considered by the Executive Decision when making final decisions about the licences and entitlements of landholders in the Gwydir.

inspections and the recommendations made in the packages was based on this information. For this reason, the fact that site inspection reports were not completed for the properties was not material to the final decisions.⁹

- 5.6 The only probity issue that we identified in the Interviews in relation to site inspections related to the need to ensure that one staff member did not conduct a site inspection for a particular landholder, after it was identified by that landholder that they had issues with that staff member because of past regulatory interactions. This was addressed by the Department by having different staff members attend the site inspections in their place and then make decisions about that property.^{xviii}
- 5.7 Once a site inspection was completed, the process for preparing a brief as to the recommended draft eligibility status position was that the site inspection report would be reviewed by a different Departmental officer who would then prepare a brief on these matters with a recommendation about a landholder's eligibility or ineligibility. If, as part of their review, this staff member identified the need for additional information, this would be requested, and no decision would be recommended until that information had been provided.^{xix}
- 5.8 All landholders were then informed about the Department's views as to their draft eligibility status by written notice and they were given an opportunity to provide further information and make submissions if they did not agree with the decisions proposed.^{xx}
- 5.9 We note however that this did not occur in the unregulated water source because the Department had made a decision to only notify landholders by exception if they were deemed ineligible.^{xxi} While from a probity perspective this decision does not raise any concerns, it ended up having no effect in this water source because it was concluded by the Department that all landholders were eligible in this instance, and this conclusion did not change at any stage of the process.
- 5.10 In contrast, for the regulated water source, BN22/380 provides that 14 landholders were initially deemed ineligible and most of those landholders were notified of this fact by the Department by written notice in November 2013, and given an appropriate timeframe in which to respond and provide additional information. They were also afforded an opportunity to request a review of this decision by the HFR Committee. However, the Documents suggest that none of these landholders made a submission about the decisions made by the Department about their status at that time.
- 5.11 In addition, the Documents show that 2 of the 14 landholders were not notified of the Department's views on their draft eligibility status until 2021, and one agreed to waive the submission period and the other ultimately withdrew from the process. Our interviews were not able to draw out why this had occurred other than it had occurred as an oversight due to human error. However, when it was picked up on subsequent reviews the landholders were notified and given an opportunity to make submissions.^{xxii}
- 5.12 For the landholder who withdrew from the process, there was evidence in the Documents that the landholder elected to have the Department's decision regarding eligibility reviewed by the HFR Committee. The Documents show that the Department's decision that the works were out of scope for the Program was reviewed by the HFR Committee and the committee made a recommendation to the Department that its decision be upheld. It was on this basis that Department later invited the landholder to withdraw from the Program.^{xxiii} The Documents also confirm that the landholder then withdrew from the Program following the HFR Committee's review.

⁹ This conclusion is made however based off our Interview with the Manager, Floodplain Licensing. We were not provided with copies of the contemporaneous notes as part of our review.

6. The determination of the category of licence and share components

- 6.1 The next step in issuing a replacement floodplain harvesting access licence was for the Department to determine:
 - 6.1.1 the category of replacement floodplain harvesting licence an eligible landholder was entitled to; and
 - 6.1.2 the final share components of that licence.
- 6.2 There were processes for determining these matters depending upon whether the land where the eligible works were located was in the unregulated or regulated water source.

7. Category of licence

- 7.1 Under s 57(1) of the WM Act, there are two categories of replacement floodplain harvesting access licences, being the:
 - 7.1.1 floodplain harvesting (regulated river) access licences (s 57(1)(k1)); and
 - 7.1.2 floodplain harvesting (unregulated river) access licences (s 57(1)(k2)).
- 7.2 The way that the category of licence was determined depended upon whether at, 3 July 2008, a regulated river access licence was in force in relation to land on which the associated eligible water supply works are located (s 23K(2) of the Regulation).
- 7.3 Eligible landholders who did not meet this criteria, were allocated a licence with the category of floodplain harvesting (unregulated river) access licence.^{xxiv}
- 7.4 In the Gwydir unregulated water source, we understand that none of the subject landholders met the criteria and were therefore allocated a licence with the category of floodplain harvesting (unregulated river) access licence.^{xxv} We tested how the Department came to that conclusion in our Interviews, and it was confirmed that the Department made these conclusions from information it had obtained through the site inspections and a further assessment of the Government's access water licence system.^{xxvi}
- 7.5 Eligible landholders in the regulated water source were all simply allocated a licence with a category of floodplain harvesting (regulated river) access licence because they met the criteria.

8. Calculation of the share components

- 8.1 The process for determining individual share components in the Gwydir also depended on whether the water source was regulated or unregulated as each had their own separate method of calculating the share component.

Unregulated

- 8.2 We understand from the Documents (in particular, the Policy Implementation Guideline) and the Interviews that the Department's starting position for determining an eligible landholder's share component in the unregulated water source was that any water taken for the purposes of floodplain harvesting in the Gwydir had been provided for as part of the original volumetric conversion process that was undertaken when a landholder's existing access licence was converted from a *Water Act 1912* to a WM Act licence. It was only if a landholder could show that there was anomaly or that floodplain harvesting had not been provided for as part of this conversion process that they would get an entitlement in a separate floodplain harvesting access licence under the Program.^{xxvii}

- 8.3 BN22/379 provides that in calculating an eligible landholder's draft share component entitlement, the Department undertook a further volumetric conversion process for the 15 properties, relying on the same methodology and process that had previously been used for that particular water source to see if it resulted in the same outcome.
- 8.4 That this work was in fact undertaken by the Department is evident from the Documents (in particular, Attachment A to BN22/379), which shows the steps key staff went through and the data that informed the relevant calculations again. This was further tested in the Interviews, where key staff confirmed that the further volumetric conversion process had in fact been done by the Department.^{xxviii}
- 8.5 During the Interviews, key staff outlined the process that they went through, and confirmed the following:
- 8.5.1 for properties with an unregulated river access licence, the assessment followed the process outlined in clause 23D of the Regulation, including obtaining the authorised area used in the original volumetric conversion process, determining the maximum crop area in every year between 1993 to 1999 to determine which year had the highest yielding crop, then determining the crop conversion rate for the crop said to have been grown during that year, and then removing any metered groundwater usage during the relevant year; and
 - 8.5.2 for properties with a bore licence only, the assessment followed the process in clause 23E of the Regulation, including determining the maximum crop area in any year between 1993-1999, determining the crop conversion rate for cotton, and then removing any metered groundwater usage during the relevant year.
- 8.6 Relevantly, the Department set clear parameters in the Policy, which they communicated to landholders, which was that the previous volumetric conversion processes would be the baseline for their floodplain harvesting licence entitlements unless the landholder could demonstrate and provide evidence to show that their area of irrigated land in a relevant period was greater than that which had been considered in determining their original unregulated entitlement. These were then expanded upon in the Policy Implementation Guideline and then given legislative force in the Regulation.
- 8.7 It is also evident from the Documents and the Interviews that the Department undertook a further assessment of the original volumetric conversion process to form an initial view on what a landholder's individual share component should be. The Department then provided landholders with notice of their assessment of their draft entitlements in accordance with the notification requirements outlined in s 23F of the Regulation.
- 8.8 This occurred by letter sent to each landholder in March 2020, which outlined the key information that had been used by the Department to determine a landholder's entitlement, what the Department's initial assessment was and outlined how landholders could challenge the Department's draft determination, including by making a submission as to whether they believed that draft assessment was correct or if they considered they were entitled to more.
- 8.9 We note from the Documents and our Interviews that only one landholder made a submission seeking a greater entitlement than was initially outlined in their draft determination— i.e. in this case, the initial assessment was that the landholder was not entitled to separate floodplain harvesting but the landholder was able to take a mix of river and floodwater up to the limit of their current licence.
- 8.10 We understand that this landholder's submission, which outlined their concerns and included additional information about why they believed they were entitled to an additional entitlement, was considered and confirmed by the Department in satellite imagery and then subsequently referred to the HFR Committee for consideration and a recommendation. The result was that the landholder received a floodplain harvesting licence with a share component instead of not receiving floodplain harvesting licence at all.^{xxix}

- 8.11 However, in the final decisions, we understand from the Documents and our Interviews that at least 4 landholders did not receive a floodplain harvesting licence. This was on the basis that the final share component was determined to be zero or less and s 23L of the Regulation provides that a landholder is not eligible for a replacement floodplain harvesting licence in those circumstances. However, there was nothing in the Documents that we reviewed that suggested any of these landholders made a submission to the Department in response to their entitlement letters.
- 8.12 We tested the Department's engagement activities with these particular landholders during the Interviews, and, in particular, the steps that the Department took to ensure that each of the relevant landholders had in fact received the draft entitlement notifications and other correspondence that was being sent out. We were told that the Department actively sought to engage with the relevant landholders to ensure they had received the notifications through emails and telephone calls. These processes were confirmed by key staff in follow up emails.
- Regulated*
- 8.13 In the Gwydir regulated water source, clause 23C(2) of the Regulation provides that the share component of a replacement floodplain harvesting licence must be determined using the following three (3) valley specific models:
- 8.13.1 the Gwydir current conditions model (23H);
 - 8.13.2 the Gwydir eligible water supply works scenario model (23I); and
 - 8.13.3 the Gwydir plan limit compliance scenario model (23J).
- 8.14 These models were formally adopted as part of the decisions the Executive Director made in relation to the Program as whole in the packages the subject of this review.
- 8.15 The models that were put up to the Executive Director for adoption under the Regulation were developed iteratively over the life of the Program by the Water Modelling Unit of the Department that sits under the Director Analytics who reports to the Chief Knowledge Officer of the Water Group, and was updated throughout the Program as more information was collected, which allowed the Department to refine the models accordingly.^{xxx}
- 8.16 River system models are a tool used by the NSW Government to assess the potential effects of different water management strategies or policies for water sharing in each water source.^{xxxi} These help the Department to understand how the river and groundwater system behave and to predict what will happen if various scenarios were to occur.
- 8.17 We understand that the Policy set an upper limit to long-term average floodplain harvesting diversions based on the statutory limits in both State and Commonwealth legislation. Where those limits were estimated as being exceeded because of growth in use, the Policy then set out an accounting framework to bring the long-term average diversions under these limits. These limits were estimated using the Department's modelling framework, and then the accounting framework was implemented to bring the requirements back into these limits.^{xxxii}
- 8.18 This meant that in order to work out an eligible landholder's share component entitlement for a replacement floodplain harvesting access licence in the Gwydir regulated water source, the Department first needed to update its long term average annual extraction limit (**LTAEL**) for this water source in its modelling through the information it had gathered through the ROIs and submissions from landholders and other aspects of the Program to capture the floodplain harvesting infrastructure and management practices.^{xxxiii}
- 8.19 To do this, the Department drew on its existing 'base system model for the Gwydir regulated water source' which had already set overarching extraction limits, and then it modelled different scenarios to estimate the take of water at a particular level of development, licence

use and the application of the management rules to determine if there had been a growth in use.

- 8.20 We understand from the Documents (in particular, the Policy Implementation Guideline) and the Interviews that the Department used an eligible floodplain unconstrained scenario to assess the floodplain harvesting that would have occurred with eligible works in the Gwydir. This then formed the basis for the working out the floodplain harvesting entitlements for each landholder in the Gwydir regulated water source.
- 8.21 However, when this was done it was realised that the total take of water would in fact exceed the LTAAEL. As a result, the proposed share components for these licences were adjusted accordingly on an equal pro-rata basis to bring the take of this type of extraction back within the limit.^{xxxiv}
- 8.22 The end result of this was that the final determination reduced the share component of each floodplain harvesting licence holder in the Gwydir regulated system by approximately 24%¹⁰ of the unconstrained volume of the overland flow that could be taken by eligible landholders to ensure that the total valley diversions were within the LTAAEL.¹¹
- 8.23 In terms of whether this process was fair and transparent and afforded landholders procedural fairness, it is evident from the Documents and the Interviews that the early stages of the Program were marred by a perception from landholders that the Department had been attempting to make decisions based on imperfect and incomplete information and there were concerns raised that the engagement with those affected had not been as transparent as it could have been.
- 8.24 As a result, when draft determination notifications letters were first sent to landholders in this water source, there was strong push back from eligible landholders to the early recommendations. However, by the time the final determinations were made, the Department had put in place processes that were fair and transparent and which had, importantly, given affected landholders procedural fairness.
- 8.25 As discussed earlier, the key factor in addressing the concerns raised by landholders was the commissioning of Alluvium to undertake an independent review of the Department's work to date in implementing the Policy, including its modelling.
- 8.26 While the 2019 Report had concluded that the Department was on track with its modelling, it did put the Department on notice that there was still a substantial amount of work to be done in respect of its modelling before it would be in a position to finalise landholders' share component determinations in the regulated water source, if in fact they were eligible for such licences.
- 8.27 Based on the Documents and the Interviews, the Department did undertake this work, which included extensive engagement opportunities with landholders through initiatives like the farm scale validation process, where their views were sought and addressed as part of this Department's additional modelling work, and additional data and information gathered to ensure that the data underlying the modelling was the best available evidence. This therefore went beyond landholders simply being informed of the end result.
- 8.28 Once this work was complete, the Department then reengaged with Alluvium to test whether its earlier concerns had been addressed. In this regard, we note that Alluvium's further report dated 8 February 2021 confirmed that the Department had generally achieved what it needed to in respect of the modelling for the Gwydir, but it did identify some areas that could be looked at further. However, we note that the further report suggested that these areas were either considered outside the scope of works for the modelling or were minor comments on aspects of the modelling which were not considered to be significant issues.

¹⁰ Ibid, page 25

¹¹ However, we understand that in some cases, some properties would have less impacts, and others more.

8.29 To further cross check this work, the Department also sought a review of its modelling framework from the Murray Darling Basin Authority, who commissioned its own independent review. This report concluded that the best available information had been used and also that the modelling was sufficiently documented.^{xxxv}

8.30 In our Interviews, we sought to test the robustness of the modelling work undertaken over the life of the Program and it was apparent from them that the Department took a very pragmatic approach to the modelling in that they were open to input from landholders, stakeholders and any new data sources that could be found to improve the models to ensure that the Executive Director had the best available evidence and models to make the subject decision.

9. Further audit of eligibility

9.1 We note also that, before a final decision was made as to eligibility, the Department undertook another audit of all of the eligibility decisions that had been made to reconfirm the decisions that had been made to date.^{xxxvi}

9.2 One of the other reasons for doing this audit was to also check the eligibility status of all the water supply works against the express requirements of the Regulation.

9.3 We note from BN22/380 that the audit resulted in the identification of 10 water supply works (storages) on 8 properties that were no longer recommended as eligible water supply works. Two of these resulted in landholders having their proposed share components reduced to zero, making them no longer eligible for a replacement floodplain harvesting access licence at all.

9.4 The affected landholders were notified of the audit, and the outcomes of it in respect of their properties and were given a further 28-day period to respond. Three landholders took the Department up on the opportunity to provide a submission in relation to the changes, and those submissions were considered by the HFR Committee. However, the findings of the HFR Committee confirmed the Department’s position and the eligibility recommendations they made were upheld and put forward to the Executive Director for a final decision.

9.5 While the Documents and the Interviews show that the audit did flush out a handful of instances in which the criteria had been applied incorrectly, the Interviews confirmed that the issue was not systemic and the majority of decisions about eligibility (96%) were still correct.

9.6 In addition, we agree that the process was beneficial in demonstrating to the Executive Director that the eligibility criteria had largely been consistently applied across the Program in a robust and transparent way, and that she could be confident that the information in the packaged could then be relied upon to make the final decisions.

10. Final decisions

10.1 To facilitate a final decision being made on a landholder’s eligibility for a floodplain harvesting access licence and their relevant share component entitlement, the following packages were prepared by the Department for the Executive Director:

10.1.1 BN22-378 – which formed the basis for determining which works were eligible works and which landholders were eligible for a replacement floodplain harvesting access licence in the Gwydir Unregulated River Water Sources based on the eligibility criteria in clause 23B of the Regulation;

10.1.2 BN22-379 - which formed the basis for determining the share components of a replacement floodplain harvesting (unregulated river) access licence in the Gwydir Unregulated River Water Sources;

- 10.1.3 BN22-380 – which formed the basis for determining which were eligible works and which landholders were eligible for a replacement floodplain harvesting access licence in the Gwydir Regulated River Water Sources based on the eligibility criteria in clause 23B of the Regulation;
 - 10.1.4 BN22-381 – which formed the basis for approving the adoption of the models to determine the share components for replacement floodplain harvesting access licences in the Gwydir Regulated River Water Source; and
 - 10.1.5 BN22-382 – which formed the basis for determining the share components for floodplain harvesting (regulated river) access licences in the Gwydir Regulated River Water Source.
- 10.2 We understand that these packages were developed iteratively over an approximately six (6) month period and drew on the large body of evidence that the Department had collected over the course of the Program.^{xxxvii}
- 10.3 It is also clear from the Documents and the Interviews that the Department had put in place a process in which:
- 10.3.1 the briefs were drafted by key staff who had been involved in assessments for the respective aspect of the Program the subject of the proposed final decision – for example, BN22/381 was prepared by key staff within the Water Modelling Unit, and the recommendations made to the Executive Director was endorsed by the line manager for the relevant division within the Department responsible for water modelling within the Department; and
 - 10.3.2 the elements of each brief were also broken up into individual components and then assigned to individual staff who were responsible for ensuring that the information in their component was accurate, consistent and sufficient and so that there was a clear chain of responsibility.
- 10.4 We were told that initially the Department’s focus was on gathering all the relevant information for the packages and aligning it with the steps under the Policy that they were required to take – so that there was an accurate symmetry in the information.
- 10.5 As the packages were further developed, this then shifted to aligning the requirements to the steps under the Regulation, and ensuring that the review process established by the Department ensured that the ‘right people responsible for this information was providing quality assurance and ensuring that the information provided to the Executive Director was true and correct’.^{xxxviii}
- 10.6 From the Interviews it was clear that there a strong focus for those responsible involved that the information was accurate, consistent and sufficient for the Executive Director to make the necessary decisions around eligibility and a licence’s share component.
- 10.7 In those Interviews, the key staff told us that a deliberate part of the development of the packages was putting in place the early review and feedback loop with the Executive Director, whereby drafts at different stages were provided to her for interrogation.
- 10.8 In relation to the information that underpinned the packages, in her Interview, the Executive Director indicated that her process for interrogating that information was to spend substantial time reading through the entire package, doing a sample of the decisions made in relation to landholders and going through that sample information to ensure that everything was consistent and logically held together in line with the Regulation requirements.
- 10.9 The Executive Director also informed us that she was cognisant of the fact that she was not the technical expert and had to rely, at least in part, on the staff who were. The process that she adopted was directed at ensuring she could make informed decisions under the

Regulation based on the information and evidence put before having regard to these limitations.

- 10.10 We understand that from the Executive Director's Interview that when she identified issues or gaps in the information, she contacted the staff who were responsible for that aspect of the package and asked them to either clarify or provide additional information or make changes to that aspect of the package to resolve any concerns. The Executive Director stated that 'this was particularly important to her because she understood the contentious nature of the Program, and the decisions she was being asked to make, as well as the likelihood that she would be asked to revisit the basis of her decisions at some point in the future'.
- 10.11 In our Interviews, we also sought to directly test the key staff's confidence in the packages and information put before the Executive Director and whether they agreed that the packages contained sufficient evidence to enable the Executive Director to make the decisions that she had. It is our conclusion that the packages did have sufficient evidence in them to make the recommendations that were made to the Executive Director, and that this evidence enabled the Executive Director to make the decisions she did.
- 10.12 This was on the basis that:
- 10.12.1 the packages had been prepared by the relevant technical experts and had been through a rigorous testing process as a result of the iterative process that Executive Director had instigated, ensuring the Executive Director had the right information before her to make the final decisions; and
 - 10.12.2 the Executive Director indicated to us in her Interview that she was satisfied that landholders had been given the opportunities to input at various stages throughout the process in a substantive and meaningful way that ensured that they had been afforded procedural fairness.

Schedule B –Key documents considered

Key documents considered

Briefing Note – Determination of eligibility for floodplain harvesting licence in the Gwydir Unregulated River Water Sources – BN22-378

Attachment A – Details of all landholders in the Gwydir Unregulated River Water Sources that have been assessed for eligibility

Attachment B – Registrations of Interest for the Gwydir Unregulated River Water Sources

Attachment C – Desktop assessments carried out for the Gwydir Unregulated River Water Sources

Attachment D – Records of site inspections carried out for the Gwydir Unregulated River Water Sources

Briefing Note – Determination of share components for floodplain harvesting licence in the Gwydir Unregulated River Water Sources – BN22-379

Attachment A – Share components for floodplain harvesting (unregulated river) access licences in the Gwydir Unregulated River Water Sources

Attachment B – Letters to notify each eligible landholder in the Gwydir Unregulated River Water Sources of the category and share component of the floodplain harvesting (unregulated river) access licence

Attachment C – Correspondence to eligible landholders in the Gwydir Unregulated River Water Sources that specified the proposed share components for the replacement floodplain harvesting access licences

Attachment D – Summary of submissions and minutes of the Healthy Floodplain Review Committee

Attachment E – Guideline for the implementation of the NSW Floodplain Harvesting Policy

Briefing Note – Determination of eligibility for floodplain harvesting licence in the Gwydir Regulated River Water Source – BN22-280

Attachment A – Landholders recommended as being eligible for a replacement floodplain harvesting licence

Attachment B – Water supply works recommended as being eligible water supply works for modelling purposes

Attachment C – Registrations of interest received for the Gwydir Regulated River Water Source

Attachment D – Records of desktop assessments carried out for the Gwydir Regulated River Water Source

Attachment E – Records of site inspections carried out for the Gwydir Regulated River Water Source

Attachment F – Records of the opportunity given to relevant landholders to provide further information in the Gwydir Regulated River Water Source

Attachment G – Submission summary and relevant minutes of the Healthy Floodplains Review Committee

Attachment H – Submission summary for eligible works audit and associated minutes from the Healthy Floodplains Review Committee

Attachment I – Guideline for the implementation of the NSW Floodplain Harvesting Policy

Briefing Note – Adoption of models used to determine the share components for replacement floodplain harvesting access licence in the Gwydir Regulated River Water Sources – BN22-381

Attachment A – Building the river system model for the Gwydir Valley regulated river system

Attachment B – Floodplain harvesting entitlements for Gwydir regulated river system: Model scenarios report

Attachment C – Independent peer review for the Building the river system model for the Gwydir Valley regulated river system and the Floodplain harvesting entitlements for Gwydir regulated river system: Model scenarios report

Briefing Note – Determination of share components for floodplain harvesting (regulated river) access licences in the Gwydir Regulated River Water Source – BN22-382

Attachment A – Share components for floodplain harvesting (regulated river) access licences in the Gwydir Regulated River Water Source

Attachment B – Letters to notify each eligible landholder in the Gwydir Regulated River Water Source of the category and share component of the floodplain harvesting (regulated river) access licence

Attachment C – Correspondence to eligible landholders in the Gwydir Regulated River Water Source that specified the proposed share components for the floodplain harvesting (regulated river) access licences

Attachment D – A summary of submissions received in the Gwydir Regulated River Water Source

Attachment E – Guideline for the implementation of the NSW Floodplain Harvesting Policy

NSW Floodplain Harvesting Policy

The Independent Review of NSW Floodplain Harvesting Policy Implementation – Final Report Alluvium (July 2019)

The Floodplain Harvesting Action Plan (September 2019)

Guideline for the implementation of the NSW Floodplain Harvesting Policy (June 2020)

Alluvium Further Review of NSW Gwydir Valley Model Build, Scenarios and Environmental Outcomes reports relevant to the Floodplain Harvesting Policy Implementation (February 2021)

Expression of Interest Form

Healthy Floodplain EOI cover letter

Media Release for the Program in the Gwydir dated 1 November 2012

Health Floodplain Technician’s Manual Version 3

The Department’s ‘Modelling and data collection for implementing floodplain harvesting’ (PUB18640)

Fiftee 50 – Murray-Darling Basin Authority, Independent Review of Proposed NSW Baseline Diversion Limits for Floodplain Harvesting: Border Rivers and Gwydir SDL Resource Units dated 18 August 2022

Schedule C – Key staff interviewed

Date	Key staff
20 October 2023	Acting Principal Water Modeller
26 October 2023	Senior Project Officer, Floodplain Licensing Team
3 November 2023	Director, Floodplain Management Manager, Floodplain Licensing
10 November 2023	Executive Director

Schedule D – details of sample packages reviewed

Landholder	Water Source
G001	Unregulated Water Source
G018	Unregulated Water Source
G037	Unregulated Water Source
G046	Unregulated Water Source
G054	Unregulated Water Source
G068	Unregulated Water Source
G085	Unregulated Water Source
G102	Unregulated Water Source
G118	Unregulated Water Source
G123	Unregulated Water Source
G126	Unregulated Water Source
G127	Unregulated Water Source
G130	Unregulated Water Source
G150	Unregulated Water Source
G153	Unregulated Water Source
G002	Regulated Water Source
G003	Regulated Water Source
G006	Regulated Water Source
G017	Regulated Water Source
G020	Regulated Water Source
G025	Regulated Water Source
G026	Regulated Water Source
G032	Regulated Water Source
G036	Regulated Water Source
G044	Regulated Water Source
G048	Regulated Water Source
G053	Regulated Water Source
G059	Regulated Water Source
G060	Regulated Water Source
G061	Regulated Water Source
G066	Regulated Water Source
G079	Regulated Water Source
G086	Regulated Water Source
G089	Regulated Water Source



G092	Regulated Water Source
G104	Regulated Water Source
G105	Regulated Water Source
G106	Regulated Water Source
G119	Regulated Water Source
G125	Regulated Water Source
G128	Regulated Water Source
G151	Regulated Water Source
G155	Regulated Water Source

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- ⁱ The Policy and copy of the invitation letter that was sent to landholders in the Gwydir seeking expressions of interest dated 1 November 2012
 - ⁱⁱ BN22/379, and Attachment D
 - ⁱⁱⁱ Email dated 10 February 2022 in Attachment F to BN22/380
 - ^{iv} Interview with the Manager, Floodplain Licensing and Director, Floodplain Management on 3 November 2023
 - ^v BN22/380, page 5, Attachment B to BN22/380
 - ^{vi} BN22/380 – pages 5 and 6, Attachment B and the interviews with the Manager, Floodplain Licensing and the Director, Floodplain Management on 3 November 2023.
 - ^{vii} The Policy, page 7
 - ^{viii} BN22/378 – page 3, Attachment B to BN22/378, BN22/380 – page 4, Attachment C to BN 22/380
 - ^{ix} BN22/378 – page 3
 - ^x Interview with the Manager, Floodplain Licensing on 3 November 2023.
 - ^{xi} BN22/378 - page 3, Attachment C to BN22/378, BN22/380 – page 4, Attachment D to BN 22/380, Policy Implementation Guideline
 - ^{xii} Interview with the Manager, Floodplain Licensing on 3 November 2023.
 - ^{xiii} BN22/378 - page 3, Attachment C to BN22/378, BN22/380 – page 4, Attachment D to BN 22/380,
 - ^{xiv} The Policy, Policy Implementation Guidelines, interviews with the Manager, Floodplain Licensing and the Director, Floodplain Management on 3 November 2023.
 - ^{xv} Interview with the Manager, Floodplain Licensing on 3 November 2023, Technical Manual.
 - ^{xvi} Interview with the Manager, Floodplain Licensing on 3 November 2023.
 - ^{xvii} BN22/380 – page 4, Attachment E to BN 22/380,
 - ^{xviii} Interview with the Manager, Floodplain Licensing on 3 November 2023.
 - ^{xix} Interview with the Manager, Floodplain Licensing on 3 November 2023.
 - ^{xx} BN22/378 - pages 3&4, BN22/380 – page 4&5
 - ^{xxi} BN22/378 - page 4
 - ^{xxii} Pages 4,5, 17 and 18 of Attachment F to BN22/380 and Interview with the Manager, Floodplain Licensing on 3 November 2023.
 - ^{xxiii} Pages 2, 242 and 254 of Attachment G to BN22/380
 - ^{xxiv} BN22/379, page 3
 - ^{xxv} BN22/379, page 3
 - ^{xxvi} Interview with Senior Project Officer, Floodplain Licensing Team on 26 October 2023
 - ^{xxvii} Interview with Senior Project Officer, Floodplain Licensing Team on 26 October 2023 and the Manager Floodplain Licensing and Director, Floodplain Management on 3 November 2023.
 - ^{xxviii} Interview with Senior Project Officer, Floodplain Licensing Team on 26 October 2023 and the Manager Floodplain Licensing and the Director, Floodplain Management on 3 November 2023.
 - ^{xxix} BN22/379 – page 4 and Attachment D
 - ^{xxx} This conclusion is drawn from interviews with the key staff, include Acting Principal Water Modeller on 26 October, and the Director, Floodplain Management on 3 November 2023.
 - ^{xxxi} Policy Implementation Guideline, page 6
 - ^{xxxii} The Department's 'Modelling and data collection for implementing floodplain harvesting' (PUB18640), p1
 - ^{xxxiii} The Policy, page 12 and interviews with key staff, including Acting Principal Water Modeller on 26 October, and the Director, Floodplain Management on 3 November 2023.
 - ^{xxxiv} Policy Implementation Guideline, page 8
 - ^{xxxv} Fiftee 50 – Murray-Darling Basin Authority, Independent Review of Proposed NSW Baseline Diversion Limits for Floodplain Harvesting: Border Rivers and Gwydir SDL Resource Units dated 18 August 2022
 - ^{xxxvi} BN22/378 - page 4, BN22/380 – page 4 and Attachment B
 - ^{xxxvii} This is drawn from interviews with key staff Senior Project Officer, Floodplain Licensing Team, the Manager, Floodplain Licensing and the Director, Floodplain Management.
 - ^{xxxviii} This is drawn from interviews with key staff Senior Project Officer, Floodplain Licensing Team, the Manager, Floodplain Licensing and the Director, Floodplain Management.