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Subject Review of farm-scale validation process

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8. The Department is now in the process of preparing draft determinations of each eligible property's floodplain harvesting entitlement. Essentially, this means calculating what share of available floodplain water a property should be entitled to take and involves:
- developing models to calculate extraction limits;
 - calculating the volume of water capable of being taken, and historically taken, by eligible works; and
 - distributing any limitations on total floodplain harvesting among eligible properties.

It is the second aspect of this process that this review is related to.

9. The Department commenced the FSV Process in 2020. In summary, the purpose of the FSV Process is to obtain further information on the basis of which the Minister, or her delegate, will determine share components for floodplain harvesting water access licences.
10. Once the Department has calculated the entitlement for each eligible property within a valley and the Regulation has been amended as referred to in paragraph 5, it is intended that the Minister (or her delegate) will then determine the entitlements for a valley in accordance with that Regulation.
11. We note that Tony Weber and Greg Claydon of Alluvium Australia Pty Ltd (**Alluvium**) conducted an independent review of the implementation of the Policy and produced a report on that review in July 2019,¹ which has been publicly available on the Department's website since 30 August 2019.

Scope of our review

12. Maddocks was engaged to conduct a retrospective probity review of the FSV Process. As stated above, we have considered whether the FSV Process enabled the gathering and testing of sufficient information to allow the Minister to make an evidence-based determination of the share component of replacement floodplain harvesting access licences in a way that afforded procedural fairness to the owners of eligible properties. We have also considered whether the process was transparent and well documented, and whether any actual or potential conflicts of interest for Committee members and departmental officers were properly managed.
13. The review is focussed on the process of gathering information under the FSV Process, and not on whether sufficient information was in fact obtained for any particular property or the merits of any recommendations by the Department or the Committee for any particular property. Our views are based on samples of landholder submissions and other documents provided to us by the Department.

Summary of findings

14. Based on the documents we have reviewed and our meetings with Committee members and two Committee advisors, we consider that the FSV Process enabled the gathering and testing of sufficient information to allow the Minister (or the Minister's delegate) to make an evidence-based determination of the share component of replacement floodplain harvesting access licences in a way that afforded procedural fairness to the owners of eligible properties. We consider that the FSV Process was appropriately documented and that there was a system in place to manage conflicts of interest.

¹ Alluvium, *Independent Review of NSW FPH Policy Implementation – Final Report*, July 2019.

Ability to gather sufficient information

15. We consider that the FSV Process enabled the Department to obtain relevant information to support evidence-based recommendations to the decision-maker about individual farms' floodplain harvesting entitlements.
16. The result of the FSV process is a suite of information to supplement the Department's existing records and modelling. It includes information submitted by landholders, notes taken by departmental officers in relation to one-on-one meetings with landholders, the Department's analysis of that information, updating modelling, Alluvium reviews of modelling and of the Department's analysis of submissions, and the Committee's recommendations. It is, of course, a matter for the Minister (or her delegate) as the decision-maker to determine the weight to be given to each particular piece of evidence in considering the entitlement for each property.
17. The assessment of eligible works as at 2008 and their capacity to take and store floodplain water based on conditions between 1993–2000 is a complex task given the passing of time and corresponding limitations on the availability of data, the unique physical characteristics of individual farms and their works, and a number of other variables. It is not possible to achieve a level of perfection in the information relied upon; a degree of uncertainty must be accepted. The question is whether the Department could obtain information for the Minister to make a reasonable decision on individual floodplain harvesting volumetric entitlements for the purposes of access licences. Related to this question is whether information was obtained in a way that was fair to the people who would be impacted by these decisions. We provide further comments below on the specific questions of procedural fairness, documentation and transparency, and managing conflicts of interest.

Procedural fairness

18. We consider that eligible landholders were given a reasonable opportunity to provide information about their eligible works and the modelling of floodplain harvesting on their property. Landholders were informed of the information upon which their floodplain harvesting entitlement would be determined and were encouraged to make a submission with supportive evidence if the information provided did not reflect the works on the property.
19. We did not identify any cases where the Department denied a person an extension of time, nor any cases where a submission was refused due to being lodged out of time. In our view, the time allowed (including extensions of time) was appropriate.
20. We have considered the possibility that some landholders contested the Committee's recommendation on the understanding that to do so of itself would result in a larger entitlement, and we considered whether it was unfair to consider submissions from landholders contesting the Committee's communicated recommendation in circumstances where the Recommendation Letter did not invite appeal. In our view, the answer to this question is informed by a proper understanding of the Committee's role in the FSV Process. The Committee has an advisory role to the Minister and is not a tribunal or statutory decision-maker. The Committee's consideration of the Department's assessment of submissions, including contested submissions, generated further information for the Minister to consider in the form of recommendations by members representing affected interest groups. We consider that it was open to the Committee to consider the contested submissions and we do not consider that the Committee or the Department had an obligation to inform all landholders that they could contest the Committee's recommendation. What is relevant is whether the Department and the Committee properly considered, and whether the Minister will properly consider, the evidence in determining the volume of water that could be taken by eligible works. A submission per se would not result in an amendment to the Committee's recommendation.

Transparency and documentation

- 21. We consider that the FSV Process was appropriately documented and note in particular the information available to the public on the Department’s Healthy Floodplains Project website about the FSV Process, types of information used in determining entitlements, modelling reports and peer reviews.
- 22. While this review identified some differences in documentation of the FSV Process and information obtained from landholders between valleys, this does not indicate to us systemic issues with the FSV Process and any discrepancies would, in our view, be a matter going to the weight to be given to that information by the decision-maker. We would expect in a project of this scale and complexity that available information would differ with respect to its probative value.
- 23. While it is out of the scope of this review to consider the processes involved in the modelling of valley-wide and individual floodplain harvesting share components, we note that modelling is fundamental to the Minister’s ultimate determination of floodplain harvesting access licences and therefore we make the following comments. Internal departmental documents we reviewed indicated engagement by both departmental technical staff and consultants with modelling issues and evidence raised by applicants as well as information held by the Department. The Department’s assessments of floodplain harvesting submissions were reviewed by Tony Weber of Alluvium and we understand that the review report was included in the material for consideration by the Committee with respect to those submissions. Model build reports and model scenarios reports are available on the Department’s website for the Border Rivers, Gwydir and Macquarie. The modelling reports for these systems have been reviewed by Alluvium and their reports are publicly available on the Department’s website.

Managing conflicts of interest

- 24. We consider that there was a process for the management of potential conflicts of interest through:
 - a standing item on Committee meeting agendas for declaring conflicts of interest;
 - the Committee’s ToR; and
 - Department’s *Code of Ethics and Conduct*.²
- 25. With respect to the Committee members’ independence, it is important to understand that the while the NSW Nature Conservation Council, the NSW Irrigators Council and the NSW Farmers Association were invited to nominate a person for Committee membership, members were appointed by the Deputy Secretary and the members were to represent the interests of environmental groups, the irrigation industry and the agriculture industry generally, not the interests of their nominating organisation. Our impression was that the Committee members understood that their role was to independently assess submissions and not to advocate on policy matters.

Review methodology

- 26. This section summarises the key steps undertaken in this review.
- 27. Maddocks met with the Department to be briefed on the farm scale validation process. The Department provided Maddocks with background documents and the scope of the review was refined. Maddocks requested a sample of submissions which was provided by the Department with further documents. The sample parameters were determined by Maddocks in consultation with the Department, based on the numbers and categories of submissions

² 4 November 2020.



made in each valley.³ The samples are considered to be representative of the submissions. Further information was provided by the Department from time to time as requested by Maddocks. Following review of the sample documents, Maddocks met with the Department and requested further documents which were provided.

28. The Department provided Maddocks with correspondence from Committee members to the Deputy Secretary and subsequently instructed Maddocks to meet with Committee members to obtain their views of the FSV Process. Between August and October 2021, Maddocks met with the Committee members and with advisors Tim Duddy and Tony Weber. Maddocks requested further information which was provided by the Department.
29. Maddocks and the Department met in October to discuss outstanding matters for the finalisation of Maddocks' report. The Department was provided with an opportunity to correct any factual errors.

Contact

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³ The Department provided 10% of submissions from Border Rivers and Gwydir, and 6 submissions for each of Barwon Darling, Macquarie and Namoi. The sample set from each valley included documents relating to submissions across the eligible works, modelling and contested categories, and spread across previous and current Committee membership. We are instructed that the Department tried to provide variety in terms of the number and range of issues in the submissions.