

23 July 2012

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Dear Megan,

### **Murray-Darling Basin Ministerial Council s43A notice**

EDO NSW welcomes the opportunity to provide comment on the Murray-Darling Basin Ministerial Council s43A notice (**s43A notice**). The Australian Network of Environmental Defender's Offices (**ANEDO**) submitted a detailed response to the draft Basin Plan in April 2012. This submission, which focusses on a selection of issues raised in the s43A notice, is intended to build on that work.

Our comments will relate to the following four areas:

- The Sustainable Diversion Limit (**SDL**) adjustment mechanism;
- Water quality and salinity;
- Constraints; and
- Accreditation of Environmental Watering Plans (**EWPs**).

#### **1. The SDL adjustment mechanism**

As noted in ANEDO's submission to the MDBA regarding the proposed Basin Plan, reducing extractions in the Basin by 2,750 GL/y constituted a significant derogation from the best publicly available science, which was contained in the Guide to the proposed Basin Plan (the **Guide**). Specifically, the Guide stated that it was necessary to reduce extractions by 7,500 GL/y to restore degraded environmental assets in the Basin, while 4,000 GL/y was the minimum amount capable of meeting the objectives of the *Water Act 2007*.

Accordingly, ANEDO argued that the environmentally sustainable level of take (**ELST**) needed to be recalculated to reflect an uncompromised assessment of what was required to protect and restore ecosystems across the Basin. ANEDO further argued that failure to do so would constitute a breach of the Water Act,<sup>1</sup> and possibly Australia's international legal obligations, in particular the Biodiversity Convention and Ramsar Convention.

In light of the above, EDO NSW is concerned that the adjustment mechanism will be used to increase the already considerable gap between the reduction figures specified in the Guide,

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<sup>1</sup> Water Act 2007, section 3 (d). The intention to return the Basin to environmentally sustainable levels of take is also reflected in sections 20 and 21 of the Act.

and the current figure of 2,750 GL/y. We therefore submit that if such a mechanism were to be implemented, it should only be used to decrease SDLs in order to enable targets for Key Environmental Assets (**KEAs**) to be met. We would further submit that for the mechanism to be lawful under the Water Act, it should arguably operate within the range indicated in the Guide, namely between 4,000 and 7,500 GL/y.

We are also concerned by the proposal to base the adjustment mechanism on works and measures, removal of constraints, and rules. That is, the mechanism will not factor in scientific developments, notably in respect of climate change. During the targeted consultation held on 17 June 2012, the MDBA stated that they had received legal advice indicating that it would be unlawful to build 'uncertainties' (in other words, future science) into such a mechanism.

EDO NSW strongly opposes this view. In fact, we believe that failure to incorporate future scientific knowledge (including climate change modelling) into such a mechanism would actually breach the Water Act. Specifically, section 21 (4) of the Act requires the Plan to be based on best available science.

## **2. Water quality and salinity**

EDO NSW is concerned that the Basin Plan will not include mandatory, enforceable water quality and salinity targets. This is problematic for three central reasons.

First, given the clear link between water quality and water resource health, an omission of this nature will potentially undermine overall targets set for KEAs.

Second, it may breach the provision in the Water Act outlining the framework for the water quality and salinity management plan.<sup>2</sup>

Third, failure to include mandatory targets in the Basin Plan is arguably inconsistent with the Act's objects. Specifically, the objects include promoting the relevant international agreements in such a way that 'optimises economic, social and environmental outcomes',<sup>3</sup> where 'environmental outcomes' are defined to include 'water quality'.<sup>4</sup> Based on our experience, it will be difficult to improve water quality (thereby implementing the Act's objects) in the absence of mandatory targets.

## **3. Constraints**

EDO NSW generally supports the proposed Constraints Management Strategy, however submits that such a strategy should inform a concrete program designed to remove constraints for the purposes of decreasing SDLs.

## **4. Accreditation of EWPs**

EDO NSW supports the environmental NGOs' proposal to bring the accreditation of EWPs forward for the purposes of improving environmental outcomes across the Basin.

We would further submit that the accreditation process involve careful scrutiny of proposed mechanisms to manage Commonwealth Environmental Water (**CEW**) under water resource plans (**WRPs**).

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<sup>2</sup> Water Act 2007, section 25 (1) (b).

<sup>3</sup> Water Act 2007, section 3 (c).

<sup>4</sup> Water Act 2007, section 4.

For example, we note that the NSW Office of Water (**NOW**) is in the process of developing a 'water shepherding framework' designed to move CEW from the Barwon-Darling Rivers to the Menindee Lakes for the purposes of watering environmental assets in the Southern Basin. The framework, which is based on a MOU between the NSW and Federal Governments, will not include cease to pump rules to protect this water as it is passing through the system. NOW has justified this decision on the basis that the MOU requires the shepherding framework to avoid all third party impacts.

In a submission to NOW regarding the proposed shepherding framework,<sup>5</sup> EDO NSW argued that this constituted a misconstruction of the MOU. That is, the MOU's overriding objective was not to avoid third party impacts. Rather, it was to:

*...optimise the use of all water for the environment, to provide the capacity to deliver water to high priority environmental assets, and, in the case of in-stream environmental watering, to provide protection for environmental flows to pass through the system as far as transmission losses allow.*<sup>6</sup>

As this example highlights, it is vital to ensure that WRPs include rules capable of protecting CEW, thereby optimising environmental outcomes across the Basin.

Please do not hesitate to contact our office if you have any further questions regarding our comments.

Yours sincerely,  
**EDO NSW**



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<sup>5</sup> Dated 6 July 2012. This submission is available at: [http://www.edo.org.au/edonsw/site/pdf/subs/120702Proposed\\_arrangements\\_for\\_shepherding\\_environmental\\_water\\_in\\_NSW.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/120702Proposed_arrangements_for_shepherding_environmental_water_in_NSW.pdf)

<sup>6</sup> MOU, clause 14. The MOU is available on the NOW website at: <http://www.water.nsw.gov.au/Water-management/Water-recovery/Water-shepherding/Water-shepherding>