

Murray–Darling Basin Authority
GPO Box 1801, Canberra City,
ACT 2601

Submission regarding the Sustainable Diversion Limit Adjustment Mechanism Draft Determination

The First Nations of the MLDRIN confederation have asserted our sovereignty, and articulated rights and responsibilities encompassing the lands and waters of our traditional territories. Our water values and rights as Traditional Owners are expressed in the Echuca Declaration (2007), which states that ‘water has a right to be recognised as an ecological entity, a being and a spirit and must be treated accordingly’. The Echuca Declaration also highlights our position that Australian governments ‘have been negligent in the management of the lands and waters of the Indigenous Nations causing ecosystem collapse, severe water quality degradation, extreme stress upon river ecologies and species extinction at a scale and rate which is unprecedented.’

Our position on the SDL Adjustment is informed by these values and perspectives.

MLDRIN and its member Nations have articulated concerns regarding the potential impacts of supply measure projects and the SDLAM on a number of occasions including:

- In written correspondence to the MDBA (27th Nov 2015 and 23rd August 2016)
- In dedicated meetings: Peak Bodies briefing, August 2015 (Canberra), 7th February 2017 (Melbourne), 30th August 2017 (Adelaide)
- In various MLDRIN Full Delegation and Executive Meetings (between 2015-2017)

This submission should be considered in light of the information already provided to MDBA. We are concerned that there is a lack of transparency around the whole SDL adjustment process.

We oppose the amendments detailed in the SDL Adjustment draft determination report on the following grounds:

No free prior and informed consent

Free, prior and informed consent entails bottom up participation and consultation of Indigenous populations prior to the beginning of a development on ancestral land or using resources within the Indigenous population's territory.

Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples requires States to 'consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent *before adopting and implementing legislative or administrative measures that may affect them*'¹

Construction and operation of supply measure projects and amended water recovery targets entail potential impacts across floodplain ecosystems in the Southern connected basin. These floodplain areas are our Nations' cultural hotspots, encompassing important cultural heritage sites, traditional food, fibre and medicinal resources, sacred sites and other important values. Traditional Owners are entitled to a substantive role in determining how these areas are managed.

Traditional custodians not been asked if we want the proposed package of supply measure projects or the adjustment in water recovery. We have not been allowed the agency or been provided with adequate information, to support informed decision-making about the risks, impacts and potential benefits arising from these projects and actions.

The Akwe:Kon guidelines have been recognised internationally, and within Australian water planning contexts, as a best practice guide to engagement with Indigenous peoples in undertaking impact assessments. The guidelines specifically mandate the '[e]stablishment of a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community.'² Traditional custodians have not had the opportunity to make decisions about whether supply measure project should proceed or whether water recovery targets should be amended. This contravenes the principle of Free, prior and informed consent.

Negative impacts on Country and Culture

The MDBA's modelling shows that the implementation of the SDLAM draft determination will lead to an uneven distribution of negative ecological impacts across the Southern Basin.

¹ United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, Article 19.

² Secretariat of the Convention on Biological Diversity (2004). *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, Montreal, (CBD Guidelines Series).

The Modelling Metric provided in the SDLAM Draft Determination report shows that ecological elements scores for five of the nine reaches modelled are lower under the 'SDL 605' scenario than the Benchmark scenario. In some reaches, such as the Mid-Murrumbidgee and Lower-Goulburn Floodplain, and for some ecological elements, scores are significantly lower.³

While the Environmental Equivalence methodology aggregates outcomes for ecological classes across the Southern Basin region, to determine 'equivalent' outcomes, this approach is patently not appropriate to apply to Aboriginal cultural values and outcomes. Positive and negative outcomes for specific, unique and localised Aboriginal groups cannot be averaged out across a region.

The uneven distribution of 'benefits' and 'dis-benefits' will entail impacts on Aboriginal values and uses. MLDRIN has repeatedly sought information from the MDBA regarding the on-ground implications of reduced scores at the reach scale, and what measures will be put in place to ensure that these impacts can be assessed and ameliorated. However, as discussed below, MLDRIN's specific requests have not been addressed and there have been no resources or steps dedicated to implementing assessment approaches.

No consideration of Traditional Owner outcomes in assessment and modelling

Our membership want access to adequate information to be able to understand the impacts of the SDLAM on their Country. As MDBA officials have conceded in correspondence with MLDRIN, the SDLAM and environmental equivalence methodology do not take into account the impact of an amended SDL on Traditional Owner values and uses. The on-ground cultural implications of reduced ecological elements scores need to be identified and understood.

Further, our membership want to understand how the operation of the SDLAM will impact on plant and animal species that hold particular cultural significance to them. However, there is no allowance for assessing, monitoring and understanding the impacts of the adjustment on culturally significant species, beyond the ecological elements included in the current methodology.

This gap in the assessment approach is particularly relevant for those groups or in those reaches situated between supply measure project sites, where the modelled ecological outcomes are worse.

In 2015⁴, MLDRIN specifically asked the MDBA to address the following questions:

³ Murray Darling Basin Authority, 2017. *Sustainable Diversion Limit Adjustment Mechanism: Draft Determination Report*. Appendix C. pp.52-56

⁴ Darren Perry, Chair- MLDRIN. Letter to Neil Andrew, Chair – MDBA 'Re. cultural implications of supply measures and SDL Adjustment.' 27th November 2015.

- How will potentially detrimental cultural outcomes, arising at a local scale as a result of the SDL adjustment, be addressed or ameliorated?
- What pathways exist for Traditional Owners to ensure that their concerns about potential negative impacts are addressed or ameliorated?
- How can Traditional Owners come to a clear understanding and make informed decisions about the likely local impacts of SDL adjustment? What sources of information are available to inform this consideration and decision-making?

In response to these questions, MDBA officials proposed an approach whereby details of flows needed to achieve objectives defined by Aboriginal people (flow rate, duration, timing and/or frequency at specific locations) could be used to determine whether the proposed SDL adjustment would result in 'material impact on Aboriginal objectives, outcomes, values and uses or particular sites.'⁵ As the MDBA knows, this information is currently unavailable to most, if not all, Nation groups. MLDRIN highlighted this challenge and sought a response from MDBA regarding the availability of resources and expertise to collect this information.⁶ Unfortunately, we did not receive a response to that correspondence.

We consider it a significant and unacceptable gap that the potential impacts on Aboriginal cultural values are not integrated into assessment tools and decision-making for supply measures and the SDL Adjustment. MLDRIN has also written to the NSW and Victorian Governments seeking further information and support to be able to understand the impacts of the SDL Adjustment. Despite recognition of the potential impacts, there has been no support forthcoming.

Traditional Owners have already borne unacceptable impacts as a result of river regulation and unsustainable extraction. We are disappointed that there has been no commitment from basin jurisdictions to support a greater understanding of the cultural impacts of the SDLAM.

Potential impacts of the supply measure projects on environmental outcomes, physical and intangible cultural heritage

The development and operation of supply measure projects entails considerable risks. These have not been appropriately addressed by the MDBA, or State proponents. MDBA has not provided adequate information about the Supply Measure projects. We do not know what their environmental outcomes will be or how they contribute to the Basin wide environmental watering strategy and its targets for water birds, fish and vegetation.

⁵ Russel James, Executive Director – Policy and Planning. Letter to Darren Perry, Chair – MLDRIN, 25th January 2017.

⁶ Darren Perry, Chair- MLDRIN. Letter to Russel James, 23rd August 2016.

Our members have highlighted significant concerns about the lasting impact of major construction works on their cultural values and uses. In a recent meeting with MDBA staff, one Victorian Traditional Owner explained the impact of major environmental infrastructure works on his connection with Country:

“We don’t go back to that site now because there are massive concrete structure in place. That has affected our dreaming connection to the site. We disagreed with how the program was implemented. When it was completed, they didn’t come back to ask about the impacts and benefits.”

Destruction of Aboriginal cultural heritage, including numerous burial sites, was recorded during the construction of the Koondrook-Perricoota Flood Enhancement works, at a considerable psychological toll on local communities. Even with appropriate cultural heritage assessments and planning, further impacts are highly likely given the cultural significance of floodplain landscapes throughout the Southern basin.

The infrastructure approach achieving water-dependent environmental outcomes is untested, speculative, expensive and high-risk. Recent research by Bond et al (2014) highlights that engineering approaches may risk detrimental ecological outcomes, including reductions in biotic connectivity, river–floodplain productivity, and water quality, and thus may fail to support the range of ecological processes required to sustain healthy river–floodplain systems.⁷ Environmental infrastructure has also been linked to negative impacts on native fish and increased breeding of European carp.⁸

Supply measure projects represent an untested approach to achieving environmental outcomes, which entail a range of significant cultural and ecological impacts. These impacts should be given due consideration, alongside any socio-economic impacts associated with water recovery. MLDRIN believes that these issues and impacts are not just a State responsibility – the projects are part of an adjustment process legislated and funded at the Commonwealth level.

Lack of progress with efficiency measures

While State governments have invested considerable resources to progress supply measures that will bring the water recovery target down, there has been no corresponding effort to develop efficiency measures, which will increase water recovery with neutral or improved social and economic impacts. A volume of water

⁷ Bond, N. *et al.* ‘Ecological risks and opportunities from engineered artificial flooding as a means of achieving environmental flow objectives,’ *Frontiers in Ecology and the Environment*, 2014; 12(7): 386–394.

⁸ Dr Martin Mallen Cooper. Transcript: ‘Carp enjoying near perfect breeding conditions in the River Murray’. *ABC Radio: ‘The World Today’* <http://www.abc.net.au/radio/programs/worldtoday/carp-enjoying-near-perfect-breeding-conditions-in/8667726>

recovery through efficiency will be required to comply with the 5% adjustment limit, but apart from that there we have no certainty that additional water will be recovered. While MDBA communications state that '[t]here *will* be 605 gigalitres additional water'⁹ available as a result of the supply measures program, there is no certainty around the delivery of efficiency measures: only that '*up to* 450GL is *expected* to be recovered by 2024'. With the current EY review of socio-economic impacts, and a public push from MPs and powerful interest groups to abandon efficiency measures¹⁰, MLDRIN is very concerned that the SDLAM will result in a reduced water recovery target that compromises the achievement of environmental and cultural outcomes.

Delays and opposition to progressing efficiency measures risks locking in a water recovery target of 2140 GL. MLDRIN considers this unacceptable, given that the MDBA own studies on environmentally sustainable level of take found that even 2400 GL was insufficient to achieve a number of key environmental objectives for the River Murray downstream of the Murrumbidgee junction.¹¹

Ongoing compliance issues

There has been a major breach of confidence in the implementation of SDLs and extraction limits across the Basin. Allegations of water theft and meter tampering in the northern Basin are currently under investigation and changes to the Basin Plan should not be considered until all the current inquiries are complete.

It is not appropriate to be amending SDLs while enquiries and reviews are underway to address major compliance issues including significant water theft. How can an increase in the SDL be contemplated when communities, State agencies and the MDBA have no confidence that SDLs are actually being complied with?

Recommendations

MLDRIN has little confidence that our inputs and concerns regarding the SDLAM will be meaningfully considered, especially given the timeline required to provide a proposed SDL adjustment to the Minister responsible for Water.

Our submission reflects a fundamental disagreement with the process: the SDL Adjustment does not align with First Nations' water values and first principles.

⁹ Murray Darling Basin Authority, 'The Sustainable Diversion Limit Adjustment Mechanism- draft determination', MDBA website: <https://www.mdba.gov.au/basin-plan-roll-out/sustainable-diversion-limits/sustainable-diversion-limit-adjustment-mechanism/issues-opportunities-basin-governments-have-considered-topic1>

¹⁰ 'Ley: No need for extra 450GL', *Deniliquin Pastoral Times*, 4 April 2017.

<https://www.pressreader.com/australia/deniliquin-pastoral-times/20170404/282029032075339>

¹¹ Murray-Darling Basin Authority 2011, The proposed "environmentally sustainable level of take" for surface water of the Murray-Darling Basin: Methods and outcomes, MDBA publication no: 226/11, Murray-Darling Basin Authority, Canberra.

However, we are aware of the pragmatic requirement to minimise negative impacts on our membership.

Our recommendations to the MDBA are:

1) Allow appropriate time and resources to run a transparent and inclusive SDL Adjustment process informed by:

- a comprehensive package of supply and efficiency measures
- comprehensive information about the design and operation of supply measure projects
- the completion of EY's Independent review of Efficiency Measures
- the completion of all reviews, investigations and inquiries into compliance issues

2) MDBA and Southern basin States must support a thorough cultural impact assessment¹² of the SDLAM including the full package of supply measure projects and the amended water recovery target. A cultural impact assessment must be developed in collaboration with MLDRIN and relevant Traditional Owner groups and must consider:

- Impacts on Aboriginal heritage, values and uses arising from construction and operation of supply measures
- Impacts on Aboriginal values and uses arising from any change to the water recovery target to determine whether the SDL Adjustment will result in material impact on Aboriginal objectives, outcomes, values and uses (building off the approach previously outlined by MDBA in correspondence with MLDRIN)
- Impacts on culturally significant species
- Impacts on culturally significant sites, landscapes and cultural heritage

3) Identify and resource strategies to address any cultural impacts. The MDBA and Basin States must work with MLDRIN and other relevant organisations to develop and implement strategies that can address any identified impacts. These may include

- Improved management and delivery of operational water or planned environmental water to ameliorate any impacts
- Monitoring of culturally significant species and locations that may be impacted by SDL Adjustment
- Support for acquisition of water by Aboriginal organisations to allow affected groups to mitigate potential impacts through culturally-informed water delivery

4) The MDBA and Basin States should identify opportunities to support Traditional Owner organisations to acquire water entitlements from the consumptive pool in order to support our social, economic, cultural and environmental objectives.

¹² As outlined in the *Akwe:Kon Guidelines* Part II, 6. (a) p. 6.