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29 May 2015

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Sent by email: chayna.moldrich@dpi.nsw.gov.au

Dear Chayna

Draft NSW Prerequisite Policy Measures – Implementation Plan

Many thanks for your informative presentation outlining the Draft NSW Prerequisite Policy Measures (**PPMs**) and proposed implementation plan for each of these measures (**Draft Plan**). We enjoyed meeting both you and your colleagues, and look forward to further engagement as the policy process and eventual implementation for PPMs unfolds between now and 30 June 2016.

We note, however, that details of the eight supply measure sites where PPMs are to be implemented are yet to be published on your website. As discussed during our meeting, it is difficult to properly comment on the suitability of PPM options for each location in the absence of any information about those locations. We certainly understand that this is a complex process involving several units within NOW, however we seek further details regarding the supply measure sites in order to provide comprehensive feedback during the public exhibition period.

In the absence of this background information, our comments will focus on following areas:

1. Legal considerations
2. Principles for implementing the PPMs in NSW
3. Options for implementing environmental flow reuse
4. Options for piggybacking.

1. Legal considerations

As PPMs contribute to supply measures contributions which in effect increase SDLs, they are required to comply with certain provisions in the Basin Plan, and in turn the *Water Act 2007* (**Water Act**).

We note that adjustments to SDLs based on supply measures must result in two outcomes. First, 'there are to be equivalent environmental outcomes', with equivalent outcomes measured against the 'benchmark environmental outcomes.' Second, supply measures must avoid 'detrimental impacts on reliability of supply of water to the holders of water access rights that are not offset or negated.' [1]

[1] Basin Plan, 7.15 (1).

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Of further consideration are the management objectives and outcomes to be achieved by the Basin Plan, outlined in Chapter 5. Relevantly, these include environmental objectives which are to give rise to a specific environmental outcome, namely 'the restoration and protection of water-dependent ecosystems and ecosystem functions in the Murray-Darling Basin with strengthened resilience to a changing climate.'[2]

We note that this outcome is to be balanced with other outcomes, including 'greater certainty of access to Basin water resources.'[3] However we emphasise that this balance cannot be achieved – legally or practically – if consumptive use is protected at the expense of restoring and protecting water-dependent ecosystems and ecosystem functions.

Significantly, the Water Act, with which the Basin Plan must legally comply, states that SDLs 'must reflect an environmentally sustainable level of take' (**ESLT**).[4] As you would know, an ESLT is defined as the level of take from a water resource which if exceeded, would compromise the resource's key environmental assets, its ecosystem functions, its productive base or key environmental outcomes.[5] While we acknowledge that the various objects of the Act must be balanced,[6] as must the mix of elements underpinning the 'purpose of the Basin Plan',[7] it is our view that these are ultimately secondary to the implementation of an ESLT.

Finally, we cannot overestimate the importance of ensuring environmental watering under the Basin Plan implements – as per the requirements of the Water Act – the relevant environmental treaties to which Australia is signatory. These include the Ramsar Convention, the Convention on Biological Diversity, and various bilateral treaties protecting migratory birds.[8]

2. Principles for implementing the PPMs in NSW

EDO NSW wishes to raise concerns with respect to two of the principles underpinning PPMs.

NSW will implement PPMs to the extent that third party impacts relating to both physical and reliability impacts can be negated or offset, or are acceptable to the community.

According to the Draft Plan, this principle is based on the clause reproduced above, according to which supply measures must have 'no detrimental impacts on reliability of supply of water to the holders of water access rights that are not offset or negated.'

'No detrimental impacts on reliability of supply' does not equate to 'no third party impacts' for the following reasons.

In the first instance, 'no detrimental impacts' is far narrower than 'no third party impacts'.

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[2] Basin Plan, 5.03 (1), (2).
[3] Basin Plan, 5.05 (2) (c).
[4] *Water Act 2007*, s. 23.
[5] *Water Act 2007*, s. 4, definitions.
[6] *Water Act 2007*, s. 3.
[7] *Water Act 2007*, s. 20.
[8] *Water Act 2007*, s. 20. See also s. 3, objects.

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Second, what actually constitutes a 'detrimental impact' in this context is debatable. We would argue that an analysis of this issue must start with the clear fact that reliability of supply *is not absolute or guaranteed*. Rather, it is impacted by a variety of factors, the most important of which are rainfall, the quantity of water in storages and the State's allocation policies. The security level of a given licence will also influence reliability of supply, particularly during drier periods.

It is therefore apparent that supply is inherently variable, being continuously subject to the 'impacts' outlined above. This being the case, it is difficult – indeed impossible - to argue that environmental watering has a more detrimental impact on reliability of supply than these other factors. In fact, we would argue the reverse.

Furthermore, an impact will not always amount to a 'detrimental impact.' Certainly, protecting environmental water as it moves through the system may have an impact on other users, but properly managed this impact will not be unreasonable. It will certainly be far less detrimental than low rainfall or low storage levels.

Conversely, failing to protect environmental water may result in a short-term net benefit to other users at the expense of Basin health. This benefit may also result in breaches of the Water Act and/or Basin Plan if it occurs at the expense of statutory obligations (such as the reinstatement of an ESLT).

NSW will devise PPMs that facilitate the delivery of environmental water through the system.

According to the Draft Plan,

> *NSW's focus is on improving flexibility in the delivery of environmental water to achieve the outcomes sought under the Basin Plan. This is not the same as protecting licensed water from extraction through the system.*

Building on our previous comments, failure to protect environmental water as it moves through the system may result in breaches of the Water Act and/or Basin Plan.

We therefore strongly support changes to rules to ensure that legislated environmental outcomes are achieved.

In making this recommendation, we note that rules can and are changed from time to time, and that these changes may impact certain users. For example, changes in 2012 to the Hunter Unregulated and Alluvial Water Sharing Plan exempting mining companies from cease-to-pump rules very likely had an impact on farmers in the area.

Furthermore and as with other legal instruments, water sharing plans and rules are subject to the will of Parliament and to that extent are not impermeable. Indeed, the *Water Management Act 2000* (**WM Act**) empowers the Minister to change a water sharing plan by non-disallowable order,[9] rather than a disallowable legislative instrument or Bill. This certainly implies a desire to facilitate, rather than hinder, changes to water sharing plans.

[9] *Water Management Act 2000,* s. 45 (1) (a). See also *Interpretation Act 1987,* ss. 21, 41.

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3. Options for implementing environmental flow reuse

EDO NSW supports laws and policies which provide environmental water with the necessary protection to meet the environmental outcomes mandated in the Water Act and Basin Plan. We are strongly opposed to any options which place undue emphasis on so-called 'third party impacts' at the expense of these outcomes.

Accordingly, we offer in principle support for the following options for multi-site watering, subject to certain conditions being met. Furthermore, we understand that some of these options may be better suited to certain supply measure sites. We look forward to providing more detailed comments when this information becomes available.

Shepherding – unregulated system

As outlined in our 2012 submission responding to *Proposed arrangements for shepherding environmental water in NSW*, we support this option subject to environmental water being protected from consumptive use as it moves through the system (amongst other stipulated protections). This submission is attached as a PDF document at the end of our letter.

Downstream debiting – regulated system

EDO NSW strongly supports this option. In guaranteeing delivery of environmental water, it is unlikely to breach either the Water Act or Basin Plan.

We are mindful of the fact that the current system does not provide for a licence holder to require a release from a dam to meet a water order. This is no doubt due to the fact that historically, regulated systems and the laws and rules that govern them were designed to meet the needs of consumptive users, not the environment.

While the WM Act already contemplates and provides for environmental watering, it is arguable that water management under the Basin Plan requires further amendments to the Act designed to maximise the use of environmental water, including a right to require the release of water.

We are also confident that appropriate risk management measures can be built into any amendments in order to avoid unduly prejudicing water operators.

Combination debiting – regulated

EDO NSW supports this option subject to losses excluding water pumped for consumptive use. Again, we propose rule amendments to optimise the use of environmental water as it moves through the system.

Return flow credits – regulated

We note that the WM Act already provides for the creation of 'return flow rules' which enable a user to recredit water to their account.[10] To that end, the Act 'ruled in' this option despite

[10] *Water Management Act 2000*, ss. 75, 76.

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the possibility that it may impact on other users. Again, we note that water supply and in turn the WM Act cannot be construed as seeking to avoid *all impacts* on users of consumptive water. Nevertheless, we are mindful that accurately estimating the timing and volume of releases is desirable both environmentally and socially. We are also mindful that this option (indeed all options) may be more suited to certain supply sites than others.

4. Options for implementing piggybacking

EDO NSW submits that the ability to call for the release of held water during an unregulated flow event ('piggybacking') is an important environmental tool. We would argue that contrary to the comments in the Executive Summary, achieving a 'peak outcome' is entirely consistent with ensuring ecological targets for certain indicator sites, including Ramsar-listed wetlands, are met.

Please do not hesitate to contact me if you have any further inquiries.

Yours sincerely,
EDO NSW

Dr Emma Carmody
Policy and Law Reform Solicitor

EDO NSW Sub
Shepherding July 201