

27 June 2017

Lifeblood Alliance
C/- Juliet Lefeuvre
Healthy Rivers Campaigner
Environment Victoria
Level 2, 60 Leicester Street,
Carlton, Victoria 3053

Dear Juliet

Notification and proposal requirements – adjustment mechanism

1. You have requested advice regarding the notification requirements for the adjustment mechanism. Specifically, you have sought advice as to whether it is necessary:
 - For the Basin Officials Committee (**BOC**) to notify the Murray-Darling Basin Authority (**MDBA**) of both supply and efficiency measures by 30 June 2017, or whether it is acceptable to only notify the MDBA in relation to supply measures by this date as only supply measures must achieve ‘equivalent environmental outcomes’;
 - For the MDBA to propose an adjustment figure between 30 June 2017 and 15 December 2017 that exceeds the 5% limits of change rule, on the basis that this limit will be met by the adjustment mechanism reconciliation date of 30 June 2024;
 - For the details of proposed efficiency measures to be notified.
2. In order to answer this question, we have examined Parts 1 and 2 of Chapter 7 of the Basin Plan and s.23A of the *Water Act 2007* (Cth) (**Water Act**).

Executive Summary

3. Parts 1 and 2 of Chapter 7 of the Basin Plan may be divided into three core areas: the *notification* of supply and efficiency measures by the BOC and Commonwealth/Basin States; a *determination* by the MDBA of the proposed adjustment volume(s); and a *proposal* by the MDBA to make an adjustment under s. 23A of the Water Act.
4. The BOC is required to notify the MDBA of any relevant supply and efficiency measure projects by 30 June 2017. The MDBA has until 30 June 2017 to determine the supply measure contribution and 15 December 2017 to determine the overall adjustment amount for 2017. The MDBA must also propose an adjustment under s. 23A of the Water Act by 15 December 2017.
5. Note that the determination and proposal made by the MDBA by 15 December 2017 may only be based on projects notified by the BOC by 30 June 2017.
6. Additional efficiency measures may be notified by the Commonwealth or relevant Basin State between 30 June 2017 and 31 December 2023. However, these additional measures may only be taken into account for the purposes of reconciling adjustments by 30 June 2024. They may not be used to inform the determination and proposal to be made by the MDBA by 15 December 2017.

7. Any proposal put forward by the MDBA to make an adjustment under s. 23A of the Water Act must respect the 5% limits of change rule.
8. The specific details of efficiency measures must be notified, as set out in the body of this advice.
9. This advice also contains details of the public exhibition requirements for the adjustment mechanism, as well as the information that must be included in a publicly available register of notified and additional measures.

Background

10. Parts 1 and 2 of Chapter 7 of the Basin Plan may be divided into three core areas: notification of supply and efficiency measures; determination to propose adjustments; and proposal of adjustments. The relationship between these three areas will be discussed below, as will the 5% limits of change rule.

Notification

11. Part 2 sets out – amongst other things - the process that the BOC must follow when notifying the MDBA of supply and/or efficiency measures.
12. Chapter 7 includes three notification deadlines: 30 June 2016 (**First Notification**); 30 June 2017 (**Second Notification**); and 30 June 2017 to 31 December 2023 (**Third Notification**). The First Notification is no longer relevant. As such, this advice will discuss the Second and Third Notifications, respectively.
13. Section 7.12(1A) provides for the Second Notification and stipulates that the BOC has until 30 June 2017¹ to ‘notify the Authority of 1 or more supply measures or efficiency measures that, in the view of the Committee, should be taken into account in proposing adjustments under sections 7.10 or 7.11.’
14. Section 7.12(2) provides for the Third Notification, specifying that *additional efficiency measures* may be notified by the Commonwealth or relevant Basin State between 30 June 2017 and 31 December 2023 if the notifying party is of the view that they should be taken into account by the MDBA when proposing adjustments under s. 7.11.²
15. To clarify, efficiency measures notified under a Third Notification may only be taken into account for the purposes of s. 7.11 (which concerns the reconciliation of adjustments by 30 June 2024). They MAY NOT be used to inform a proposal under 7.10 (which must be made as soon as practicable after 30 June 2017 and no later than 15 December 2017). The proposal process will be discussed in more detail, below.
16. A measure may only be notified if it satisfies the following three criteria (**mandatory criteria**): it will enter into operation by 30 June 2024; it is not an anticipated measure;³ the person (Basin State or Commonwealth) funding or undertaking the measure agrees with the notification.⁴

¹ Basin Plan, cl. 7.12(1A).

² Basin Plan, 7.12(2).

³ Defined as a measure that is part of the benchmark conditions of development: Basin Plan, 7.02.

⁴ Basin Plan, 7.12(3).

17. The notification must include, for each measure, the following four elements (**mandatory elements**): the details of the measure; the surface water SDL resource units affected by the measure; details of any relevant constraints measure; the date on which the measure entered into, or will enter into, operation.⁵ Up until 31 December 2023, the following amendment provisions apply to notified measures (**amendment details**):

- The details of notifications must be amended as soon as practicable after any of the aforementioned elements have changed.⁶
- A notification must be amended to withdraw a measure if the measure will not enter into operation by 30 June 2024.⁷

Determination

18. The MDBA is required to make a determination regarding adjustment amounts for the purpose of s. 7.10 by 15 December 2017 (**First Determination**) and for the purposes of 7.11 by 30 June 2024 (**Second Determination**). It may only make such determinations if the following conditions are met:

- It has considered advice from the BOC and submissions from members of the public;
- It has satisfied the criteria set out in s.7.17 concerning equivalent environmental outcomes (for supply measures) and neutral or improved socio-economic outcomes (for efficiency measures).⁸

19. The MDBA must make a determination regarding supply contributions (that is, the amount) by 30 June 2017.⁹ However, and as noted above, it has until 15 December 2017 to **propose** an actual adjustment under s. 23A of the Act based on supply and/or efficiency measures.

Proposal to make an adjustment under s. 23A

20. Section 7.10 sets out the requirements for the **First Proposal**. Specifically, it provides for the MDBA to make the First determination and then 'propose accordingly' an adjustment under s. 23A of the Water Act for each affected SDL unit and for all affected units. As noted above, this must be done 'as soon as practicable after 30 June 2017 and no later than 15 December 2017.' The First Determination and First Proposal must result from the measures included in the Second Notification (that is, the measures notified by 30 June 2017).

21. Section 7.11 sets out the requirements for the **Second Proposal**. A Second Proposal may be made by the MDBA by 30 June 2024 where it appears to the Authority that, as at that date, the First Determination will need to be varied to accurately reflect:

- supply and efficiency measures notified under the Second Notification (i.e. by 30 June 2017); and
- any additional efficiency measures notified under the Third Notification (i.e. between 30 June 2017 and 31 December 2023).

⁵ Basin Plan, 7.12(4).

⁶ Basin Plan, 7.12(5).

⁷ Basin Plan, 7.12(6).

⁸ Basin Plan, ss. 7.20, 7.21.

⁹ Basin Plan, s. 7.20(2).

22. We note that the MDBA must advise the Minister on the implications of a proposal for any declared Ramsar wetland.¹⁰

Limits of change rule

23. Any individual proposed adjustment made under the First Proposal and/or Second Proposal must respect the 5% limits of change rule. This is a function of s. 23A(4) of the Water Act and ss. 7.19 and 7.20(4) of the Basin Plan.

24. To clarify, s. 7.20(4) requires an adjustment proposal to be ‘in the form of a formula as a function of time, either varying continuously or changing at specified times, that reflects the changes up until 30 June 2024 of...the relevant efficiency contributions and the operation of [the 5% rule].’ This in essence means that while a proposal may set out times at which the adjustment figure will change between 2017 and mid-2024, those changes must at all times stay within the 5% limits of change rule.

Public consultation requirements

25. Section 23A(2)(d) states that the Basin Plan must include a requirement for the MDBA not to propose an adjustment under s. 23A(1) without:

- (i) *providing the public with an opportunity to make submissions on the proposed adjustment; and*
- (ii) *providing a reasonable amount of time for those submissions to be made and **considered by the Authority** [our emphasis].*

26. We note that s. 7.06 of the Basin Plan provides for public consultation in relation to proposed adjustments. Specifically, before finalising a determination of amounts of proposed adjustments, the MDBA must ‘publish a draft determination of the proposed adjustments on its website, with an account of how they were arrived at and the reasons for the decisions made in arriving at the draft determination...’. It must then provide a minimum of one month for the public to make submissions regarding the draft determination.¹¹

27. Furthermore, the MDBA must take these submissions into account before making the First and Second Determinations, respectively, pursuant to ss. 7.10(1)(a) and 7.11(1)(a).¹²

Relationship between various requirements under Chapter 7

28. To clarify, a notification by the BOC and/or Basin State or Commonwealth informs the determination by the MDBA of an adjustment amount,¹³ while the proposal to make the adjustment under s. 23A of the Water Act must be based on the MDBA’s determination.¹⁴ Any individual proposed adjustment must respect the 5% limits of change rule. As noted above, this is a function of s. 23A(4) of the Water Act and ss. 7.19 and 7.20(4) of the Basin Plan.

29. The following table clarifies these relationships and the dates by which certain events must take place.

¹⁰ Basin Plan, 7.10(2); 7.11(2).

¹¹ Basin Plan, s. 7.06.

¹² Basin Plan, ss. 7.20(1)(a), 7.21(1)(a).

¹³ Basin Plan, ss. 7.10(1)(a); 7.11(1)(a).

¹⁴ Basin Plan, ss. 7.10(1)(b); 7.11(1)(b).

| 2017 | 2024 |
|--|---|
| <p>Second Notification regarding supply and efficiency measures to be made by 30 June 2017 (s. 7.12(1A)).</p> <p style="text-align: center;">↓</p> <p>Draft First Determination regarding amounts is put on public exhibition for at least one month (s. 7.06).</p> <p style="text-align: center;">↓</p> <p>On the basis of the measures notified under the Second Notification, First Determination regarding overall adjustment amounts to be made by 15 December 2017 (s. 7.10(1)(a)).</p> <p>Note that supply measure contributions must be determined by 30 June 2017 (s. 7.20(2)).</p> <p style="text-align: center;">↓</p> <p>On the basis of First Determination regarding adjustment amounts, First Proposal to adjust the 2,750GL under s. 23A of the Water Act to be made between 30 June 2017 and 15 December 2017. (s.7.10(1)(b)).</p> <p style="text-align: center;">↓</p> <p>First Proposal must respect the 5% limits of change rule (ss. 7.19, 7.20(4)(b) and s. 23A(4) of Water Act).</p> <p style="text-align: center;">↓</p> <p>An amendment to the Basin Plan must then be prepared under s. 23B of the Water Act and laid before Parliament.</p> | <p>Third Notification regarding additional efficiency measures may be made between 30 June 2017 and 31 December 2023 (s. 7.12(2)).</p> <p style="text-align: center;">↓</p> <p>On the basis of any variations to the First Determination and efficiency measures notified under the Third Notification, a Second Determination regarding adjustment amounts may be made by 30 June 2024 (s. 7.11(1)(a)). This is to be made after Draft Second Determination regarding amounts is put on public exhibition for at least one month (s. 7.06).</p> <p style="text-align: center;">↓</p> <p>On the basis of the Second Determination, a Second Proposal to amend the adjustment amount under s. 23A of the Water Act to be made by 30 June 2024.</p> <p style="text-align: center;">↓</p> <p>Second Proposal must respect the 5% limits of change rule (ss. 7.19, 7.20(4)(b) and s. 23A(4) of Water Act).</p> <p style="text-align: center;">↓</p> <p>An amendment to the Basin Plan must then be prepared under s. 23B of the Water Act and laid before Parliament.</p> |

Requirement to keep register

30. For the sake of completeness, we note that the MDBA must keep a register of notified measures and additional efficiency measures. This register must be published on the MDBA's website¹⁵ and must include the following information:¹⁶

¹⁵ Basin Plan, 7.13(3).

¹⁶ Basin Plan, 7.13.

- The notification by the BOC;
- Where relevant, any notification of additional efficiency measures by the Commonwealth or Basin State;
- The mandatory criteria;
- The mandatory elements;
- Where relevant, any amendment details;¹⁷
- The following information in relation to efficiency measures:
 - For each surface water SDL unit, the efficiency entitlements and additional efficiency entitlements for the unit from time to time;
 - The long-term average quantity of water that is available under the efficiency entitlements for the unit from time to time;
 - The long-term average quantity of water that is available under the additional efficiency entitlements for the unit from time to time;
- If an adjustment is likely to be proposed, estimates of the likely supply contribution, the likely efficiency contribution and overall SDL adjustment amount, and to the extent practicable, the likely SDL adjustment amounts for the affected units.

Please do not hesitate to contact us to discuss this advice or any matters arising from this advice.

Yours sincerely,
EDO NSW

Dr Emma Carmody
Policy and Law Reform Solicitor

Our Ref: 1693

¹⁷ This and the preceding dot points are all of the matters outlined in 7.12.