

9 December 2016

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To whom it may concern

### **Gwydir Water Resource Plan Surface Water – Issues Paper**

Thank you for the opportunity to comment on the Gwydir Water Resource Plan (Surface Water) – Issues Paper (**Gwydir Issues Paper**).

EDO NSW is a community legal centre specialising in public interest environmental law. We have extensive experience advising on all aspects of the *Water Management Act 2000 (WM Act)*, *Water Act 2007 (Water Act)* and Basin Plan.

We have also actively engaged in all elements of the Basin Plan development and implementation process. We have clients – including farmers, community groups and conservation groups – many of whom are located in the Basin and who are particularly concerned about the implementation process, including the development of water resource plans. The issues raised in this submission are therefore representative of this client base, including those individuals who live in the Gwydir region.

This submission is divided into four parts. Parts 1 and 2 will address specific matters raised in the Gwydir Issues Paper. Part 3 will briefly discuss the Murray-Darling Basin Authority's (**MDBA's**) position statements regarding water resource plans. Part 4 summarises our recommendations.

#### **Part 1 - Water resource plans**

##### ***What the final water resource plan will look like (1.3)***

We note that the Gwydir Issues Paper states that 'NSW water resource plans will meet the minimum requirements of the Commonwealth *Water Act 2007* and Basin Plan.'<sup>1</sup> EDO NSW is concerned that:

- the focus is on meeting 'minimum requirements' rather than on fulsome implementation of the Water Act and Basin Plan; and

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<sup>1</sup> Gwydir Issues Paper, p. 1.

- the NSW Government has not clarified what constitutes ‘minimum requirements’. This is particularly concerning given that the manner in which the Government interprets these requirements will have implications for the development of water resource plans across the entire State.

### ***Consultation and stakeholder input (1.6)***

EDO NSW is concerned that the Gwydir Issues Paper does not include a clear definition of ‘stakeholder’ or outline the differing roles of Government stakeholders. For example, the Office of Environment and Heritage (**OEH**) should be clearly defined as an ‘environmental stakeholder’ on account of its environmental water holdings in the catchment. Further, it is crucial that wetland landholders have a representative role the ECA Operations Advisory Group.

## **Part 2 - Issues to be addressed in water resource plan development**

### ***Supporting Aboriginal values and uses (3.2)***

A number of EDO NSW’s Aboriginal clients have expressed dissatisfaction with the water resource plan development process. For example, one Aboriginal client group with a specific mandate to assist in the development of water resource plans has expressed concern regarding:

- the proposal to disband the Aboriginal Water Initiative;
- DPI Water’s failure to provide regular updates regarding the water resource plan development process and meet with the group;
- the absence of single Aboriginal representative on any of the Stakeholder Advisory Panels (**SAPs**).

EDO NSW submits that these are inconsistent with the stated intention in the Gwydir Issues Paper to support Aboriginal values and uses. Further, the NSW Government’s intention to merely meet the ‘minimum’ requirements of the Water Act and Basin Plan stands to undermine cultural flows and activities in the Gwydir catchment.

### ***Improving water sharing (3.3)***

The Basin Plan includes a range of requirements regarding the contents and outcomes of water resource plans. Relevantly, the Basin Plan states that a water resource plan:

- ‘must ensure that there is no net reduction in the protection of planned environmental water from the protection provided for under State water management law immediately before the commencement of the Basin Plan;<sup>2</sup> and

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<sup>2</sup> Basin Plan, 10.28.

- ‘must be prepared having regard to whether it is necessary for it to include rules which ensure that the operation of the plan does not compromise the meeting of environmental watering requirements of priority environmental assets and priority ecosystem functions’.<sup>3</sup>

EDO NSW is concerned that a number of the proposals included in the Gwydir Issues Paper may result in breaches of one or both of these requirements. These concerns are addressed in turn:

- Environmental Contingency Allowance (**ECA**) - EDO NSW opposes any proposal to synchronise ECA water management account rules with those for other general security licences. Reducing carryover from 200% to 150% may jeopardise environmental outcomes and effective compliance with Australia’s international obligations under the Ramsar Convention. Further to this point, it is imperative that the current prohibition on selling or trading ECA account water be maintained in order to maximise environmental outcomes.
- Supplementary water - EDO NSW opposes any changes to the ‘3T minimum flow rule’ if providing greater supplementary access to licence holders would increase long-term diversions, decrease reliability for environmental licence holders and compromise Australia’s international obligations under the Ramsar Convention.
- Increased flexibility for general security licence holders - EDO NSW opposes any changes to limits on annual allocation due to the potential to increase long-term diversions, which again could in turn compromise Australia’s international obligations under the Ramsar Convention.
- Reviewing mandatory conditions on licences and approvals - while EDO NSW is critical of the existing ‘self-reporting’ system of compliance, we are concerned that the impending review of mandatory conditions on licences and approvals will further weaken - rather than strengthen - reporting and compliance requirements. EDO NSW strongly supports full implementation of the National Framework for Non-urban Water Metering<sup>4</sup>, including telemetry. We submit that this is the only way to guarantee compliance and in turn the efficacy of the sustainable diversion limits (**SDLs**) set under the Basin Plan.

### ***Environmental watering (3.5)***

We wish to make three comments regarding environmental watering.

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<sup>3</sup> Basin Plan, 10.17.

<sup>4</sup> Commonwealth of Australia *National Framework for Non-urban Water Metering: Policy Paper*, 2009. Elements of this Framework have been or are in the process of being, rolled out. See for example: <http://www.waternsw.com.au/projects/metering/southern-valleys-metering-project>.

This is vital given the alleged prevalence of outdated or inaccurate meters and that meter reading is conducted and reported by entitlement holders themselves.

First, we would like to reiterate the comments made above under ‘Improving water sharing’. Specifically, we note that any changes to environmental watering arrangements must comply with the requirements of the Basin Plan, including requirements set out in clauses 10.17 and 10.28 (cited above).

Second, EDO NSW commented on NSW’s Draft Prerequisite Policy Plan. As our concerns and recommendations remain the same, we have attached this letter to our submission at **Annex A**. In short, we strongly support the use of rules to protect environmental water and oppose any interpretation of the Basin Plan (including cll. 6.14 and 7.15) which results in decreased or insufficient protection of environmental water and consequently *increased* reliability of access for other licence holders.

Third, the Gwydir Issues Paper indicates that ‘DPI Water is also investigating and developing new tools to increase transparency and availability of environmental water use.’ EDO NSW strongly supports increased transparency however submits that this must apply to all water use and users. Currently, the absence of accurate metering and telemetry means that there is little publicly available data regarding the true volume of extractive use in a given water resource area, and whether all use is legal. Compliance is further hampered by inadequate resourcing. For example, we understand that there are currently two compliance officers for the entire State.

Failure to address these issues may result in breaches of the Water Act, Basin Plan and Australia’s international obligations under the Ramsar Convention.

### ***Managing risks - risk of insufficient water damaging ecological values (3.6)***

In assessing risks to ecological values arising from extractive use and regulation of flows, ‘DPI Water has made assumptions about the use of water by licence holders because of the current lack of actual water take information on these rivers. It is *likely that actual water take is less than the assumed amount/volume (our emphasis)*.’<sup>5</sup>

We note that annual Water Balance Reports for the Gwydir River indicate that a percentage of the ‘unaccounted difference’ between legal diversions and actual diversions may be attributed to water theft.<sup>6</sup> As such, we seek urgent clarification from DPI Water as to whether assumptions about water use in the Gwydir water resource plan area include likely unlawful diversions. If they do not, then it is unlikely that ‘actual water take is less than the assumed amount/volume.’

### ***Managing risk - risks to water availability arising from climate change (3.7)***

The approach outlined in the Gwydir Issues Paper is both lacking in detail and assumes that the impacts of climate change can be managed by adjusting water allocations on a needs basis. This problematic for two central reasons.

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<sup>5</sup> Gwydir Issues Paper, p. 19.

<sup>6</sup> See for example: [http://www.waternsw.com.au/\\_data/assets/pdf\\_file/0011/118937/Gwydir.pdf](http://www.waternsw.com.au/_data/assets/pdf_file/0011/118937/Gwydir.pdf). We note that after 2011-12, these reports remove the use of the word ‘water theft’ from the definition of ‘unaccounted difference’. This does not mean water theft was eliminated in NSW after 2011.

First, pre-emptive reductions in water consumption are necessary if water resources (including those covered by the Gwydir water resource plan) are to recover from historic over-exaction and build the resilience required to successfully adapt to climate change.<sup>7</sup>

Second, it has been argued that '[r]eallocation of water for climate change will get harder, not easier, as funds from the Australian Government's multi-billion dollar Water for the Future Package are exhausted and if water availability declines.'<sup>8</sup> While the SDLs outlined in the Basin Plan are based on the historic climate record, NSW is nonetheless placing all water users (both consumptive and environmental) at risk by failing to adequately prepare for climate change. This issue must be addressed by both the Commonwealth and Basin States before water resource plans are accredited in mid-2019. Failure to do so may give rise to breaches under one or more of the environmental treaties to which Australia is signatory, and by way of extension, the Water Act.

### ***Managing in extreme events (3.8)***

EDO NSW notes that between 2006 and 2010, many water sharing plans in the Southern Basin were suspended, thereby exacerbating the impact of water shortages on the environment. For example, the CSIRO has indicated that during the Millennium drought 'environmental flows across the Basin declined by about four times as much as reductions in surface water extractions by irrigations.'<sup>9</sup>

We submit that it is both practically and legally<sup>10</sup> possible to maintain town water supply during drought *and* ensure equitable water sharing arrangements between other forms of consumptive use and the environment.

We therefore strongly recommend that a range of options be fully explored when developing the state-wide approach to the management of extreme events. This must include an assessment of the likely impact of diversions for irrigation - both lawful and lawful - on critical human water needs in the Gwydir water resource area.

### **Part 3 - MDBA Position Statements regarding water resource plans**

EDO NSW has identified legal issues with a number of the MDBA's position statements regarding water resource plans.<sup>11</sup> NSW should therefore ensure that its water resource plans are in fact consistent with the requirements of the Water Act and Basin Plan.

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<sup>7</sup> Pittock, J and Grafton, R. Quentin, Williams, J, *The Murray-Darling Basin Plan fails to adequately deal with climate change*, Water, January 2015, pp. 27.

<sup>8</sup> Ibid, p. 29.

<sup>9</sup> Grafton, R. Quentin et al, Water Planning and Hydro-Climatic Change in the Murray-Darling Basin, Australia, *Ambio*, 2014 Dec; 43(8), p. 1084. Citing CSIRO, *Water availability in the Murray-Darling Basin. A report to the Australian Government from the CSIRO Murray-Darling Basin Sustainable Yields Project*. CSIRO, Australia, 2008 p. 59.

<sup>10</sup> That is, consistent with the Water Act, Part 2A and Basin Plan, Chapter 11 (both of which concern critical human water needs).

<sup>11</sup> <http://www.mdba.gov.au/publications/mdba-reports/water-resource-plan-requirements>

## **Part 4 – Summary of recommendations**

1. **Issue 1.3:** The NSW Government must provide further, explicit details as to what constitutes the ‘minimum requirements’ of the Water Act and Basin Plan with respect to the contents and outcomes of water resource plans. This information should be made publicly available without further delay in order to ensure that the water resource plan development process is transparent and legally rigorous.
2. **Issue 1.6:**
  - a. The Office of Environment and Heritage (**OEH**) must be clearly defined as an ‘environmental stakeholder’ on account of its environmental water holdings in the catchment.
  - b. Wetland landholders must have a representative role the ECA Operations Advisory Group.
3. **Issue 3.2:**
  - a. The NSW Government must take steps to address the concerns raised by our Aboriginal clients both generally and in relation to the development of the Gwydir water resource plan. These concerns are specified in the body of this submission.
  - b. The NSW Government must familiarise itself with the recommendations set out in a report by the Murray Lower Darling Indigenous Nations entitled ‘Ensuring equality in the development and assessment of water resource plans.’<sup>12</sup>
4. **Issue 3.3:**
  - a. Any changes to environmental watering and licencing arrangements must be consistent with the Water Act and Basin Plan, in particular clauses 10.17 and 10.28 of the Plan.
  - b. Carryover for held environmental water must remain at 200%.
  - c. The 3T minimum flow rule must remain unchanged.
  - d. Annual allocations must remain unchanged.
  - e. The National Framework for Non-urban Water Metering<sup>13</sup>, including telemetry, should be fully implemented across NSW in order to guarantee compliance and in turn the efficacy of the sustainable diversion limits (**SDLs**) set under the Basin Plan.

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<sup>12</sup> [http://www.mldrin.org.au/wp-content/uploads/2013/06/MLDRIN\\_WRP\\_DiscussionPaper\\_May2016.pdf](http://www.mldrin.org.au/wp-content/uploads/2013/06/MLDRIN_WRP_DiscussionPaper_May2016.pdf)

<sup>13</sup> Commonwealth of Australia *National Framework for Non-urban Water Metering: Policy Paper*, 2009. Elements of this Framework have been or are in the process of being, rolled out. See for example: <http://www.waternsw.com.au/projects/metering/southern-valleys-metering-project>. This is vital given the alleged prevalence of outdated or inaccurate meters and that meter reading is conducted and reported by entitlement holders themselves. See for example : Holley, Cameron and Sinclair, Darren. Compliance and enforcement of water licences in NSW: limitations in law, policy and institutions. *Australasian Journal of Natural Resources Law and Policy*, Vol. 15, No. 2, 2012: 149-189.

**5. Issue 3.5:**

- a. Any changes to environmental watering must be consistent with the Water Act and Basin Plan, in particular clauses 10.17 and 10.28 of the Plan.
- b. PPMs must be implemented consistently with the requirements of the Water Act and Basin Plan, as per our submission attached at **Annex A**. We strongly support the use of rules to protect environmental water and oppose any interpretation of the Basin Plan (including clauses 6.14 and 7.15) which results in decreased or insufficient protection of environmental water and consequently *increased* reliability of access for other licence holders.
- c. EDO NSW strongly supports increased transparency in relation to all water use and users. This requires full implementation of the National Framework for Non-urban Water Metering and a significant increase in the number of compliance officers employed by the NSW Government.

**6. Issue 3.6:**

- a. The NSW must clarify whether their assumptions about water use in the Gwydir water resource plan area include likely unlawful diversions. If they do not, then it is unlikely that 'actual water take is less than the assumed amount/volume.'
- b. The issue of climate change must be addressed by the Commonwealth and NSW Governments before water resource plans are accredited in mid-2019. Failure to do so may give rise to breaches under one or more of the environmental treaties to which Australia is signatory, and by way of extension, the Water Act. It may also increase the vulnerability of all water users to the future impacts of climate change.

**7. Issue 3.8:** The state-wide approach to the management of extreme events must promote – to the extent possible - equitable water sharing arrangements between consumptive users and the environment. This must include an assessment of the likely impact of diversions for irrigation - both lawful and lawful - on critical human water needs in the Gwydir water resource area.

**8. MDBA position statements:** As EDO NSW has identified a number of legal issues with the MDBA's position statements, we strongly recommend that the NSW Government take steps to ensure that its water resource plans are in fact consistent with the requirements of the Water Act and Basin Plan.

Please do not hesitate to contact us if you have any questions regarding this submission.

Yours sincerely,  
**EDO NSW**



Dr Emma Carmody  
Policy and Law Reform Solicitor

## ANNEX A

29 May 2015

Chayna Moldrich  
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Office of Water  
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Sent by email: [chayna.moldrich@dpi.nsw.gov.au](mailto: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.’<sup>14</sup>

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.’<sup>15</sup>

We note that this outcome is to be balanced with other outcomes, including ‘greater certainty of access to Basin water resources.’<sup>16</sup> 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).<sup>17</sup> 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.<sup>18</sup> While we acknowledge that the various objects of the Act must be balanced,<sup>19</sup> as must the mix of elements underpinning the ‘purpose of the Basin Plan’,<sup>20</sup> 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.<sup>21</sup>

## **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.***

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<sup>14</sup> Basin Plan, 7.15 (1).

<sup>15</sup> Basin Plan, 5.03 (1), (2).

<sup>16</sup> Basin Plan, 5.05 (2) (c).

<sup>17</sup> Water Act 2007, s. 23.

<sup>18</sup> Water Act 2007, s. 4, definitions.

<sup>19</sup> Water Act 2007, s. 3.

<sup>20</sup> Water Act 2007, s. 20.

<sup>21</sup> Water Act 2007, s. 20. See also s. 3, objects.

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’.

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,<sup>22</sup> rather than a disallowable legislative instrument or Bill. This certainly implies a desire to facilitate, rather than hinder, changes to water sharing plans.

### **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.

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<sup>22</sup> *Water Management Act 2000*, s. 45 (1) (a). See also *Interpretation Act 1987*, ss. 21, 41.

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.<sup>23</sup> To that end, the Act ‘ruled in’ this option despite 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

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<sup>23</sup> *Water Management Act 2000*, ss. 75, 76.