



A Community Legal Centre specialising
in public interest environmental law

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Murray Darling Basin Authority

By email: engagement@mdba.gov.au

PROPOSED MURRAY DARLING BASIN PLAN

The Environmental Defenders Office of South Australia (EDO) is a community legal centre with over 15 years' experience specialising in public interest environmental and planning law. Engaging in law reform processes, including reviewing and proposing changes to documents such as the Murray Darling Basin Plan forms an important part of our work. As a result, we welcome the opportunity to make a submission to the Authority.

Environmental Water is Mandatory

The *Water Act 2007* (Cth) provides for the following relevant mandatory requirements in the Basin Plan, that is, for the provision of water from the Basin which is dedicated to:

- the environment and its ecosystems;
- conserving the declared Ramsar wetlands in the Murray Darling Basin.¹

The *Water Act* mandates these requirements. They are not an option. The fact that the Basin Plan must be prepared by "*having regard to ... the consumptive and other economic uses of Basin water resources*"² (emphasis added) does not diminish the mandatory nature of the requirements to ensure sufficient environmental flows.

The Proposed Plan states that, "*The Draft Murray Darling Basin Plan provides for a diversion limit for all surface water SDL³ resource units to be 10,873 GL per year. This*

¹ Sections 3, 20 and 21 *Water Act 2007*

² Section 21(4)(c)(ii). Social and economic needs are also referred to in general terms in sections 3(c) and (d) (paragraph 3(d) is expressly subject to the environmental provisions) and 20(d) but this must be read in the context of the other comprehensive and significantly more numerous provisions protecting the environment in those sections.

³ Sustainable Diversion Limit

reflects a reduction of 2,750 GL per year⁴. The 2,750 gegalitres referred to is water which would be used for the environment.

However, the CSIRO review provides that this calculation is not sufficient to meet the environmental targets required by the Plan⁵. Further, scientists have stated that 3,800 gegalitres⁶ to more than 4,000 gegalitres⁷ is needed in order to have a “moderate to high chance”⁸ of returning the Basin to a healthy state. In these circumstances, if the Plan remains in its current form, it will be in breach of the clear and indispensable obligations set out in the Water Act and will arguably be invalid at law.

We recommend that the SDL be increased to between 3,800 and 4,000 gegalitres in accordance with best available science.

Groundwater extraction

The increase in groundwater extraction proposed by the Draft Plan is contrary to the purpose of the *Water Act* which is to ensure sustainable diversion levels based on the best available science. Given the connectivity of the basin waters, the SDL calculation is impacted by increased groundwater extraction. In addition, the groundwater SDL increases are not sustainable and these issues are likely to mean that environmental assets of the Basin will not be protected⁹.

We recommend that the increased groundwater extraction be included in the calculation of the SDL and related calculations.

Constraints

The Hon Tony Burke, the Federal Minister for the Environment has stated publically that the constraints will curb his ability to allow sufficient water for the environment¹⁰. However, constraints do not override the key objectives of the *Water Act* (set out above)

⁴ *Proposed Basin Plan*, Murray–Darling Basin Authority © Copyright Commonwealth of Australia 2011 p40

⁵ CSIRO *Science Review of the Environmentally Sustainable Level of Take for the Murray Darling Basin* November 2011 p29

⁶ Kingsford, RT, Fairweather, PG, Geddes, MC, Lester, RE, Sammut, J and Walker, KF, *Engineering a Crisis in a Ramsar Wetland: the Coorong, Lower Lakes and Murray Mouth, Australia*, Australian Wetlands and Rivers Centre, University of New South Wales November 2009 which at p4 provided that: “A target of an annual median flow of 3,800 GL at the barrages represents a flow that would restore low flows (below the median) when the system is most vulnerable to about one third of natural volume, considerably below historical levels, but probably allowing establishment of an estuarine-freshwater ecosystem in the Lower Lakes.” (emphasis added) and at p34 provided that this amount would “offer flow protection during drought.”

⁷ Wentworth Group of Concerned Scientists *Submission to the Senate Inquiry into the Urgent Provision of Water to the Coorong and Lower Lakes* September 2008 p12

⁸ *Ibid*

⁹ Wentworth Group, *Analysis Of Groundwater In The 2011 Draft Murray-Darling Basin Plan*, April 2012 p3

¹⁰ “No Future on a Dead River: South Australia needs a Healthy Murray”, Adelaide Town Hall, 10 April 2012

to provide for environmental flows. As a result, the Minister has a duty to ensure that the constraints do not inhibit the Government's ability to comply with the *Water Act*. To do otherwise may result in an irrelevant consideration informing the Minister's decision and so may result in a plan which is invalid at law.

We recommend that the Minister ensure that consideration of constraints do not override the key objectives of the Act that the Basin Plan provide for environmental flows.

Cultural Water

The Murray Darling Basin Authority has indicated that it:

*"supports the belief of the Northern Murray-Darling Basin Aboriginal Nations and the Murray Lower Darling Rivers Indigenous Nations that cultural flows will provide beneficial outcomes for Traditional Owners."*¹¹

However, the Plan does not sufficiently consider cultural water. In accordance with the *Water Act*¹², proper consideration should be given to cultural and indigenous water use *"to improve water security for all uses of Basin water resources"*¹³ and more specifically to maintain and preserve indigenous practices relevant to the conservation of biodiversity¹⁴.

We recommend that cultural and indigenous water use be appropriately considered in the Plan.

Climate Change

Climate change is likely to impact the flows of water in the Basin.¹⁵ The Proposed Plan does not sufficiently consider the future impacts of climate change. Such consideration is required by the *Water Act's* mandate that the Minister protect environmental flows.

We recommend that the impacts of climate change be considered in drafting the Plan.

Penalties

The Plan does not sufficiently penalise those who breach the requirements of the Plan. Water has been described as 'liquid gold' and so penalties which deter contravention are appropriate.

¹¹ *Proposed Basin Plan*, op cit, p3

¹² Sections 3, 20 and 21 *Water Act 2007*

¹³ Sections 3(e), 20(g) *Water Act 2007*

¹⁴ Convention on Biodiversity

The environmental sentencing principle of deterrence provides that the penalty must be high enough to deter a breach. Justice Duggan of the Supreme Court of South Australia was cited in the case of *Piva v Maynard* (2000) 112 LGERA 165 as saying that, “*in order for legislation to succeed ... there must be effective means of enforcement ... emphasis on general and individual deterrence remains a vital consideration.*”¹⁶ Without a sufficiently high penalty, businesses can view the penalty merely as a business expense and not treat the provision seriously.

In these circumstances, we recommend penalties in the order of hundreds of thousands of dollars, or millions of dollars in order to deter breach of the Plan.

In addition, if a State does not comply or does not ensure compliance with the Plan, then similar penalties should be applied.

ANEDO Submission

We adopt the terms of the submission prepared by the Australian Network of Environmental Defender’s Offices with respect to the Plan.

Please contact Ruth Beach of this office if you have any queries.

ENVIRONMENTAL DEFENDERS OFFICE (SA) INC

¹⁵ Wentworth Group, *Statement on the 2011 Draft Murray-Darling Basin Plan*, January 2012

¹⁶ See also *Environment Protection Authority v Gardner* (unreported, LEC (NSW), Lloyd J, August 14 and November 7 1997) and *DPP v TransAdelaide* [2004] SAERDC 92.