



australian network of environmental defender's offices

Submission on the Development of Sustainable Diversion Limits for the Murray-Darling Basin

23 December 2009

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

ANEDO is a network of nine community legal centres in each State and Territory, specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to provide comment on the development of sustainable diversion limits (SDLs) for the Murray-Darling Basin under the *Water Act 2007* (Cth). EDO offices have been involved with the development of the Water Act and have assisted environment groups in their engagement with the Act.

EDO Victoria recently provided legal advice to the Australian Conservation Foundation on the Water Act's requirements for the Basin Plan. We are aware that the legal advice has been appended to the joint submission from ACF and other groups to the SDL issues paper. ACF has given us permission to refer to the advice in our submission.

As a result of the ACF analysis ANEDO has come to the view that the Murray-Darling Basin Authority's (MDBA) understanding of what the Act requires in relation to sustainable diversion limits is incomplete. We therefore submit our views on what the Water Act requires of the SDLs.

Scope of submission

We have limited our submission to specific legal issues surrounding the approach to the development of SDLs, such as instances where we believe there has been a flawed interpretation of the Act. We also support the recommendations made in the ACF/joint groups submission.

ANEDO is anticipating making further detailed comment when the Basin Plan is released for consultation in mid 2010.

We would be pleased to meet with the MDBA to clarify any points in this submission or provide further information.

Executive Summary

It appears from the SDL issues paper that the MDBA considers the SDL to be synonymous with the term ‘environmentally sustainable level of take’ as defined in section 4 of the Water Act. However, ANEDO submits that this fails to fully consider the overarching purpose of the Water Act and the Basin Plan which is to return the use of Basin water resources to a sustainable level and not to simply focus on key environmental characteristics¹.

Further, the SDL issues paper does not ‘give effect to’ the relevant international agreements as required by the Water Act. Giving effect to the relevant international agreements requires the interpretation of the SDL to be based on a holistic view of the Basin water resources where those water resources are a series of interconnected systems which need a certain amount of water to function in a healthy and productive way indefinitely. This holistic view should be adopted.

Comments on the MDBAs approach to sustainable diversion limits

In our view the MDBA is taking an overly narrow approach to the development of the Basin Plan and the determination of the SDLs.

To accord with the Water Act the Basin Plan must be developed in a way that will return the use of Basin water resources to a sustainable level. The Basin Plan’s purpose is broader than just establishing a sustainable diversion limit and the sustainable diversion limit is broader than just protecting ‘key’ environmentally sustainable level of take characteristics. The Act requires that all elements of the Basin Plan, not just the sustainable diversion limit, should be aimed at returning the use of Basin water resources to sustainable levels.

The SDL issues paper indicates that the MDBA’s current approach is to list key assets, key ecosystem functions, and attempt to define and list key environmental outcomes and the components of the productive base, then assign a number to each which will add up to the SDL. For example at page 13 of the issues paper it is stated:

These [SDL] limits must be set at a level that the MDBA, using the best available scientific knowledge, determines to be environmentally sustainable. This is defined as the level at which water can be taken from a Basin water resource without compromising the key environmental assets, key ecosystem functions, productive base or key environmental outcomes of the water resource.

At page 23 it is stated:

SDLs will limit the take of water from the Basin water resources so that sufficient environmental water is available to prevent the compromise of certain characteristics of water resources (the ‘environmentally sustainable level of take characteristics’).

In our view this approach is too narrow and does not fully take into account the objects and purpose of the Act and the Basin Plan, or the requirement to give effect to relevant international agreements.

What does the Water Act require of SDLs?

Section 22 item 6 of the Water Act contains the requirement for sustainable diversion limits to be included as mandatory contents of the Basin Plan. Item 6 states that the matter that must be included in the Basin plan is:

The *maximum long-term annual average quantities of water that can be taken on a sustainable basis*, from:

- (a) the basin water resources as a whole; and
- (b) the water resources or particular parts of the water resources of each water resource plan area.

The averages are the long-term average sustainable diversion limits for the Basin water resources and the water resources or particular parts of the water resources of the water resource plan area.² (emphasis added)

¹ The term, ‘environmentally sustainable level of take’, considers key environmental characteristics.

² Water Act s 22 item 6

Item 6 then states that the limit must comply with s 23. Section 23 gives further direction on the sustainable diversion limits. Section 23(1) states:

A long-term average sustainable diversion limit for the Basin water resources, for the water resources of a particular water resource plan area or for a particular part of those water resources must reflect an environmentally sustainable level of take.

Section 4 of the Water Act defines an environmentally sustainable level of take. Section 4 states that:

environmentally sustainable level of take for a water resource means the level at which water can be taken from that water resource which, if exceeded, would compromise:

- (a) key environmental assets of the water resource; or
- (b) key ecosystem functions of the water resource; or
- (c) the productive base of the water resource; or
- (d) key environmental outcomes for the water resource.

From the SDL issues paper it is apparent that the MDBA views the sustainable diversion limit as synonymous with ‘environmentally sustainable level of take’³.

In other words, the view is that the sustainable diversion limit must only limit the take of water from the Basin to a level that will not compromise the key environmental assets, key ecosystem functions, productive base or key environmental outcomes (termed in the issues paper as ‘environmentally sustainable level of take characteristics’).

SDL broader than ‘environmentally sustainable level of take’

In our view, a close reading of the Water Act shows that sustainable diversion limits are not limited to what is an ‘environmentally sustainable level of take’ and in fact require a much broader more holistic consideration of what is sustainable overall.

At s 22 the Act states that the Plan must include *the maximum long-term annual average quantities of water that can be taken on a sustainable basis* from the Basin as a whole, the water

³ For example, pages 15-19 of the SDL issues paper

resources or parts of each water resource plan area. In other words, s 22 requires the MDBA to determine the quantities of water that can be taken on a *sustainable basis* from the Basin.

Section 23 clarifies what must be included in the consideration of what is sustainable - the sustainable diversion limit must reflect ‘an environmentally sustainable level of take’.

In the Water Act, ‘environmentally sustainable level of take’ is limited to ‘key’ assets, ‘key’ functions, and ‘key’ outcomes and the productive base (i.e. the ‘environmentally sustainable level of take characteristics’). However, ANEDO submits that what can be taken on a sustainable basis – in other words what the SDL should be - is a larger consideration than just these environmentally sustainable level of take characteristics. The environmentally sustainable level of take characteristics are in fact a subset of the SDL.

Assessing what must be included in the sustainable diversion limit should therefore be considered in two stages. The overall requirement is what amount of water can be taken on a sustainable basis from each water resource plan area⁴, and therefore the Basin. A sub-requirement is what is an environmentally sustainable level of take, that is, what is the level of take which protects key assets, function and outcomes.

This interpretation is not only supported by the wording of sections 22 and 23, it is supported by the wording in the context of the Act as a whole and the purposes of the Act and the Basin Plan. The overarching purpose of the Act and the overarching purpose of the Basin Plan is to return the use of Basin water resources to a sustainable level. This will not be done by purely focusing on ‘key’ environmental characteristics, but rather the SDL must view the Basin water resources holistically.

⁴ As set out in ss22 and 23 of the Water Act set out at p5 above

Sustainable diversion limit and the international agreements

The Water Act contains a strong focus on ‘giving effect to relevant international agreements’.⁵ The requirement to give effect to relevant international agreements is a core requirement of the Act and the Basin Plan. The international agreements should therefore strongly influence the development of SDLs. The requirements in those agreements to protect Ramsar wetlands, protect biodiversity, protect migratory species especially water birds, and manage the risks of climate change, drought and desertification must be reflected in the SDLs.

This supports the interpretation above that the development of SDLs must not focus purely on the ‘key’ environmentally sustainable level of take characteristics, but as indicated above must consider the Basin water resources holistically as a series of interconnected systems that will require a certain amount of water to function in a healthy and productive way indefinitely.

There is no mention in the SDL issues paper of the requirement to give effect to these international agreements in the development of SDLs and there is no discussion of how the international agreements will be implemented through the SDLs.⁶

Conclusions on the MDBA approach to SDLs

For the reasons argued above, the current MDBA approach to set SDLs at a level which will not compromise the environmentally sustainable level of take characteristics, is not adequate according to the Act. The current approach of the MDBA leads to what appears to be incongruous conclusions such as that stated at page 28 of the issues paper:

⁵ This requirement is in ss 3(b), 20(a) and 21(1). The relevant international agreements are the Ramsar Convention; The Biodiversity Convention; The Desertification Convention; The Bonn Convention; CAMBA; JAMBA; ROKAMBA; The Climate Change Convention.

⁶ The issues paper at page 16 notes the intention to use the *National Framework and Guidance for Describing the Ecological Character of Australian Ramsar Wetlands*. The requirement to take account of these descriptions is in s 21(3) of the Act. Its inclusion in the issues paper does not change our view that the requirement to give effect to international agreements in SDLs has not been properly considered.

There are likely to be entities other than the Commonwealth that hold environmental entitlements (e.g. Basin States), and they may be required to use those entitlements in accordance with the environmental watering plan. Water that is held in dedicated environmental entitlements and used in accordance with the environmental watering plan would not compromise the ‘environmentally sustainable level of take characteristics’, and would not be take that is limited by SDLs.

It is possible that some take for purposes that can be described as ‘environmental’ in nature could still contribute to compromising ‘environmentally sustainable level of take characteristics’, and therefore would be take under the SDL. (emphasis added)

Essentially this states that water allocated for environmental purposes by State governments, but which are not identified as such in the Commonwealth environmental watering plan, do not fall within what is considered sustainable.

Another problem that arises if the SDL is limited to environmentally sustainable level of take characteristics is the desire to assign just enough water to keep key iconic ecosystems or assets functioning in isolation from the rest of the system, and use that as a reflection of what is sustainable. Views have been expressed by some stakeholders that this could be done by employing engineering solutions that pump the minimum amount of water to a particular asset to keep it ‘functioning’. This approach is not supported by the Act.

The preferable reading of the Act - that the sustainable diversion limit should reflect a level of take that is ‘sustainable’ - would not lead to these results. What is required is a consideration of what is sustainable for the Basin water resource as a whole and the water resources in each area, in order to keep each system functioning indefinitely. In other words, the Basin Plan should ensure that actions done now do not degrade the resource or the ecosystems that depend on it.