



8 November 2012

Senate Environment and Communications Committee
Parliament House Canberra
ACT 2600
"EC (SEN) Committee" ec.sen@aph.gov.au

Conservation Council SA and The Wilderness Society submission to the Senate Environment and Communication Legislation Committee.

- 1. Inquiry into Water Amendment (Long Term Average Sustainable Diversion Limit Adjustment) Bill 2012 [provisions] (SDL BILL)**

and

- 2. Water Amendment (Water for the Environment Special Account) Bill [provisions]. (Special Account Bill)**

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1. Introduction

1 (a) Position of the CCSA and TWS

The Conservation Council of SA and The Wilderness Society SA do not support this SDL Bill when the Basin Plan currently being tabled does not deliver the environmental outcomes as required under the *Water Act 2007*. Introducing an adjustment mechanism without first determining a true Sustainable Diversion Limit (SDL) avoids the real issue: over-allocation of a finite and essential resource has damaged the environments, wetlands, waterways, rivers, streams and estuaries our nation relies on for economic and social wellbeing. Without a healthy functioning Murray-Darling Basin to support agriculture, industry and communities, there is no long term future for the Basin.

In addition, we cannot support the Special Account Bill in its current form as there is no absolute requirement for an additional 450 GL to be returned to the river, and there is no guarantee that the additional funding will be spent for this purpose. We caution against the dazzle of nearly \$1.8B to be allocated to projects and purchases over 10 years from 2014.

We suggest that the fine print details in both Bills be properly scrutinised and assessed in relation to the key question of whether they will return the required amount of water to the Murray-Darling Basin. We know already that the \$10bn originally set aside by the Howard government has not induced collaborative responses based on sound science in relation to the Basin Plan. It is difficult to believe this additional money will lead to better outcomes via future adjustments to the SDL's. Instead, we believe that the SDL Bill in particular provides the potential to further undermine the draft Basin Plan.

1 (b) Basic Principles

- The Plan must comply with the *Water Act 2007*;
- Amendments are to the Water Act and need to be consistent with the Objects of the Act;
- The Act requires best science.

2. Key shortcomings

- The Basin Plan in its current form has not been designed to achieve the hydrological and environmental targets that would return the Murray-Darling Basin to health, based on the best available science. The Wentworth Group, Goyder Institute and the Australian Wetlands and Rivers Centre have all stated that while 3200GL is an improvement on an SDL of 2750GL, it still does not provide enough water to ensure environmental outcomes;
- In this context, the plus or minus 5% SDL adjustment mechanism Bill does not guarantee that additional water will be provided when necessary to meet the needs of the river;
- The additional 450GL of water from a Special Account may never be achieved even if up to \$1.77B is spent on infrastructure. There is also no absolute requirement in the Special Account Bill for these funds to be spent to achieve additional water.

3. Science

We draw the Committee's attention to the following recent reviews by independent scientists

3 (a) . 24 Oct 2012: Prof Richard Kingsford*

Findings: Damage to farm lands minimal at 3200GL and benefits to flood plains dramatic with respect to both grazing livestock and ecological outcomes.

The research is based on sound science. Using satellite imagery, the researchers examined the maximum flooding and floodplain area in the Murray-Darling Basin, including 62,164 km² of wetland, which covered 5.87 per cent of the land area of the entire Basin. These wetlands included all rivers, lakes, swamps and floodplain areas that were inundated fully during a ten-year period (1984-1993). The Australian Floodplain Association provided the funding for the study. When all wetlands on agricultural land were included (i.e. agricultural cropping, grazing, unallocated agricultural land), flooded land was predominantly in grazing areas (84.28%) in the Basin.

* <http://newsroom.unsw.edu.au/news/science/damage-farms-minimal-under-basin-plan>; http://theconversation.edu.au/more-flooding-in-the-murray-darling-basin-could-be-good-news-for-farmers-10321?utm_medium=email&utm_campaign=The+Weekend+Conversation&utm_content=The+Weekend+Conversation+CID_2ee5589b833c5aa3517ecccb60419855&utm_source=campaign_monitor&utm_term=More%20flooding%20in%20the%20Murray-Darling%20basin%20could%20be%20good%20news%20for%20farmers

3 (b). Oct 2012 Goyder Institute Peer Review of SA Science*

- 3200GL: Ecological improvements delivered but many SA Government defined metrics still not fully met;
- Goyder Institute Expert Panel Assessment (Lamontagne *et al.*, 2012) suggested model wider range of possible scenarios;
- Further increase in flow might achieve even greater environmental benefits;
- But the MDBA advised the peer review team that there were no plans to model scenarios above 3200GL at this point in time and are therefore the possible benefits of higher returns to the MDB were outside the scope of this peer review.
- The Goyder Institute Peer reviewers highlighted the points that could not be addressed in the current SA Government assessment due to the constraints on time available for the analysis:
 - Basin Plan and associated Environmental Water Plans should pay attention to the aspect of drought recovery of degraded assets following prolonged periods of low flows (Lamontagne *et al.*, 2012);
 - Limited field validation of assumptions re: ecological response to hydrological conditions. Monitoring of ecological responses to environmental watering required for model validation and to support an adaptive management framework that improves future planning and management of environmental watering events;

- Recommend that the SA Govt work closely with the MDBA to improve the representation of CLLMM water demands to achieve CLLMM outcomes in the modeling scenarios;
- Water quality issues, other than salinity in the Lower Lakes and Coorong, not considered and not currently possible due to the lack of information available to make a reasonable assessment;
- Water quality issues identified as a risk to achieving some of the environmental outcomes sought by South Australia.

*<http://goyderinstitute.org/>

Reviewer /Organisation/ Area of Expertise:

Jim Cox: Chair, SARDI/Adelaide University/Hydrology, Catchments, Water Quality;

Jason Nicol: SARDI/ Vegetation, Floodplain, Channel CLLMM#;

Todd Wallace: Adelaide Uni/Vegetation, Floodplain;

Qifeng Ye: SARDI /Fish, Channel;

David Paton: Adelaide Uni /CLLMM#;

Ian Overton: CSIRO/ River hydrology and environmental indicators

3 (c). Oct 2012 Wentworth Group Concerned Scientist*

The WGCS asked: Does a 3200GL reduction in extractions combined with the relaxation of eight constraints give a healthy working Murray-Darling Basin River system?

'There has never been any scientific analysis, released by the Murray-Darling Basin Authority or any other scientific institution, to suggest that returning 3200GL of water to the rivers of the Murray-Darling Basin will deliver a healthy working river system.'

'The real question is does 3200GL (with eight constraints relaxed) result in a healthy working Murray-Darling Basin?'

'To answer this question the Wentworth Group has looked at four areas:

- Outcomes for the whole of the Murray-Darling Basin;
- Real world outcomes once groundwater extraction is included;
- Modeled maximum dry periods;
- Modeled outcomes according to the South Australian river health targets.'

We note that for SA the WGCS stated: 'A 3200GL reduction in extractions with a relaxing of eight constraints only achieves three of the of the 20 (15%) South Australian environmental water requirement targets.'

The WGCS concluded: 'From the analysis of the four areas it appears that the 3200GL with eight constraints relaxed scenario, although delivering improved outcomes on the 2800GL in the Proposed Basin Plan, still falls well short of satisfying the requirements of the Commonwealth Water Act 2007 to deliver a healthy working Murray-Darling Basin.'

[*http://www.wentworthgroup.org/uploads/Wentworth%20Group%20Evaluation%20of%203200GL%20modeling.pdf](http://www.wentworthgroup.org/uploads/Wentworth%20Group%20Evaluation%20of%203200GL%20modeling.pdf)

WGCS: Mr Peter Cosier, Dr Richard Davis, Prof Tim Flannery, Dr Ronnie Harding, Prof Lesley Hughes, Prof David Karoly, Prof Hugh Possingham FAA, Mr Robert Purves AM, Dr Denis Saunders AM, Prof Bruce Thom AM, Dr John Williams FTSE.

Box 1 Notes

- Even if an amendment delivers a combined return of 3200GL by 2024, it will not return the river to health. See WGCS re '3200GL with eight constraints relaxed achieves 66% of the 112 targets (environmental water requirements) set by the Murray-Darling Basin Authority to deliver a healthy working river. While better than the outcomes in the proposed Basin Plan, 3200GL with eight constraints relaxed is still only 2/3rds of the way to a healthy working river and achieving the objects of the Water Act 2007.'
- The current Plan fails to satisfy the South Australian Government requirements. .See WGCS: A 3200GL reduction in extractions with a relaxing of eight constraints only achieves three of the of the 20 (15%) South Australian environmental water requirement targets.
- The current Plan fails MDB See WGCS: The Authority has not released any information on what the impact of the 1700GL increase of groundwater will be on the surface waters of the Basin. Some of the aquifers from which this increased groundwater extraction comes are closely connected to surface waters. Taking groundwater from these aquifers will mean less flow in the Basin's rivers.
- See WGCS : Across the four sites looked at in the MDBA modeling of the River Murray system there are 25 flow indicators. Even with the 3200GL relaxed constraints scenario, 16 of the 25 sites have a maximum dry period at least double the period that occurred naturally. Even if 25% of the increased groundwater take impacts on the rivers, in reality there will be less than 2,800GL available and the outcomes claimed in the MDBA 3200GL scenarios will not be achieved. A net target of 2800GL has no chance of restoring the rivers of the Murray-Darling Basin to health.

3 (d) Conclusion of the Conservation Council of South Australia and The Wilderness Society SA

There is not yet a Plan that will return the Basin to health or meet the objectives of the Act to ensure the return to environmentally sustainable levels of extraction for water resources that are over allocated or overused;

See 4000 + Position Statements

4. Water Amendment (Long-term Average Sustainable Diversion Limit Adjustment) Bill

4 (a) The Bill was amended in the course of its passage through the House of Reps to address three matters:

- First, to make community consultation on any proposed adjustment to the SDL's an explicit requirement;
- Second, to empower the minister to reject an adjustment that is presented by the MDBA; and
- Third, to have an adjustment that is tabled in Parliament treated as a disallowable instrument.

4 (b) Additional concerns beyond these matters include:

1. The criteria to be applied by the MDBA in making use of the SDL adjustment mechanism

Cl.23A(2)(a) requires the criteria for determining whether the Authority should propose an adjustment and the amount of such adjustment to be spelled out in the Basin Plan. In the explanatory memorandum accompanying the original version of the Bill, the following statement is made:

It is envisaged that criteria to be specified in the Basin Plan will include that the mechanism operate on a no-detriment basis. The adjustments would then not be able to weaken the social, economic and environmental outcomes inherent in the Basin Plan Projects to enable improved environmental outcomes, must maintain or improve the socio-economic circumstances of basin communities compared with the Basin Plan.

Cl.23A(3) reinforces the requirement in s.23 concerning an environmentally sustainable level of take by expressly affirming that a long-term average sustainable diversion limit that is produced after an adjustment "must reflect an environmentally sustainable level of take". **However, if the criteria and approach outlined in the passages above from the explanatory memorandum are applied, it is strongly arguable that this would elevate social and economic considerations to a position of equal status alongside the matter of environmental sustainability in a way that is contrary to the requirements of the current version of s.23 and also to the proposed revised s.23 and new 23A(3)(b).**

Underlying this observation is a legal debate of a quite fundamental nature concerning the relationship between environmental, social and economic considerations in relation to the proposed Basin Plan. The government, through its statements in the explanatory memorandum, is perpetuating a highly contentious legal viewpoint that all three aspects may be considered simultaneously when producing the Basin Plan, and now in relation also to any adjustment to the SDL's spelled out therein.

There is strong legal advice to the contrary, for example via the EDO network, which suggests that socio-economic considerations may only be taken into account after the long-term average sustainable diversion limit has been determined by reference to the environmental sustainability needs of the MDB. It follows that there is a distinct prospect of litigation to challenge the validity of the Basin plan on the basis that it fails to comply with the requirements of the Act spelled out in s.23 in particular. Such a claim would be more likely to be pursued if the Basin plan specifies criteria for the adjustment mechanism that explicitly reflect the government's (and others') apparently different legal interpretation of these key provisions of the Water Act.

This matter does not necessitate any amendment of the proposed provisions of the SDL Bill, which are entirely consistent with the current provisions of the Water Act in this particular context. But there is cause for grave concern if the operation of the SDL adjustment mechanism is intended to be based on an interpretation of the Water Act that is highly contentious and has a high potential to be litigated by parties who are disappointed with the outcomes of the Basin Plan. The risk of such litigation being pursued is substantially increased by extending the contentious legal interpretation to the new adjustment mechanism also.

2. The 5% limit on proposed adjustments (Cl23A(4))

Given that the definition of the "Basin reference limit" in Cl.23A(95) is "the long-term average sustainable diversion limit for the Basin water resources that applies at the reference time", it is possible that the limit could be adjusted downwards by the proposed mechanism so that the 2750 GL goal for additional environmental water would be decreased to 2205 GL (based on a BRL of 10,900 GL) or to 2050 GL (based on a BRL of 14,000 GL, if groundwater is included in the defined "Basin water resources"). This possibility seriously undermines the fragile consensus emerging with respect to the Basin Plan and, once again, heightens the risk of litigation to challenge the validity of the Basin plan. Of course, there is also the possibility of a corresponding increase above the 2750GL, although this would seem politically unrealistic in the current negotiating climate.

One option could be to add a further constraint to the effect that no adjustment downwards in the Basin reference limit can have the effect of reducing the volume of water to be returned to the system for environmental purposes by more than 5%, thus placing a floor under the 2750 GL figure (of 2671.5 GL). Of course, the reciprocal argument would inevitably arise that increases should be similarly restricted.

3. Decision-making by the MDBA on adjustments

It would seem possible that an adjustment could be imposed against the wishes of one of the MDB jurisdictions in the future. S.194 of the Water Act provides that decisions of the Authority shall be made by a majority vote. I am unaware of any other provision within the Act that makes an exception in relation to the Basin Plan, and assume therefore that this provision will also apply to future adjustments. Thus, if the eastern States combine to propose an adjustment downwards in the Basin reference limit in the order of the full 5% figures mentioned above, South Australia could not resist such action and it would ultimately fall to the minister and to Parliament as to whether to reject such a proposal. Changing political circumstances could mean that these safeguards would have little value.

It might be desirable to insert a requirement that any adjustment to the long-term annual diversion limits must be agreed unanimously by all members of the Authority. Of course, once more, this would also present a possible threat to proposed increases in the SDL's that are supported by a majority.

Box 2 Notes	
The estimated average annual inflows into all rivers in the Murray-Darling Basin.	31,599 GL
Average annual runoff (2003) ¹	23,850 GL
Average Water Use (2003) 11576 SW + 1233 GW =	12,809 GL
Estimated Baseline Diversion Limit (Surface Water) 2012 (MDBA ²)	13,623 GL
Basin Reference Limit (BRL)	May change through time
MDBA Assessed Long Term SDL	10,873 GL
Proposed reduction in estimated Basin Diversion Limit	2,750 GL

4 (c) In summary, whilst the basic intention behind the Bill to create a more flexible and "transparent" mechanism for adjusting SDL's is quite reasonable, there are very serious risks that the mechanism could be used in the future by the Authority to significantly reduce the current proposed target, which of itself remains highly dubious in terms of its scientific justification. The end result is a highly-flawed and seriously compromised Basin Plan that includes a mechanism to potentially further weaken its provisions for environmental flows in the future, over the objections of the down-river constituents. It is likely that this will leave many of these constituents unsatisfied and unconvinced that there has indeed been a satisfactory outcome for SA, and simply increases the risk of legal challenges to the validity of the Basin Plan in the near future.

¹ See http://www2.mdbc.gov.au/_data/page/20/water_resourcesver2.pdf

² See <http://www.mdba.gov.au/draft-basin-plan/draft-basin-plan-chapter-summary/schedule02>

5. Water Amendment (Water for the Environment Special Account) Bill 2012

5 (a) . Link to SDL Adjustment Bill (Cl.2 re Commencement information)

This Bill is joined at the hip to the SDL Bill also currently before the Cth Parliament, in that if the latter does not commence at all, neither will this one. Should the SDL Bill fail to pass through Parliament, then this Bill would also fail to come into operation, even if passed by the Parliament.

5 (b) . Objects clause (86AA) and the 450 GL target

Cl. 86AA(3) does not afford sufficient priority or guarantees with respect to the 450 GL additional water resource promised by the Prime Minister in that:

- It is not stated as a firm commitment, or even an object of the Bill, but merely as part of the means of achieving the stated object; as such, it could hardly be less compelling as a goal of the Bill;
- It is framed as an additional means to achieve the object to that of easing or removing constraints on delivery of environmental water, when in fact it should be an over-arching object or obligation that could be met, for example, by such means; thus it might be possible in years to come to report that the objects of Part 2AA of the act have been partially met through some removal of constraints but that the 450GL goal is still far from being delivered;
- It is ceiling rather than a floor.

Cl.86AA(3) could be revised to:

"The object of this Part is to be achieved by increasing the volume of the Basin water resources available for environmental use by 450 gigalitres over the period 2014-2024 through :

- (a) Easing or removing constraints etc (as per current clause); and
- (b) Purchasing water access rights in relation to basin water resources."

However, an even firmer obligation in relation to the 450 GL target could also be incorporated into Cl.86AD (2), so as to reinforce its significance; for example, by adding after the words "further the object of this Part" in sub-cl.(2)(a) the following words:

"...by increasing the volume of the Basin water resources available for environmental use by at least 450 gigalitres over the period 2014-2024".

This would not cover sub-cl.2 (b) re purchase of water access rights, but it would take more to reconstruct this clause to cover both situations.

5 (c). Expenditure clause (Cl.86AD)

Three points are significant to this important clause of the Bill.

First, there is no obligation imposed by the Bill on the Minister to spend any of the monies in the special Account. A future government not supportive of the program could simply allow moneys to accumulate in the Account and recover them as part

of general revenue after 2024, under cl. 86AH. Whether this is a real risk is difficult to predict, and presumably a future government could always try instead to amend the provisions of Part2AA, including by way of repeal. But in a tight Parliament, this may not be possible and they might choose instead to simply sit on the monies. Some language to impose an obligation to spend may therefore be a good safeguard against such recalcitrance.

For example, an additional sub-clause might be added to CL. 86AD to the effect that : "The Minister must, to the fullest extent reasonably practical, apply amounts held in the Special Account so as to avoid the accumulation of more than one fifth of the total amount to be credited to the Account."

Second, there is a potential concern with respect to sub-cl. 86AD (2) (c) (ii), which enables payments to be made to "address any detrimental social or economic impact on the wellbeing .. .etc. ". There is a risk that a future government, instead of not spending anything, could alternatively use this provision to soak up a large proportion of the funds held in the Special Account, thus leaving little other monies for achievement of the overall 450GL target. This might be overcome by adding a limit on this form of expenditure, as follows:

'...provided however that the amount used for this purpose shall not exceed at any time a total of one quarter of all moneys spent from the Special Account".

Thirdly, in relation to Cl. 86AD (4), the limitation of expenditure therein to projects or purchases related to an adjustment of the SDL for a particular water resource **may prove to be a significant limitation** upon the use of Part 2AA. We note that the bracketed words in this sub-clause contain the proviso "whether or not the adjustment has been proposed", so this may give considerable lee-way in terms of approving projects or purchases, but the matter is worth some further consideration.