

Department of Planning, Industry and Environment

# Water sharing plans and water resource plans

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Community consultation—what we heard

July 2020

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# 1. Introduction

Under the Australian Government's *Water Act 2007* and *Basin Plan 2012*, NSW must prepare water resource plans for its Murray–Darling Basin water resources. NSW has 20 of the 33 water resource plan areas across the entire Murray–Darling Basin: nine covering surface water resources and 11 for our groundwater resources.

Elements of the statutory water sharing plans for NSW water sources form a large part of these water resource plans. These water sharing plans are being amended or replaced to meet the requirements of the Basin Plan.



## Consultation

Draft plans for NSW water resource plan areas have been developed over the last three years, in close consultation with water users, First Nations groups, environmental and local government representatives and government agencies. This helps to achieve the right balance of community, environmental, economic and cultural outcomes, while meeting the requirements of both the Basin Plan and the NSW *Water Management Act 2000*.

Public consultation on draft plans was held from late 2018 and throughout 2019, with 55 public meetings across 39 locations in the Basin attended by more than 1,600 people. We received 710 written submissions, and have published a [summary of these for each water resource plan area](#).

Final drafts of the water resource plans were due for submission to the Murray–Darling Basin Authority at the end of 2019. In December 2019, the Minister for Water, Property and Housing, Melinda Pavey, announced that NSW would delay submission. This was because of the severe drought across regional NSW, and to allow time for the NSW Government to consult further with stakeholders on the outcomes of the public exhibition process and to share any proposed changes resulting from this.



## Feedback

Most of the feedback on water resource plans relates to the water sharing plan elements. This is understandable, given that these water sharing plans directly address users' rights to access water, how we share water between water users and the environment, and how we share it between different categories of water users.

This document discusses several issues that were consistently raised during consultation, and across several water sharing plan areas. It discusses the issues as expressed by stakeholders, and gives the NSW Government's response to each of these, and the rationale for the response. Where there are alternative pathways to address an issue, these are highlighted.



Public consultation on draft plans was held from late 2018 and throughout 2019 and included:



**55**

public meetings



**39**

locations in the Basin



**1,600**

attendees



**710**

written submissions

A summary of each water resource plan area consultation has been published. To view, visit [www.industry.nsw.gov.au/water/plans-programs/water-resource-plans/drafts](http://www.industry.nsw.gov.au/water/plans-programs/water-resource-plans/drafts)

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## 2. Approach

Some of the feedback we received was very specific, relating to particular clauses in individual water sharing plans, and suggested by multiple stakeholders from different locations. As these suggestions often overlapped, we have grouped the feedback in this document and addressed the overall issue rather than specific clauses in individual plans.

Most issues raised relate to water sharing plans for regulated rivers, that is river systems with major public dams that can control a large proportion of flows. Some issues relate to all types of water sharing plans—for regulated rivers, unregulated rivers and groundwater, and a few to water sharing plans for unregulated rivers only.

Some of the issues raised are not within the NSW Government's independent capacity to address, requiring adjustments to the Murray–Darling Basin Agreement, or lying within the responsibility of another jurisdiction. We have identified where this is the case. We have also considered the interaction of different legal instruments, such as the application of the Commonwealth *Water Act 2007*, where water sharing plan provisions are a part of water resource plans.

Where we are unable to address issues without significant further policy change or consultation, we have put forward possible pathways for addressing these issues.

### 3. Issues and pathways

This section summarises the feedback received, groups it by key area of concern and gives a response to that key area.

## Water sharing plan objectives, strategies and performance indicators

### Concerns about the ability of plans to deliver definitive environmental objectives, and about the adequacy of economic objectives.

Water user groups expressed the following concerns about the objectives, strategies and performance indicators in Part 2 of the water sharing plans:

- The draft economic objectives are inadequate, and do not address the issues of reliability of water entitlements and stakeholder perceptions of the operation of the plans. Stakeholders suggested various alternative and additional economic indicators.
- The environmental objectives contained in draft water sharing plans implied the plans, independently, could and would deliver the objectives. There are many factors that affect river health, and water volumes and flow management are just a subset of these.
- The strategy of ‘reserving’ all water in excess of the long-term average annual extraction limit as environmental water is misleading. This is because the limit is an average, and a volume of water greater or lesser than the limit may be taken in any given year, and will depend on any number of factors, including rainfall, river flows and the amount of water held in dams in that year.
- The reference to the monitoring, evaluation and reporting plan in a note at the beginning of Part 2 was criticised. This was because the monitoring, evaluation and reporting plan submitted to the Murray–Darling Basin Authority as part of the water sharing resource plan packages covered only environmental monitoring, evaluation and reporting.
- The objectives, strategies and performance indicators do not establish a baseline from which change can be assessed.

### Response

The objectives, strategies and performance indicators in previous plans were criticised by independent plan audits and reviews for not being ‘SMART’, or specific, measurable, achievable, relevant and time-bound. That is, there was no clear link between the objectives, the strategies for achieving them, the performance indicators and the measures for these.

The re-work of Part 2 addresses these concerns, with particular attention paid to measurable performance indicators. NSW Department of Planning, Industry and Environment scientists developed the environmental objectives. The department also engaged Marsden Jacobs Associates in 2018–19 to develop a suite of economic objectives and performance indicators. Those in the draft water sharing plans are derived from that work.

We recognise that further work could be done on Part 2, in particular on the economic, social and cultural objectives and performance indicators. To that end, Part 12 of the water sharing plans now includes a provision allowing Part 2 to be amended following a review. The review will occur over the next 12–18 months, with the plans amended as required. We will complete consultation as part of the review. We will also consider establishing a baseline to assess the success of the plans’ strategies to meet the objectives as part of this review.



Image courtesy of Quentin Jones.

The NSW Government is committed to comprehensive monitoring, evaluation and reporting against water sharing plans. This is necessary for us to be able to evaluate the effectiveness of plan rules in maintaining environmental health, and achieving the social, cultural and economic objectives we are seeking through managing the state's water resources. As a result, the reference at the beginning of Part 2 to the monitoring, evaluation and reporting plan (MER) has been removed. We will develop a more comprehensive MER Plan following the review outlined earlier.

We have amended the environmental objectives to make them more realistic by including the phrase 'contribute to the enhancement of'. The provisions about evaluating the effectiveness of the strategies in meeting the objectives require evaluating the effects of external influences on the water source

during the term of a plan, and if or how they have affected progress toward achieving the environmental objectives. The plans acknowledge that the strategies in a plan alone will not independently deliver the desired environmental objectives under incompatible circumstances.

We have also amended the strategy that previously would reserve all water above the long-term average annual extraction limit to the following, noting that the intent has been retained:

*establish and maintain compliance with long-term average annual extraction limits and long-term average sustainable diversion limits.*

**Note.** *Part 6 of this Plan sets out the provisions for maintaining compliance with the long-term average annual extraction limits and long-term average sustainable diversion limits.*

# Planned environmental water

## Concerns about the inconsistency in definition of planned environmental water (PEW) under the NSW *Water Management Act 2000* and the Commonwealth *Water Act 2007* and *Basin Plan 2012*.

Water users are concerned that the Commonwealth definition of PEW is inconsistent with the definition under NSW legislation, and that this compromises NSW's ability to manage adaptively to optimise environmental, social and economic outcomes.

### Response

PEW under NSW law is defined in section 8 of the NSW *Water Management Act 2000*. PEW under Commonwealth law is defined in section 6 of the *Water Act 2007*.

Under Commonwealth law, a state water resource plan, including the accredited provisions of a water sharing plan, must identify rules and arrangements for planned environmental water. Further, the provisions must ensure that there is no net reduction in the protection of planned environmental water from the protection provided under NSW law immediately before the Basin Plan first took effect in 2012.

The Murray–Darling Basin Authority (MDBA) issued a formal position statement on the identification of PEW ([Position statement 3A](#)). A key point is that a PEW rule commits or preserves water to achieve environmental outcomes. Subsequent advice from the MDBA indicates a broader interpretation of PEW will be applied when assessing NSW resource plans. This interpretation captures water sharing plan rules or other arrangements that may not be for the express purpose of committing or preserving water for achieving environmental outcomes, but which effectively do so.

Water sharing rules are complex and inter-dependent. Combined, the rules aim to ensure that water is sustainably and optimally shared between the environment and consumptive users, and between different types of water users. While some rules expressly commit and preserve environmental water, indirectly all rules in a water sharing plan may affect the environment. It is difficult to determine the indirect effects of any given water sharing rule that is not specifically intended to achieve environmental outcomes.

The NSW Government is concerned that the MDBA's interpretation of identifying rules that do not have the primary purpose of achieving environmental outcomes as PEW is beyond the intent contemplated by the Commonwealth *Water Act 2007*. This interpretation could affect NSW's ability to change rule settings to adapt to natural changes in a water resource over time, including those resulting from improved information on environmental requirements, or changed user behaviour.

Notwithstanding this concern, the operative provisions of the water sharing plans will be assessed by the Australian Government for accreditation under the Basin Plan. The assessment will refer to the provisions of the Commonwealth *Water Act 2007*, and the MDBA's interpretation of these.





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## Addressing underuse

### Stakeholders sought stronger commitment to resolve under-use.

Water user groups have expressed concern that use is tracking well below the water sharing plan extraction limits in some regulated river systems. They have requested that rules be included in plans to address this apparent chronic underuse.

### Response

The long-term annual extraction limits (LTAAELs) in water sharing plans were originally set at or below the Murray-Darling Basin Ministerial Council 'Cap' on diversions. This in turn limited surface water diversions in the Murray-Darling Basin to the volume of water that would have been diverted under 1993-94 levels of development. This is the amount of water users could take

on average over the climate record with the development in place at that time.

The baseline diversion limits (BDL) and hence sustainable diversion limits (SDL) in the Basin Plan were established from this LTAAEL baseline. The 'hard' triggers for compliance with these limits are set in the water sharing plans and mirror the hard limits set first by Cap compliance, and now by SDL compliance under the Basin Plan arrangements.

The trigger for non-compliance with the plan limit (LTAAEL) is 3% above the LTAAEL, to account for model errors. The triggers for non-compliance with an SDL are established in the Basin Plan.



Image courtesy of Quentin Jones.

There are several factors that may be contributing to underuse in a system:

- **Climate change/variability.** From the start of the original water sharing plans, NSW has experienced (and is still experiencing) two significant droughts. It is not surprising that average annual water use over the past 15 or more years has been less than the LTAAEL in some systems.
- **Water user behaviour appears to have become more conservative in response to recent historical drought conditions.** Before the Millennium drought, many users would plant more crops than could be supported by the allocations in their accounts at the time of planting. In effect, they took a risk that there would be further inflows to the dams during the year and that crops could be finished off with this additional water. This behaviour paid off most of the time, but meant that crops failed during the drought, as the expected future inflows did not eventuate. Following this, many users have become more conservative and are planting only that area of crop that can be supported by early-year allocations. Later-year allocations are not used.
- **Carryover provisions introduced in the first water sharing plans have encouraged this more conservative behaviour.** Licence holders can, to some extent, respond to climate variability without fear of losing all unused allocations. These provisions were introduced for exactly this reason—to allow licence holders to manage their own risk of inter-annual allocation variations. Unused allocations are available to be sold to others, and/or carried over to prop up future year allocations where carryover or continuous accounting rules apply. Over the long term, assuming water ‘losses’ from the potential for increased spills from dams and evaporation of carryover water in the dams are minimal, average annual water use should be the same. That said, the highs and lows will be moderated.

Before changes are made to address chronic underuse, further work and consultation is needed to understand the causes of the underuse, to explore possible responses, and to analyse the potential effects of these responses on the full spectrum of water users and the environment.

The draft water sharing plans for regulated rivers now include the following provision to allow for further consideration of this issue:

*This Plan may be amended to facilitate total extractions reaching the long-term average annual extraction limit or long-term average sustainable diversion limit, subject to:*

- a. an assessment of compliance with the limits made under Part 6 verifying that total extractions are less than those limits over the long term*
- b. a review and report on the reasons for total extractions being less than the limits over the long term, including recommendations for potential changes to this Plan to increase extractions to the limits and assessment of the impacts of the recommendations on future water allocations to all categories of water access licences*
- c. there being no net reduction in the protection of planned environmental water established under clause 16 of this Plan.*

**Note.** *Section 10.28 of the Basin Plan requires that a water resource plan must ensure there is no net reduction in the protection of planned environmental water from the protection provided under State water management law immediately before the commencement of the Basin Plan.*

# Water sharing plan commitment to maintaining reliability of entitlements

**Stakeholders sought stronger commitment in the water sharing plans to maintain the reliability of allocations for different entitlement types.**

Water user groups requested the insertion of clauses explicitly stating that water sharing plans will not reduce the yield and reliability of the different classes of water entitlements. They argued that if changes have or do occur that affect water access, they should be fully compensated for the effect of those changes.

## Response

'Reliability' is a value-laden and ambiguous word, meaning different things to different people. Historically, the department has used the term to describe the average start-of-year allocation for a particular category of access licence. Other measures at other times of the water year could be used.

Reliability can be modelled (using a baseline model, or a current-conditions model, both using historical climate data or paleoclimate data), or actual (using historic start-of-year allocations). Reliability can be affected by many factors, which may or may not be within government control:

- **Change in policy or water sharing plan rules.** This is within government control. It is contemplated by Division 9 of Part 2 of the *Water Management Act 2000*. Under these provisions, compensation can be claimed by licence holders if a change to government policy (including water sharing plan rules) results in water allocations being reduced by more than 3%.
- **Climate change.** A long-term and sustained change in rainfall and runoff due to climate change can change reliability of water products.
- **Change in use of existing water entitlements for external reasons.** Licence holders' use of their entitlement and allocations may change from time to time in response to factors such as commodity price changes, interest rates status, forward contract commitments, energy costs or technological advances.
- **Increased activation of previously unused entitlements, or parts thereof.** In continuously accounted, regulated river systems such as in the north of NSW, if a licence holder does not use their allocation and the water in the account has reached the account limit, then any future allocations in effect 'spill' into the dam, and are made available as future allocations to other licence holders. Likewise, in carryover systems such as in the south of the state, any water in excess of the carryover limit remaining in an account at the end of a water year in effect 'spills' into the dam and is made available as future allocations to all licence holders.  
In both cases, the underuse is socialised, and other licence holders accrue the benefits of this underuse. This underuse may reduce over time because of changed business behaviour, such as planting additional crops, or growing other water-using businesses, or trading of allocations to others that then use them. This reduces the socialisation of previous underuse, and in turn the new allocations for all reduce. The result is a reduction in reliability.
- **Change in the distribution of use of existing entitlements or allocations.** With some limitations, current policy settings allow entitlements and allocations to trade throughout a regulated river system. Generally, the operational water required to deliver water to the downstream end of a system is greater than that required to deliver to extraction points closer to the dam.
- **Greater use of entitlements may also result in actions required to ensure total extraction remains within plan limits.** This will change the reliability for the affected category of access licence. This is not new. It has been the case under the Murray-Darling Basin Ministerial Council Cap regime and remains so under the Basin Plan SDL compliance regime.

Any of these factors may affect the reliability of allocations to entitlement holders.

As outlined above, the compensation provisions of the *Water Management Act 2000* protect water users against the effects of changes to government policy on reliability. The NSW Government also recognises the value of

monitoring changes to reliability more generally, and making this transparent to entitlement holders. To this end, as part of the review of objectives, strategies and performance indicators, we will explore metrics to show changes to reliability over time, and methods to consider the causes of such changes.



Image courtesy of Quentin Jones.

# Allocation policy and drought of record

**Views on the appropriateness of fixing the allocation risk baseline at the pre-2004 drought-of-record are mixed.**

There are mixed views about the drought-of-record used in water sharing plans as a basis for water resource assessments and allocations. Some are of the view that failing to take into account the two significant droughts of the past 15 years poses a risk to the water security of high-priority licence holders such as towns and high security licences, as well as water for unlicensed domestic and stock needs (basic rights). The pressure the current arrangements put on these, and on environmental assets and values during dry times, is seen as unacceptable.

Others view any change to a more severe drought-of-record as creating an unnecessary effect on general security licence holders in most years, and maintain that the water security issues can be addressed by other means that have less effect overall on regional economies.

## Response

When decisions are made about how much water to allocate to different categories of licences in regulated rivers, water managers consider several factors. These include:

- how much water is in the dam
- how much of this is already committed as carryover in accounts of licence holders, for
  - future requirements of high-priority needs such as towns
  - stock and domestic supplies
  - high security licences
  - inter-state water delivery.

Volumes required to deliver water down the river to meet these commitments are also considered. When assessing the available water, an assumption is made about how much water will flow into the dam during a water year, and a

risk is taken at the beginning of the water year that these inflows will occur during the year to supply the allocations.

The first water sharing plans for regulated rivers directed water managers to assume for allocation purposes that no more than the inflows experienced in the drought-of-record before the start of the plan would occur. That is, they would make allocations assuming inflows matching those during the worst drought previously experienced. This drought was different for each valley. For example, in the Gwydir valley, the period of lowest inflows before the first plan started was from December 1918 to May 1920; in the Lachlan valley it was July 1979 to June 1981; and in the Murrumbidgee valley it was the federation drought of July 1902 to April 1904.

Since the start of the first plans, NSW has experienced two severe droughts. In the regulated river valleys from the Lachlan south, the Millennium drought is now the worst drought of record. In the northern valleys, the current drought that we are still experiencing is the worst drought of record. Both have resulted in inflows of less than the water sharing plan benchmark drought of record. This has meant that in all valleys, lower-priority, general security allocations have not been announced, and in some valleys, access to carryover water in general security licence accounts has been reduced or prohibited so that higher-priority needs can be met.

In 2014, the NSW Government decided against becoming more conservative when making allocations and locked in the allocation risk as that taken at the start of the first water sharing plans, rather than moving to a new drought of record. This was viewed as the appropriate balance between productive use of water and drought

security. It concluded that alternative drought contingency measures including subsidies and other assistance were preferable to setting water aside in reserves.

This followed an assessment of the effect of changing the drought of record after the Millennium drought. The Lachlan Valley was used as a case study. The modelling indicated that using the Millennium drought as the drought of record would require a significant increase in storage reserves to continue to guarantee high-priority licences and demands in severe drought years. This in turn would significantly reduce the water allocations for general security licences in all years.

Any change in the allocation framework needs to be carefully analysed, and both technical and policy aspects considered. This will need to be a detailed, nuanced and transparent discussion with potentially affected stakeholders and the broader community. Complex issues of the appetite for risk and risk-sharing need to be explored.

This discussion will be conducted in the development of NSW's regional water strategies. The regional water strategies will include more detailed analysis of drought and water security risks and include modelling to examine the severity and duration of drought beyond the current period of record.

The new climate data provides us with two datasets to improve our understanding of risk.

The first is a generated 10,000-year record of streamflows derived from statistical analysis of our recorded climate and paleoclimate, to give us a long-term understanding of streamflow behaviour under present-day climate conditions. The second dataset builds on this information but introduces potential, human-induced climate change effects on our streamflows. This new analysis will allow us to move away from making our planning decisions based on one 'drought of record', and towards a risk-based decision framework for the allocation of water.

The regional water strategies will consider community views and hydrologic data to inform a more transparent, measured and pragmatic approach to setting future water allocation rules. This will help to balance regional economic outcomes against future water supply security. Water sharing plans and the allocation policy positions in these may be changed as a result of these regional water strategies discussions. Community consultation will be completed on the strategies, and on any proposed water sharing plan changes before any final decisions are made.

Water sharing plans can be amended at any time if it is in the public interest to do so, not just at their 10-year remake. This could happen as part of the implementation phase of approved regional water strategies, not just in response to any agreed changes to our approach to allocating water, but also as any new, approved infrastructure comes online.



Image courtesy of Quentin Jones.

# Aboriginal water rights

## Secure access to water for cultural and economic activities.

First Nations people and Aboriginal communities have expressed strong desire to:

- enhance cultural flows, economic opportunities and access to water entitlements
- seek shared benefits by using water allocated for environmental and consumptive purposes to deliver cultural benefits where synergies exist
- have acknowledged that water is critical to the health and wellbeing of communities
- enable access to Country
- embed Aboriginal participation, partnerships and communication into water management and government decision-making.

Several submissions sought greater clarity about the process of accounting for 'new water' issued as the result of Native Title Rights, and any new Specific-Purpose access licences for Aboriginal Cultural purposes.



Image courtesy of Quentin Jones.

## Response

The water sharing plans recognise access to water through the exercise of Native Title rights as a basic right. They also allow for relatively small volume licences to be granted for cultural purposes and in some cases for economic purposes. Plans can also now be amended to include rules for the protection of water-dependent Aboriginal cultural assets.

As part of the water resource plan development process, the NSW Government, assisted in the design phase by Northern Basin Aboriginal Nations (NBAN) and Murray Lower Darling Rivers Indigenous Nations (MLDRIN), consulted with First Nations people across 29 Nation groups to discuss their values and uses, objectives and outcomes for water management within their Nation area. The objectives above reflect the outcome of those discussions in a very broad sense.

As can be seen, these objectives go beyond the scope of water sharing plans and reflect a much more integrated approach to land and water—or Country. The water sharing plans simply provide the statutory enablers to develop a more comprehensive approach to water management for and by Aboriginal people.

To this end, the NSW Government is committed to the co-design of an Aboriginal water strategy, with associated policies and implementation programs, focused on delivering the objectives outlined above. As a first step, we are working with peak Aboriginal groups to establish our co-design principles and commitments, and to begin developing our strategy and policies. The solutions and programs we collectively develop must be sustainable, based on shared understanding through knowledge exchange, and carried out through enduring programs and pathways.



# Prerequisite policy measures in the southern Basin

**There is some concern in the community about the implementation of prerequisite policy measures (PPMs).**

Most submissions from public exhibition supported the concept of PPMs. Extractive users were concerned about the potential impact on reliability of access and how it would be avoided, as well as unwanted inundation of private property. Environmental groups were concerned that limiting the implementation of PPMs to the extent that it does not affect reliability will bias rules towards extractive users and minimise PPMs' capacity to achieve the desired environmental outcomes.

## Response

When the Murray–Darling Basin Authority set the sustainable diversion limits, they assumed that certain measures would be in place to maximise the benefits provided by environmental water. Without these measures, larger quantities of water recovery would have been needed to achieve the same results. These measures are known as prerequisite policy measures (PPMs).

PPMs are a significant change in the way environmental water is managed and accounted for in the Murray–Darling Basin. PPMs apply only to held environmental water in the regulated NSW Murray and Lower Darling and Murrumbidgee river systems. They will allow held environmental water to be used more effectively and flexibly, by letting it be used across multiple sites, and allowing water for the environment to be released on top of natural flow events.

PPMs are new measures that seek to maximise the beneficial outcomes of water recovered for the environment under the Basin Plan. Under the Basin Plan, PPMs have been in effect in the Murrumbidgee and NSW Murray and Lower Darling regulated water sources since 30 June 2019.

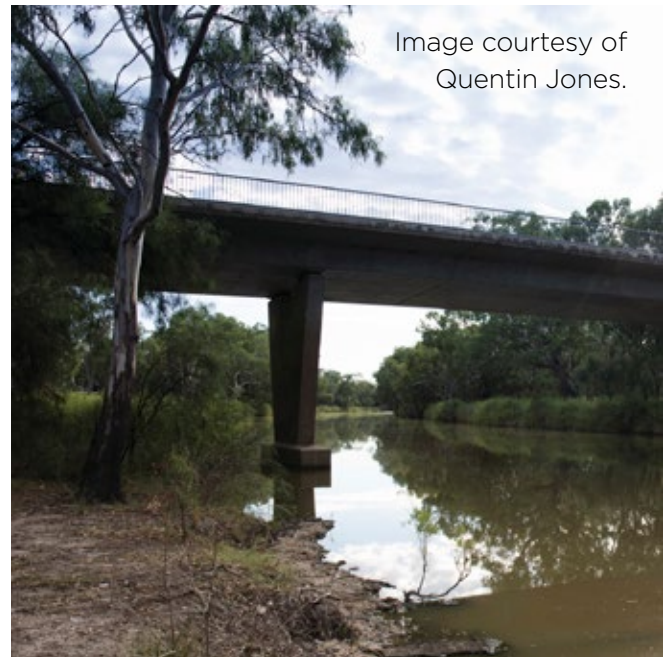


Image courtesy of Quentin Jones.

NSW will implement PPMs in a way that means detrimental effects on the access rights of licence holders and landholders can be mitigated or offset, while also enabling optimum environmental outcomes. This includes using measures such as applying conservative losses, and assessing risks to ensure reliability is not affected, and that environmental outcomes are not undermined.

The management and delivery of environmental water is still evolving. We will use adaptive management to learn, refine and improve the framework for PPMs. Each year, the NSW Environmental Water Manager and WaterNSW are both required to report on environmental watering actions that used PPMs. The department will use these reports to evaluate and review PPMs to inform and improve the way we manage PPMs. See [prerequisite policy measures](#) for more information.

# Northern Basin connectivity and active management

**There are differing views on the adequacy and potential effects of measures in water sharing plans to improve flow connectivity across the northern connected Basin in NSW.**

There is large scale support for improving connectivity of flows across the northern Basin in NSW. Most recognise the importance of managing flows coming down the system not only for environmental values, but also cultural, social and economic values throughout the northern Basin. Many downstream stakeholders are concerned that the measures in the draft water sharing plans do not go far enough and would like to see protection of held environmental water, as well as improved planned environmental water rules that increase the flows across the water sharing plan area boundaries.

In contrast, some water users in the northern tributaries are concerned that such measures are insufficiently defined and carrying them out will reduce access in these upstream areas. Particular concerns were raised about the introduction of the active management provisions in the lower reaches of the Gwydir and Macquarie unregulated systems upstream of their confluence with the Barwon–Darling system.

## Response

The draft water sharing plan rules are a significant change in the management of connectivity and environmental water in the NSW northern Basin. They provide for:

- ‘active management’ of held environmental water from the northern tributaries through the Barwon–Darling
- increased ‘commence-to-pump’ levels on the Barwon–Darling for A-Class licences to protect low flows
- daily sharing of flow access on the Barwon–Darling
- protection of a ‘first flush’ through the Barwon–Darling after an extended dry period.

Active management is one element of the [Better management of environmental water](#) reforms that the department has been consulting with stakeholders on since March 2018, and is endorsed by the NSW Government. It will be introduced in the Barwon–Darling, Gwydir unregulated and Macquarie unregulated water sharing plans.

Active management protects held environmental water through these systems that previously would have been taken upstream of these areas prior to its purchase for environmental use. In the Macquarie the active management provisions also protect a portion of planned environmental water that has been legally protected but not enforced for some time. The NSW Government is committed to further improving connectivity in the northern Basin. We will put in place an effective monitoring, evaluation and reporting framework to understand how far these initial changes go towards improving environmental, social and cultural outcomes. The Department has also done a stocktake of water sharing rules that may contribute to connectivity in the northern Basin. The stocktake will be used to inform future work.

We are also working with the Queensland and Australian governments to deliver environmental works and measures for the northern Basin. This will focus on improving cross-border collaboration and the management and coordination of environmental water, protecting environmental flows, addressing systems constraints in the Gwydir to better manage connectivity flows, and completing environmental works and measures to promote fish movement and habitat, such as building fishways.

## Potential trade from regulated rivers to upstream unregulated rivers

**There is some concern about a provision in regulated river and unregulated river plans that allows a plan to be amended to permit trade from a high security, regulated river licence to an unregulated river licence in an upstream water source.**

Water users have expressed concern that allowing trade of entitlement from a regulated river to an upstream unregulated river will affect the reliability of supply for regulated river water users. Other stakeholders are concerned that development upstream of dams will have unacceptable effects on streamflows and dependent environmental values in the unregulated catchments.

### Response

All unregulated and regulated river water sharing plans now contain a provision that allows the Minister for Water, Property and Housing to amend a plan or plans to allow for a high security, regulated river licence to be cancelled and an unregulated river licence to be issued in the catchment upstream of the dam. This allows some development to occur upstream of a dam in areas where there is little or no unregulated

river entitlement to trade, and where development would otherwise be precluded. It also means that the impact of any such development on the downstream regulated river and its users is offset. That is, while inflows to the dam may be somewhat reduced from upstream development, the effect on remaining users is offset by the retirement of an equivalent high security allocation provided for by these inflows.

Amendments would only be proposed where there was a demand, and where the modelling demonstrates that any effects of the trade on other entitlement holders are offset.

Likewise, if enabled through plan amendment, any such trade would be subject to the minimal harm test under the *Water Management Act 2000* or, in the case of more significant developments, the provisions of the *Environmental Planning and Assessment Act 1979*.



Image courtesy of Quentin Jones.



Image courtesy of Quentin Jones.

## Plan drafting and language

### Changes to the drafting of specific clauses in water sharing plans have been questioned.

Water user groups have questioned whether the language in the new or amended plans has changed the minister's discretion compared to previous plans. They have also provided alternative drafting of water sharing plan clauses for consideration.

### Response

The water sharing plans have been drafted consistently with contemporary drafting norms. 'Shall' in legal drafting indicates an obligation, confirmed by the Interpretation Act 1987 (section 9). To avoid any doubt, the new or amended plans use the expression 'the minister is to...' when imposing an obligation (that is, where 'shall' was used previously). There has been no change to intent.

Please note that a water sharing plan cannot fetter the minister's power under the Act. Such a power includes the minister's power to make an 'available water determination'. In relation to this power, some plans required that the minister 'should' consider the rules in the water sharing plan clause. 'Should' implies a discretion, but is now not preferred for use in this context in legal instruments. The plans therefore now say 'unless the minister otherwise determines, ...'. The ministerial discretion remains in this respect, with the new drafting increasing the transparency around the minister's exercise of discretion.

Section 48 of the Act also states: 'When exercising functions under this Act, the minister must take all

reasonable steps to give effect to the provisions of any management plan and, in particular, to ensure that any environmental water rules established by the plan are observed'.

Water sharing plans are statutory instruments that define the rights and responsibilities of licence holders and share available water between various uses (including the environment). Water sharing plan clauses are developed from the statutory requirements of the *Water Management Act 2000*. Drafting of clauses is a specialist task and was completed by subject matter experts working with legal experts in the department, and in consultation with the NSW Parliamentary Counsel's Office. The drafting is guided by principles outlined below. While issues raised in alternative drafting have been considered, accepting alternative drafting by a particular group of stakeholders is not appropriate.

The water sharing plans have been drafted based on the following advice and aims:

- Water sharing plan provisions and the operation of these, and water sharing plan notes, cannot be inconsistent with the provisions of the Act or regulation, unless the Act or regulation provides for such.
- To avoid inconsistencies now or in the future, where a power or obligation is contained in a relevant Act, that power or obligation is not re-stated in a water sharing plan clause.
- Legal ambiguity should be minimised.

# 4. Future review and change opportunities

The NSW Government is also working on a range of other water management programs and strategies, some of which may address the specific concerns outlined by stakeholders who provided feedback on the water sharing plans. Some of these pathways are outlined below.

## Regional water strategies

Options put forward by the regional water strategies may result in changes to water sharing plans. As part of the NSW Government’s program of investment and reform, we are preparing twelve new regional water strategies that will use the best available information on climate variability and other key water security risks to identify solutions to improve the resilience of regional water resources and communities dependent on these.

These solutions could include investments in infrastructure, changes in how we manage and operate river and groundwater systems, and changes to our regulatory and policy frameworks. These strategies will be delivered over 2020 and 2021 and will seek to balance differing water needs including for people and businesses across NSW.

The strategies will set out a long-term roadmap of actions to deliver five objectives. Options selected for the final strategy for each region will need to address at least one of these objectives, as follows:



### **Deliver and manage water for local communities**

Improve water security, water quality and flood management for regional towns and communities.



### **Enable economic prosperity**

Improve water access reliability for regional industries.



### **Recognise and protect Aboriginal water rights, interests and access to water**

Including Aboriginal heritage assets.



### **Protect and enhance the environment**

Improve the health and integrity of environmental systems and assets, including by improving water quality.



### **Affordability**

Identify least cost policy and infrastructure options.

These strategies will help provide long-term, tailored water management solutions for our regional communities by better understanding the opportunities and challenges of each region.

## Water sharing plan amendments

Under Clause 45 of the *Water Management Act 2000* the Minister for Water, Property and Housing may, at any time, and with the concurrence of the Minister for the Environment, amend a management plan:

- a. if satisfied it is in the public interest to do so, or
- b. in such circumstances, in relation to such matters and to such extent as the plan so provides, or
- c. if the amendment is required to give effect to a decision of the Land and Environment Court relating to the validity of the plan, or
- d. if satisfied that it is necessary to do so because of requirements arising under the *Water Act 2007* of the Commonwealth.

Many of the water sharing plans provide for their own amendment within their 10-year duration. This recognises that not all issues have been explored in enough detail to finalise hard-and-fast rules at this time. More technical work and consultation is required on some matters.

Floodplain harvesting is an example of such an amendment. In the northern NSW valleys plans may be amended to provide for the management of floodplain harvesting. This will occur once the licensing of this is finalised next year.

Water Sharing Plans can be amended at any time subject to a 'public interest' test. For example, as Government infrastructure programs progress, Water Sharing Plan rules will need to be updated to reflect the changed operational arrangements. Such infrastructure might include new pipelines, dams, weirs, flow regulators and other works. These might be an outcome of Basin Plan Sustainable Diversion Limit Adjustment Mechanisms, Regional Water Strategies, or other Government commitments.



Image courtesy of Quentin Jones.

The department will continue to work with stakeholders in the spirit of continual improvement. Where mutually beneficial amendments can be agreed across a broad range of stakeholders, and these meet NSW and Commonwealth statutory requirements, water sharing plans can be amended.

Ten yearly reviews of the Basin Plan are required, which allow for emerging climate change patterns, new information, tools and techniques to be considered. These reviews could result in changing sustainable diversion limits or other water management arrangements. The first review will be conducted in 2026. This may necessitate changes to NSW water resource plans and hence our statutory water sharing plans.

A water sharing plan can be changed after a water resource plan has been accredited by the Commonwealth Government. If the change affects an accredited part of the water resource plan, the changes will need to be accredited by the Commonwealth.

## Natural Resources Commission—statutory audits and reviews

Water sharing plans are the primary legal framework for managing water access and sharing in NSW. The plans are valid for 10 years from their starting date. Near the end of the 10-year term, the independent Natural Resources Commission formally reviews each plan.

The minister must also ensure that water sharing plans are audited at least every five years, for the

purpose of ascertaining whether their provisions are being given effect to. These audits are also carried out by the Natural Resources Commission.

When extending or replacing a water sharing plan, the minister must consider the results of the Natural Resources Commission's review and most recent audit. Many of the water sharing plans for unregulated rivers in the Basin are nearing the end of their 10-year term. The Natural Resources Commission will be undertaking their statutory reviews of these, which may result in water sharing plan changes.

Image courtesy of Neil Fenelon.





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