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State-wide WSP Issues and Agreed Amendments from NSW Irrigation Industry

Dear Jim and colleagues,

NSW Irrigators' Council (NSWIC) would like to arrange a meeting to discuss the latest iteration of Water Sharing Plans (WSPs).

NSWIC Members have been actively involved through the Stakeholder Advisory Panel (SAP) process, and we thank your staff for their time in working through the concerns of stakeholders.

Our Members are aware that many stakeholder concerns are state-wide matters, and were advised that a state-wide agreed approach was required to develop a way forward on these matters. The approaches recommended herein are thus the consistently agreed positions from the NSW irrigation industry.

We appreciate that this is an incredibly difficult time for us all, but the details of WSPs are of significant and ongoing importance to water users in NSW, and this nevertheless remains a very critical time to ensure these details are correct and clear.

We acknowledge the difficulty of consultation during these challenging times, and recognise that alternative arrangements were required for SAP meetings. Whilst these difficult circumstances are acknowledged, and beyond control, it has presented complications in resolving the grievances of stakeholders.

Many of the matters presented herein have been raised by industry previously (through the SAP process and broader public consultation) and stakeholders would like the opportunity to resolve these matters so that we can all have confidence in the final WSPs.

This letter outlines the positive outcomes in these latest WSPs, the critical irrigation industry-wide agreed amendments to the state-wide WSP template, as well as general comments and areas where more information is required.

Please find the specific recommended text inserts detailed in the blue text boxes, and recommended actions outlined in grey text boxes.

Positive Outcomes:

NSWIC wishes to thank the Department for providing these insertions, following numerous discussions with us on the matter of underusage.

- Inclusion of the following economic objective: to maintain, and where possible improve, access to water up to the long-term average sustainable diversion limit for agriculture, surface water-dependent businesses and landholders.
- Removal of the following environmental water rules (Murrumbidgee example): 15(3) the water that is not committed after the commitments to basic landholder rights, and for sharing and extraction under any other rights, have been met, and 16(1)(c) the water remaining after water has been taken under basic landholder rights, access licences and any other rights under the Act in accordance with the provisions in Part 6 and Part 8 and 16(4) The planned environmental water established under subclause (1) (c) is maintained by the provisions specified in Part 6 and Part 8. Note that these provisions have been retained in the Belubula and Peel where they have been in place since the first plans for those areas.
- Inclusion of a new amendment clause (Murrumbidgee example): 92(3) This Plan may be amended to facilitate total extractions reaching the long-term average annual extraction limit or long-term average sustainable diversion limit should an assessment of compliance with those limits made under Part 6 show that total extractions are in the Minister's opinion significantly less than those limits over the long term.
- Removal of references in the WSP to a long term water plan (despite aforementioned remaining issues regarding the MER).

Priority Agreed Amendments:

- Planned Environmental Water (see Page 6);
- Addressing Underusage (see Page 8);
- Socio-Economic Objectives and Performance Indicators (see Page 3).

Detailed Agreed Amendments:

- Throughout the document there are a number of wording changes that affect Ministerial discretion relating to decisions and actions. These changes include that “*the Minister must*” as compared to existing wording “*the Minister should*”. We understand that the Department’s justification for this change is to be consistent with the *Water Management Act 2000* (WMA) and to ensure the clauses are certain.

NSWIC requests the Department provide evidence as to the reference clauses in the WMA directing this change. The definition and effect of the words “should”, “shall”, “may” and “must” needs to be clarified to determine the legal effect of these changes in the template. It is accepted some change may be necessary for certainty and completeness, however, the use of the new terms has been inconsistent throughout the plan. For example the current wording potentially weakens the property rights of water access licences where the available water determination “*should*” (current plans) versus “*may*” (new plan) and removal of Ministerial discretion in terms of compliance where a Minister “*must*” act compared to “*is to consider*”.

[Action] Clarify the legal effect of wording changes to Ministerial discretion, and provide evidence of the reference clauses in the WMA, or other legal advice, directing this change.

- NSWIC request insertion of the following set of words, which confirm primacy of the NSW Water Sharing Plans:

“The Water Act 2007 of the Commonwealth, the regulations and other instruments made under it do not exclude, or limit in any way, concurrent operation of this Plan.”

- Insert clauses that explicitly state the WSP will not reduce the yield and reliability of the different classes of water entitlements. If changes have, or do occur, which impact on water access, that change must be fully compensable. For example:

Notes. Nothing in this Plan will change the reliability of water entitlements. Government bears the risk of any reduction in entitlement reliability arising from policy changes since the NSW water sharing plans of 2003 and 2004, such as new environmental objectives. Should an assessment of impacts on yield, reliability and access identify a reduction, the resulting change is to be fully compensable.

- Part 2 of the WSP is one of the most contentious sections of the plan due to the substantial changes made to it from earlier WSP's. The development of a more defined Vision, Objectives and Targets has been implemented to provide detailed descriptions as to Plan outcomes. However, the development of this Part has been inconsistent. NSWIC understand that the science team was given responsibility to develop this socio-economic section, and thus the required skill set to develop appropriate social and economic objectives and indicators was not catered for. As a result, the economic objectives are insufficient, not comprehensive, and do not reflect contemporary thinking. NSWIC request the following text is inserted:

Notes: Prior to gazettal of this Plan, the economic objectives will be updated to reflect the most contemporary thinking on outcomes for the productive and economically efficient use of water resources. This will include objectives, strategies and performance indicators to specifically address maintaining or improving the reliability of water allocations for holders of access licences. Draft text will be placed on public exhibition prior to its finalisation.

(1) The broad economic objective of this Plan is to protect and enhance access to water to optimise economic benefits for irrigation, water dependent industries and local economies.

(2) The targeted economic objectives of this Plan are as follows:

- (a) to support viable and sustainable water-dependent industries over the long term,*
- (b) to encourage economic efficiency in the management and use of water,*
- (c) to at least maintain the total reliability of water entitlement (licence) categories at the 2009 Murray-Darling Basin baseline,*

*(d) to maintain and, where possible improve water trading opportunities for water-dependent economic activities, within environmental and system constraints,
Note. Trading is a generic term referring to dealings under Division 4 of Part 2 of the Act.*

(e) to maintain and enhance access to water, up to the extraction limit for agriculture, business and landholders, and
(f) to maintain water quality within target ranges for agriculture, business and landholders
(g) to maintain a diversity of agriculture commodities and production.

Notes. The scope of this Plan is limited to water dependent outcomes.

- Economic performance indicators are inadequate. The term “*using one of more of the following*” implies only one of the performance indicators is required to be met, which is not acceptable. The performance indicator of “*the movement of water to higher value uses*” is not appropriate given the significant negative socio-economic impacts that has on communities producing other crops, and the movement of water is also the outcome of a range of factors that do not rely on the Plan. Indicators of water quality are not economic indicators – these should be removed. Insert the highlighted text:

(4) The performance indicators used to measure success in reaching the broad economic objective in subclause (1) will be evaluated by determining the extent to which the combined outcomes of the targeted economic objectives in subclause (2) have contributed to achieving the broad objective.

(5) The performance indicators used to measure success in achieving the targeted economic objectives in subclause (2) are the changes or trends in economic benefits, including the changes or trends in the following:

(a) the socio-economic benefits of water extraction and use.

(b) comparison of the reliability of water entitlement (licence) categories in the Murray-Darling Basin Plan 2009 baseline.

Note: This is a comparison with the Baseline-Diversion Limit mode to Pre-Basin plan model run (current conditions model).

(c) Volume of water allocations used by actual licence category during the term of this Plan.

(d) the economic benefits of water trading including changes or trends in the following:

(i) the change in the unit price of water that is subject to a dealing,

(ii) the annual total number of access licence share components subject to a dealing,

(iii) the weighted average price of water traded within the water source,

Note. Weighted average price is defined in the Dictionary.

(e) Long term annual average extraction within at least 3% of the Long Term Average Annual Extraction Limit.

(g) the trends in the number of irrigation commodities produced and the volume of each commodity produced in a valley.

In evaluating the effectiveness of the strategies in meeting the objectives of this clause, the following will be relevant:

- *the extent to which stakeholders have considered the operation of this Plan to be clearly explained and predictable,*

- *water made available during the term of this plan through available water determinations,*

- *the extent to which changes in the economic benefits of water extraction and use can be attributed to the strategies in subclause (3) and rules in this Plan.*

- *external influences on the water source during the term of this Plan have affected progress towards achieving the broad objective.*

Note. External influences may include trends in urban, agricultural and industrial development, energy costs, commodity prices, interest rates, technology advances and changes in policy or regulation.

- Evaluating Effectiveness - this section was changed to remove stakeholder's perception of the operation of the Plan as a measure of effectiveness. This is unacceptable as it leaves assessment of effectiveness just up to Departmental interpretation, and not those which this Plan impacts. The current wording is: "(6) In evaluating the effectiveness of the strategies in meeting the objectives of this clause, the following will be relevant: (a) the extent to which the strategies in subclause (3) and provisions in this Plan have been implemented and complied with". This should be changed back to the earlier version to include:

(a) the extent to which stakeholders have considered the operation of this Plan to be clearly explained and predictable.

- Emergency drought reserves – water users note that drought reserves are not provided for under the Plans. We recommend including in Part 2 (8)(3a) (Murray Lower-Darling example) "*or emergency drought purposes when deemed necessary*".

(3) The strategies for reaching the targeted environmental objectives of this Plan are as follows:

(a) reserve all water in excess of the long-term average annual extraction limit and longterm average sustainable diversion limit for the environment, or emergency drought purposes when deemed necessary".

- There is a need for an agreed baseline to be documented against which the Objectives and Targets will be assessed against. This should be defined in the Monitoring Evaluation Review (MER) based on the existing long term average annual extraction limit and plan rules.

There is considerable risk due to a lack of documented baseline in the MER, that the appendix documents of the WRP (Risk Assessment/LTEWP) will be used by the Natural Resource Commission (in their statutory review of WSPs) to assess the WSP objectives, strategies and targets against. This has already occurred in the preliminary Peel WSP review and the use of these documents out of context results in findings of insufficient water for the environment being overstated and based on pre-development conditions.

[Action] Develop an agreed baseline which the Objectives and Targets will be assessed against, and define this in the MER based on the existing long term average annual extraction limit and plan rules.

- Whilst the plans no longer refer to the LTEWP, the removal of reference to LTEWP is disingenuous given the MER directly links back to the LTEWP anyway. The MER uses the WRP risk assessment and Long Term Environmental Watering Plans (LTEWP) both of which were developed to meet different requirements such as guiding how Held Environmental water is used or assessing risk to sufficient water for the environment. Both documents developed under Commonwealth direction present a "raw" risk of pre-development conditions which substantially over states the risks.

- The MER is solely about meeting targeted environmental objectives.¹ There is no provision in the WSP for any MER to meet the targeted economic, community/social and indigenous objectives. This must be addressed.

[Action] Develop socioeconomic outcomes for inclusion in the MER.

- Part 4 Environmental Water Requirements otherwise known as Planned Environmental Water (PEW) rules have also been one of the most contentious issues in the WSP process. The department has lacked consistency in communication to stakeholders and the community on this issue due to a range of influencing factors.

The current regulated WSP's specify PEW in the environmental water provisions. This is water that is required for fundamental ecosystem health such as end of system flows, or translucency rules etc. The plans also provide for system operation rules which document operational rules - these rules are not classified as PEW under NSW WMA definition in all regulated WSP with the exception of the Peel/Belubula. NSWIC appreciates the Department clarification of the above view towards the end of the stakeholder consultation process.

The new WSP defines PEW in Part 4 Environmental water provisions and duplicates these rules in Part 10 System operation rules.

NSWIC is concerned this duplication of PEW rules in the operational section could potentially confuse the interpretation of PEW. NSWIC requests a return to the existing plan approach which separates Environmental and Operational rules. Alternatively, an additional note could be added to provide clarification between PEW rules and Operational rules in this section so there is no misinterpretation.

Further, there is inconsistency between valleys on how the PEW definitions are written. The Gwydir and Macquarie include supplementary rules, but others (Namoi for example) do not. Further, unregulated plans appear to have an inconsistent definition with the regulated plans (they contain the old definition, not the current one that refers largely to LTAAEL) and this needs amendment.

[Action] Return to the previous format whereby PEW rules are outlined in the environment section, and operational rules are outlined in the operational section.

Notes.

1. *Planned Environmental Water rules are for fundamental ecosystem health and are specified under part 4.*
2. *Operational rules are not specified as environmental water requirements or defined as Planned Environmental Water. Operational rules contribute to basic ecosystem health.*

[Action] Ensure consistency in the definition of PEW between regulated and unregulated plans.

¹ https://www.industry.nsw.gov.au/data/assets/pdf_file/0003/272739/schedule-j-nsw-mld-merp.pdf

- Stakeholders have been informed that the WSP and WRP process has been decoupled and that the WRP will be submitted after the WSP is made. The WSP is the primary legislative instrument in terms of NSW water management framework and this should be documented in both the WSP and WRP. NSWIC notes that there are a number of inconsistencies between WSPs and WRPs - it is critical that consistency occurs between WSPs and WRPs and additional consultation is required on the final draft of the WRP and the appendix documents.

[Action] Ensure consistency between WSPs and WRPs, and consultation on the final draft of the WRP and the appendix documents.

- Language on *reserving* water for environment² is unacceptable – it implies a default new environmental water reserve with significant implications and lacks clarity. The significant implications include ramifications for GS entitlement if unregulated tributary inflows are deemed ‘natural’ flow, and ramifications for supplementary access if natural high flows are reserved first to meet downstream flow targets. Clarity issues concern whether operational water comes from above or below the SDL, and certainty is required that operational losses are not to be included in the SDL or annual extraction limit.

[Action] Replace phrases such as ‘reserve’ back to *manage, mitigate, maintain* etc., consistent with many of the 2016 WSPs.

- Amend “*reserve all water in excess of the long-term average annual extraction limit and long-term average sustainable diversion limit for the environment*” to:

“Manage extraction within the long-term average annual extraction limit and the long-term average sustainable diversion limit for the environment, thereby maintaining water in excess of the long-term average annual extraction limit and long-term average sustainable diversion limit, and after operational losses have been accounted, for the environment,

Notes. The application of the long-term average annual extraction limit and the long-term average sustainable diversion limit and the assessment and compliance rules in Division 1 and Division 2 of Part 6 of this Plan ensure that all water in excess of those limits and after operational losses have been accounted for, is managed for the environment. These provisions contribute to the objectives in subclause (2).”

- Full example at **Appendix 1***.

[Action] Clarify that operational losses are not to be included in the SDL or annual extraction limit.

- The model run number must be stated in the Plan. Water users will not accept any Plan that does not specify model run numbers in the Notes. We understand the model run will be updated over time, but the Plan should reference the model run number current at the date the Plan commenced, and identify where subsequent amendments to the model run can be accessed.

² E.g. “(a) reserve all water in excess of the long-term average annual extraction limit and long-term average sustainable diversion limit for the environment” and “(b) reserve a portion of natural flows to partially mitigate alterations to natural flow regimes in the water sources”.

[Action] Specify model run numbers in the Notes (current at the date the Plan commenced) and identify where subsequent amendments to the model run can be accessed.

- Underusage – water users are very pleased to see the inclusion of the new amendment clause: “*This Plan may be amended to facilitate total extractions reaching the long-term average annual extraction limit or long-term average sustainable diversion limit should an assessment of compliance with those limits made under Part 6 show that total extractions are in the Minister's opinion significantly less than those limits over the long term*”. This however requires clear triggers around the interpretation of ‘significantly less’, which could be clarified through an explanatory note in the WSP.

(1) This Plan may be amended to facilitate total extractions reaching the long-term average annual extraction limit or long-term average sustainable diversion limit should an assessment of compliance with those limits made under Part 6 show that total extractions over the long term are (REMOVED: ‘in the Minister’s opinion’) significantly less than those limits.

(1) Total extractions over the long-term will be considered significantly less if:

*(a) Average annual extraction from the water source are less than the long-term average annual extraction limit by 3% or more;
or*

(b) An assessment of compliance with the long-term average sustainable diversion limit, undertaken in accordance with provision 32 of this Plan indicates that the sum of annual actual take in the water accounting periods since 1 July 2019 is less than the sum of annual permitted take for those water accounting periods less 20% of the long-term annual diversion limit for the SDL resource unit.

(2) Amendments to the Plan to facilitate total extractions reaching the long-term average annual extraction limit or long-term average sustainable diversion limit may include, but are not limited to, changes to Division 5 of Part 6 of the Plan (‘Available water determinations’).

Notes. Such an amendment is deemed to have no net impact on PEW provided annual average usage remains at or below the SDL in the long term. This is consistent with Part 2 (8)(3)(a).

- Part 12 amendments - there are a number of ‘consistency’ amendment provisions, which NSWIC ask to be removed if they have no bearing on a particular WSP. Water users fear

this may be the result of the Department trying to prevent the risk of compensation or legal action by including all amendment provisions across every plan. NSWIC are of the understanding that the WMA allows the Minister to amend the Plan regardless, and thus these provisions are not required to be specified in the general case. Where a specific amendment provision is required to remove doubt or to document unresolved issues prior to gazettal (such as the underusage amendment provision), a note should be included to specify that the amendment provision is because substantial issues were not addressed prior to gazettal of this Plan, tied to a specific agreed course of action to address those issues.

SAP Members also raised adding notes to the amendments to require consultation on any proposed amendments, but were informed by the Department staff that notes to amendment clauses was not standard practice, but that the Department would consult on any proposed amendments. Whilst that intent is appreciated, water users lack confidence that this would occur (particularly with staff turnover), and request greater certainty by including an additional note at the start of Part 12:

Prior to implementing any amendments authorised in this Part, the Minister will consult with access licence holders on proposed amendments.

[Action] Remove amendment provisions which exist purely for consistency, if they have no bearing on a particular WSP given the WMA allows for amendment regardless and there are concerns of compensation impacts. Include a note for applicable remaining amendment provisions specifying that the provision exists because substantial issues were not addressed prior to gazettal of this Plan, and identify a specified agreed course of action.

General Comments:

- Whilst water users respected the short-term importance of recent S324s to ensure water was available for critical needs, this should by no means be a usual or accepted practice given the uncertainty and property right impacts on water users. Our Plans must be developed with accepted measures and targets in place to deal with such circumstances, and Government must have the confidence in these plans so that they can be flexible in a range of circumstances. NSWIC recommend developing a regulation attached to S324 to ensure there is a clear and transparent framework to provide clarity to all stakeholders under which circumstances S324 will be invoked; to confine the circumstances when these powers can be used; to provide a mechanism to assess, review and publicly report on the action; and enable the development of a mitigation strategy. NSWIC developed a draft regulatory framework which was provided to former Minister Blair in August 2018, which is available upon request.
- NSWIC are concerned that under the proposed WSPs, water users would be unclear of what steps are required to be compliant.
- NSWIC acknowledge the importance of consistency in some elements, but if a certain component is not relevant/applicable to a particular WSP area, that component must be removed from that Plan.
 - E.g. with regard to SDLAM projects, it is not appropriate to have clauses in that regard if SDLAM projects are not planned/intended for that WSP area.

[Action] Remove components that have been added for consistency purposes only, and are not relevant/applicable to that WSP area.

- With regard to interception by plantation forestry (and conversion of HS regulated to HS unregulated) - any increase in take needs to be managed within the relevant WSP area and by the form of take responsible for the growth. NSWIC does not support water users bearing the risk of components beyond their control. The issues we have with interception being included in the regulated WSP and allowing the conversion of regulated water to unregulated entitlements are:
 - Any growth in use needs to be addressed in the un-regulated water sharing plan by the purchase of the volume of water entitlements the assumed growth in use will require from the WSP area where the growth in water use is occurring.
 - It is not appropriate to shift economic development from the regulated system to the unregulated system by allowing purchase of HS regulated and conversion to HS unregulated entitlements.
 - Conversions are fraught with third party risks, reliant on modelling and past inflows. The last few years have shown the inflows can be highly variable, once conversions are made they will be impossible to unwind.
 - This will shift economic development from one area to another.
 - In the regulated system where economic development is already constrained by the Basin Plan and associated water recovery, the NSW Government should not be encouraging by their own policies expansion in one area being offset by a reduction in another area.

More information is required:

- *“This Order is made under section 50 of the Water Management Act 2000. The concurrence of the Minister for Energy and Environment was obtained prior to the making of this Plan”.* NSWIC request explanation of the intent of this addition (which has caused concerns). Given the requirement for concurrence is in the WMA, this is an unnecessary addition to the Plan itself which was not there previously. If it is not needed, it should be removed.

We firmly believe that these changes will lead to the improvement of water policy in NSW, particularly by ensuring clarity. As always, NSWIC seek to be constructive and informed, and we trust that providing you with agreed resolutions on behalf of productive water users in NSW will be of value in finalising WSPs.

Thank you for your consideration of this matter.

Yours sincerely,



Luke Simpkins
CEO

***Appendix 1:**

Current (Final Draft)	Recommended
<p>(3) The strategies for reaching the targeted environmental objectives of this Plan are as follows:</p> <p>(a) reserve all water in excess of the long-term average annual extraction limit and long-term average sustainable diversion limit for the environment, <i>Note. Part 4 of this Plan reserves all water remaining above the long-term average annual extraction limit and long-term average sustainable diversion limit for the environment. This contributes to the protection of target ecological populations.</i></p> <p>(b) reserve a portion of natural flows to partially mitigate alterations to natural flow regimes in the water sources, and <i>Notes.</i> <i>1 Flow regimes and natural flow are defined in the Dictionary.</i> <i>2 The provisions in Division 2 of Part 8 partially mitigate alterations to natural flow regimes in the water sources.</i></p> <p>(c) reserve a portion of natural flows to maintain hydrological connectivity between the water sources and riparian zones, wetlands and floodplains connected to the water sources, <i>Note. The provisions in Division 2 of Part 8 contribute to maintaining the hydrological connectivity between the water sources and connected wetlands.</i></p> <p>(d) reserve a share of water to support environmental watering events in streams, riparian zones, floodplains and wetlands connected to the water sources, <i>Note. The rules in Division 1 and 2 of Part 10 of this Plan ensure that environmental water allowances are maintained.</i></p> <p>(e) contribute to critical environmental and water quality events in downstream water sources. <i>Notes.</i> <i>1 The provisions in Division 2 of Part 8 contribute to maintaining the hydrological connectivity between the water sources and downstream water sources.</i> <i>2 The EWA in Division 2 of Part 10 is to be used to mitigate water quality events in the Lower Darling Water Source.</i></p>	<p>(2) The strategies for reaching the environmental objectives of this Plan are as follows:</p> <p>(a) Manage extraction within the long-term average annual extraction limit and the long-term average sustainable diversion limit for the environment, thereby maintaining water in excess of the long-term average annual extraction limit and long-term average sustainable diversion limit, and after operational losses have been accounted, for the environment, and <i>Notes. The application of the long-term average annual extraction limit and the long-term average sustainable diversion limit and the assessment and compliance rules in Division 1 and Division 2 of Part 6 of this Plan ensure that all water in excess of those limits and after operational losses have been accounted for, is managed for the environment. These provisions contribute to the objectives in subclause (2).</i></p> <p>(b) Mitigate alterations to natural flow regimes in this water source, and <i>Notes. Flow regimes is defined in the dictionary</i></p> <p>(c) Maintain hydrological connectivity between this water source and wetlands connected to this water source, and</p> <p>(d) Support environmental watering events in streams, riparian zones and wetlands connected to this water source, and <i>Note. The rules in Division 1 and 2 of Part 10 of this Plan ensure that environmental water allowances are maintained for environmental watering. These rules contribute to the objectives in subclause (2).</i></p> <p>(e) Contribute to critical environmental and water quality events in downstream water sources. <i>Notes:</i> <i>1 The rules in clause 62 seek to minimise blue green algal events in the Lower Darling Water Source.</i> <i>2 The rules in Division 1 and 2 of Part 10 of this Plan ensure that environmental water allowances are maintained for environmental watering in the Murray Water Source. These rules contribute to all the objectives in subclause (2)</i></p>