

Submission to NSW Office of Water

Draft Proposed Water Shepherding Arrangements in NSW

120604

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Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators access regulated, unregulated and groundwater systems. Our members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

This document represents the views of the members of NSWIC. However each Member reserves the right to independent policy on issues that directly relate to their areas of operation, or expertise, or any other issues that they may deem relevant.

Executive Summary

NSWIC has made publicly available a documented policy position in respect of Shepherding. The document is available on our website ([here](#)) and is appended to this submission.

Our policy notes commitments made by government that the characteristics of entitlements purchased for environmental use will not change. The introduction or shepherding necessarily changes the characteristics of an entitlement if it is only available to a certain class of entitlement holder. It is, fundamentally, a breach of a commitment that is unacceptable.

NSWIC has approached the issue positively. That is, we have sought to provide a mechanism through which the movement of water between unregulated and regulated systems can be effected. We have recommended that a trading mechanism be developed that is open to all classes of entitlement holders. Unfortunately, that proposal has been ignored and the draft arrangements on which we are now asked to comment purports to continue the breach of commitment.

For clarity, NSWIC submits that shepherding necessarily results in an unacceptable breach of a clear commitment.

We reject the current proposal.

Nothing in this document that submits modifications to the proposal supersedes that rejection, nor can any submission be taken as tacit support of the proposal.

General Comments

Change of Characteristics

Public commitments from both the NSW and Commonwealth Governments have been given that the purchase or transfer of entitlements from the productive sector to the Commonwealth Environmental Water Holder will not see a change of characteristics. Such commitment is clear on the Australian Government Commonwealth Environmental Website¹ where it states, *inter alia*:

The water entitlements in the holdings retain the same characteristics as existed before acquisition.

In the 2011-12 Business Plan publicised by the Commonwealth Environmental Water Holder, the commitment was reiterated²:

Water rights held by the Commonwealth retain the same legal characteristics that existed before acquisition. While entitlements are managed for the environment rather than consumption, the Commonwealth is subject to the same allocations, fees, and carryover rules as other entitlement holders.

In a Memorandum of Understanding between Queensland and the Commonwealth in respect of shepherding in July 2010, the commitment to retain characteristics was written in as a fundamental term³:

water entitlements acquired by the Commonwealth will retain the characteristics that they had immediately prior to their acquisition by the Commonwealth;

But perhaps most persuasively, the commitment was reflected in the Memorandum of Understanding between the Commonwealth and the State of New South Wales that commenced the current process⁴:

The reliability and access characteristics of licensed entitlements for water shepherded under this MOU will be retained;

It is quite clearly the case that the "access characteristics" of the entitlements to be shepherded will be fundamentally changed. The entitlements do not provide the capacity to access the water anywhere outside the system in which they are issued. By its very nature, shepherding is designed to change that characteristics to enable access at a different point.

Shepherding undeniably involves a change in the characteristics of an entitlement and is therefore a breach of a fundamental commitment. No amount of rhetoric to the contrary will alter that fundamental breach.

¹ <http://www.environment.gov.au/ewater/management/index.html> viewed 4 June 2012

² At page 16

³ <http://www.environment.gov.au/ewater/publications/pubs/shepherding-qsl.doc> Section 19 (a) (i)

⁴ www.environment.gov.au/ewater/publications/pubs/shepherding-nsw.doc Section 15 (a)

Breach of Water Trading Rules

Section 11.07 of the Draft Water Trading Rules, contained within the Draft Murray Darling Basin Plan, provides the following:

A person may trade a water access right free of any condition as to the person being, or not being, a member of a particular class of persons.

NSWIC asked representatives of both NSW and the Commonwealth at a consultation session on shepherding held in Sydney on Friday 1 June how it was that shepherding was not a breach of this rule. We were advised that the rules had only been recently released and had not yet been fully considered in the shepherding proposal.

Unfortunately, the evidence clearly shows that this rule has been mooted for some time. The Australian Competition and Consumer Commission, who drafted the Water Trading Rules for the MDBA, sought submissions on a rule of exactly this nature and published an opinion that it should be so. Moreover, the Rule itself did not alter between the Draft Basin Plan released in November 2011 and the Revised Draft released in May 2012. NSWIC submits that sufficient time has been provided for the shepherding proposal to consider this breach of the Water Trading Rules and to provide reasoning as to how the two are not in contradiction to one another.

Whilst the Rule itself did not change between iterations of the Draft Basin Plan, we do acknowledge that a note was added to the Revised Draft;

Note 1: An example of a class of persons is 'environmental water user'

In our submission, the shepherding proposal is not only a clear contravention of the Water Trading Rules, but is specifically acknowledged as such by the Rules themselves.

Trading Regime

NSWIC notes that the draft framework is essentially that of a trading regime. We submit that availability of the regime to all entitlement holders, regardless of their identity, is the only method by which the abovementioned breaches can be reconciled.

We note that extension of a trading regime between regulated and unregulated systems is what NSWIC advocated in the first instance. It is again our submission that a trading regime be pursued and that shepherding based on identity of entitlement holder be abandoned forthwith.

Capacity to Increase Activation

NSWIC is particularly concerned at the capacity this framework has to increase activation. Extraction on unregulated systems is constrained not only by volumetric entitlements and pumping capacity - it is also constrained by on-farm storage capacity. In the event that on farm storage is full, even the existence of pump and entitlement capacity to extract further will not result in further take. Where water is being virtually taken, in the case of shepherding, neither the storage nor pumping capacity constraint will apply.

Until - and unless - NOW are able to provide an analysis of the capacity for shepherding to increase activation, NSWIC believes that there will necessarily be unacceptable third party impacts.

Specific Questions

NSWIC notes the specific questions posed by NOW on the submission form. Submissions provided below in respect of those questions must be read in conjunction with the balance of this paper. In particular, NSWIC reiterates that nothing in these answers must be read as support - tacit or otherwise - for a shepherding regime.

Do you think that using a trading framework to implement shepherding is appropriate?

Pursuant to the Water Trading Rules, a trade framework would be available to all users regardless of identification. The draft shepherding arrangements are limited by identity of an entitlement holder.

We do not regard the draft as a "trading framework".

In our submission, the development of a trading framework open to all entitlement holders would be appropriate.

It is proposed to apply a shepherding loss reduction factor to volumes of water shepherded for Barwon-Darling unregulated tributaries and the Barwon-Darling. Do you think it is appropriate that the loss reduction factor be based on long term average losses? In the Barwon-Darling, do you think it is appropriate that the factor relate to river sections?

In our submission, the elimination of negative third party impacts must be paramount. To that extent, loss reduction factors must be specifically calculated to ensure that elimination.

We do not believe that the blanket application of long term figures to a highly variable system such as the Barwon-Darling is appropriate. We submit that the development of bandwidths would be more appropriate where loss factors are adjusted based on low, medium and high flows.

Moreover, those "losses" must necessarily be absorbed by some part of the system. Whilst acknowledging that evaporation will certainly account for a portion, we submit that a significant portion will, in fact, complete part of the role of environmental water as it is lost to the system through groundwater recharge or minimum flow requirements. We submit that acknowledgement of this benefit must be calculated and it must be applied to regulatory regimes - particularly the Murray-Darling Basin Plan.

It is proposed to implement water shepherding rules that limit the allocation that can be shepherded from the parent license. Is this appropriate?

NSWIC reiterates its submission above in respect of third party impacts. If net⁵ trade balances must be limited to ensure no reliability impacts on third party water users, NSWIC will support it.

⁵ NSWIC assumes trade available to all entitlement holders and, as such, assumes trade capacity both down and up stream hence use of the term 'net'.

It is proposed to implement end-of-system commence to pump access conditions for water shepherding of A, B and C class licenses, to enable the movement of shepherded water beyond the Barwon-Darling. Is this appropriate?

NSWIC recognises the necessity to ensure that water being moved from an upstream to a downstream access point is not extracted en route. At the same time, we reiterate our strenuous objection to any arrangement that will materially alter - *or have capacity to alter* - reliability for third parties. In this instance, reliability may encompass commence to pump circumstances. For example, in conditions which might normally have triggered a commence to pump arrangement, NSWIC is concerned that an alteration of rules may result in that threshold not being triggered, causing a third party impact.

It is proposed to establish a maximum daily extraction limit for water shepherding access licenses at the end of system. This would be implemented through an account rule in the water sharing plan that limits take to the sum of the maximum individual daily extraction limits of the CEW license held in a specific class in the Barwon-Darling minus any extraction by those licenses. Is this appropriate?

NSWIC harbours concerns in respect of concentrating extraction to the lower end of the system. It is widely acknowledged that further conveyance water is required to concentrate extractions further downstream. Whilst recognising that such a concern is more appropriate to the regulated streams contributing to the Darling (and considered later herein), NSWIC believes that work to understand this impact should be completed and analysed prior to a determination being made.

It is proposed to establish dealing rules to enable water shepherding to the end of a NSW tributary (regulated or unregulated) including shepherding from a Queensland tributary (regulated or unregulated). Are the proposed dealing rules for each kind of tributary appropriate?

As above, NSWIC is concerned at the implications for loss accounts within tributaries as extraction is concentrated to the end of the system. We submit that analysis of that impact must be completed and made public for comment prior to any such system being implemented. Failure to do so will be an invitation to unacceptable third party impact.

NSWIC notes that specific local issues may arise in each system. Our Members reserve the individual right to make submissions in that respect.

It is proposed to establish shepherding loss reduction factors for Queensland shepherded water through NSW unregulated tributaries, and for NSW unregulated tributaries. Are these factors appropriate?

NSWIC harbours legitimate concerns in respect of water to be shepherded from Queensland. We urge the NSW Government to seriously consider the prospect of Queensland "gifting" environmental water to the Commonwealth as a contribution to SDL reductions that would in normal circumstances have simply flowed into NSW. Accepting such gifting arrangements through the method of shepherding would inevitably undermine the resource pool available to NSW and cause adverse impacts for all classes of

entitlement holder and planned environmental water. We do not believe that a loss factor regime can account for such circumstances

NSWIC notes that specific local issues may arise in each system. Our Members reserve the individual right to make submissions in that respect.

It is proposed to establish a fixed period for access for shepherded flows at the end of a tributary, including the end of a NSW unregulated tributary, from the Queensland Border River into the Barwon Darling, and at the end of the Barwon-Darling for shepherding of tributary water downstream. Are these fixed period of access appropriate?

NSWIC acknowledges that the fixed period proposal is to ensure that shepherded water is taken at the time it would be likely to pass the new access point and hence concurs with the proposal subject to submissions opposing shepherding *per se*.

It is proposed to establish access rules for shepherded allocations based on a parent license maximum daily extraction limits and commence to pump thresholds. (i) Is commence to pump thresholds based on the parent licence's reliability of access appropriate at the end of a NSW unregulated tributary, for shepherding of water from a NSW or Queensland unregulated tributary? (ii) Is the use of A class commence to pump access conditions appropriate to enable the shepherding of tributary water downstream of the Barwon-Darling?

NSWIC notes that a number of its Members will have specific knowledge of individual systems and urges NOW to consider their submissions closely.

More generally, NSWIC submits that commence to pump rules may vary across portions of individual systems. We submit that commence to pump rules for any entitlement must be based on its extraction point, not its point of origin. In the event that shepherded water is to be moved from one set of commence to pump rules where the parent entitlement is held, it must only be "extracted" based on the commence to pump rules that apply to the section where it is "extracted" (likely end of system in most cases).

Do you think the proposes access rules will protect the interests of existing water users. If not, do you have any suggestions for other protection measures that could be implemented?

NSWIC remains extremely concerned at the possibility of third party impacts. In the event that, despite clear industry objection, both the Commonwealth and NSW Governments breach their commitment not to change entitlement characteristics, NSWIC will require that the risk assignment principles of the *Water Act* and Basin Plan apply.

Do you agree with the recognition of shepherded water in the Menindee Lakes?

NSWIC notes that the agreement of State Governments would be required as we understand a series of amendments will be required to the Murray-Darling Basin Agreement. We note that we will be asking those Governments to ensure that the

Commonwealth and NSW Governments are not provided license to breach clear commitments to maintain the characteristics of entitlements.

In the event that a shepherding or trading regime is implemented, it will clearly need to be recognised and quarantined in the Menindee Lakes. Storage loss factors must be applied during the term of its storage and it must have no third party impact by being the first to spill.

Do you think the preferred option for recognising CEW in MLS is appropriate? Is there an alternative approach?

NSWIC is concerned that the vast policy rearrangements for the Murray-Darling Basin are being conducted in a series of vacuums. No analysis is provided in the draft arrangements of implications should various options for the Menindee system be pursued. NSWIC will make no submissions on the appropriateness or otherwise whilst external factors remains variable.

Do you think water should be able to be shepherded from the Barwon-Darling water source to the Lower Darling water source when there is no airspace available in MLS?

NSWIC submits that proposals to limit the storage capacity of the Menindee System, which we understand is the preference of the Commonwealth, will make this an increasingly important question. We submit that modelling of third party impacts in the event that Menindee is significantly downsized must be completed and publicised prior to final opinions being sought on this point.

Do you believe that shepherding water into Menindee Lakes should be suspended at specific times to ensure that there are no adverse third party impacts?

Yes.

Which option do you prefer for identifying the suspension/limitation triggers for shepherding? Why? Alternatively, are there other options?

NSWIC does not support changes to the current management thresholds for Menindee. We believe that 480 gegalitres and falling is an appropriate threshold that should be applied when a trading system open to all users is established.

Do you think it appropriate to provide access to the suspended MLS shepherding account during a period of suspension to enable shepherded CEW to be made available for critical environmental needs to avert or alleviate an environmental emergency?

NSWIC fundamentally disagrees with this arrangement. The threshold is set to take account of times when the system prepares to enter emergency management procedures. Significant bodies of rules, regulations and legislation covers such eventuality, including the ability for planned water to be directed to environmental emergencies. NSWIC will not

support access to suspended arrangements, noting the reasons they were suspended in the first instance.

Is it appropriate that shepherded CEW be recognised downstream of the Lower Darling Regulated River when periods of special account apply?

NSWIC submits that recognition of one class of entitlement over another in periods of special accounting would further breach the fundamental commitment not to change entitlement characteristics. We therefore oppose it.

Do you think that using a trading framework to shepherd water downstream of the Menindee Lakes is appropriate?

NSWIC has made substantive submissions elsewhere in this document that answer this question. In short, a trading framework that discriminates on the basis of user class is inappropriate as it breach commitments and the Water Trading Rules.

Do you believe that water should be permitted to be shepherded to water sources in downstream jurisdictions?

NSWIC submits that a trading regime should be implemented to all users such that transfer is universally available both up and downstream.

We remain unconvinced that the current proposal will prohibit consumptive use downstream.

It is proposed to apply losses associated with holding the shepherded water in an account in Menindee and in delivering (sic) this water downstream of the Menindee Lakes. When should they be applied and what should be considered?

Submissions in respect of this question are elsewhere in this document.

Do you agree with the proposed auditing, reporting and review framework?

NSWIC notes the admission of the process that it is "novel and complex". Whilst recognising the necessity for regular and thorough audit, reporting and review processes, NSWIC does not support a process that breaches fundamental commitments and the Water Trading Rules in the first instance.

What else should be considered to ensure that any adverse third party impacts that may occur as a result of the implementation of water shepherding are identified and addressed?

It is this seemingly innocuous question at the end of the submission template that concerns NSWIC the most. The phrase "as a result of the implementation of water

shepherding" suggests that it is a fait accompli. NSWIC does not accept the current proposal and will engage in activity to ensure that it *is not* implemented. It is incumbent upon interest groups such as ours to ensure that fundamental commitments are not breached as a matter of expediency.

In any regime that is implemented, NSWIC will insist that the risk assignment framework laid out in the *Water Act* and Basin Plan be applicable.

ENDS

WATER SHEPHERDING POLICY

100226

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Introduction

NSW Irrigators' Council (NSWIC) represents more than 12,000 irrigation farmers across NSW. These irrigators are on regulated, unregulated and groundwater systems. Our Members include valley water user associations, food and fibre groups, irrigation corporations and commodity groups from the rice, cotton, dairy and horticultural industries.

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Executive Summary

Water shepherding involves the movement of parcels of water through unregulated systems to the benefit of a single user. The potential introduction of water shepherding is of significant interest to NSWIC.

Protecting a parcel of water for delivery to another extraction point without affecting other users is both nigh impossible and, if only available to environmental users, will fundamentally alter the characteristics of those entitlements.

NSWIC has long maintained – and the Commonwealth have provided commitments that – the characteristics of entitlements will not alter when purchased for environmental use⁶.

This policy document was created to ensure stakeholders are aware of the details involved in water shepherding and the potential consequences of such action. It was developed in response to negotiations between the State of NSW and the Commonwealth agreed in 2009 and continue in 2010⁷.

NSWIC believes that shepherding is inappropriate as it will advantage one class of user over another and potentially result in disadvantages to some users. NSWIC recognises the need for water to move from unregulated to regulated systems as part of sustainability measures Basin-wide. We believe that this will be best accommodated by developed a trading system, if possible, within unregulated systems and between unregulated and regulated systems that all users can access.

⁶ DEWHA – Review of the 2007-08 Water Entitlement Purchases – section 1.4.2.

DWE Proposal to enable environmental water entitlements acquired in the Darling River at Toorale Station, to be diverted downstream of the Menindee Lakes – March 2009 (page 9).

DEWHA – Commonwealth Environmental Water Holder 2009-10 Business Plan

Water Act 2007 – Schedule 3 – Basin water market and trading objectives and principles

⁷ MoU in relation to water for the environment signed 22 Sept 09 The Honourable Julia Gillard MP (Acting PM at the time) and 23 Sept 09 The Honourable Nathan Rees MP

Background

NSWIC expressed concern when a “trial” shepherding arrangement was agreed to by the NSW Office of Water (NOW) (Department of Water and Energy at the time) and the Commonwealth to move unregulated water from Toorale in the Northern Darling to South Australia for environmental purposes in 2009.

The NSW and Commonwealth Governments have now entered into a Memorandum of Understanding (MoU) in relation to water for the environment to negotiate a bilateral agreement for consideration by Ministers which includes a section on shepherding of environmental water.

Toorale Shepherding Details

The Toorale arrangement involved the issuing of a “zero entitlement share Water Access Licence” in the NSW Murray water source. This licence meant it had no access to general or high security allocation but instead had an amount of water (11,400 ML) credited to it. This volume was calculated on assumptions as to what volume Toorale would have extracted in the operating conditions that prevailed prior to the Commonwealth purchase of the property. NOW then facilitated delivery of the water (minus calculated and later readjusted system losses) for environmental purposes in the Murray Valley or transfer a designated volume as determined by the Commonwealth Environmental Water Holder (CEWH).⁸

This event was identified as a test and was only possible due to a range of localised and unique factors, including:

- no active licences located between Toorale and the Menindee Lakes; and
- the ability for NOW to control the release from Menindee Lakes so as not to trigger licences between Menindee and the NSW – VIC border.

The unique conditions which allowed this shepherding event to take place still required certain special arrangements to complete it. Of note is the issuing of a zero share licence in a system which is variously recognised as “over allocated” or at full allocation and the exclusion of the water that entered the Menindee system from the interstate water sharing agreement.

Although the process appears to have been accurately implemented, the concern is the precedent that this has now set. If water from Queensland was to be sent through NSW for delivery to South Australia it would have to comply with WSP through the areas it passed. A shepherding arrangement such as the one for Toorale would bypass these regulations and therefore affect entitlement holders in each area.

Flow Rate Thresholds

The nature of an unregulated river system is the lack of structures to control the river flow. WAL holders access their entitlement when certain flow rates (water quantum or river

⁸ Information from DWE Proposal to enable environmental water entitlements acquired in the Darling River at Toorale Station, to be diverted downstream of the Menindee Lakes – March 2009.

height) are met. Water is then extracted and used immediately or stored in on-farm in dams until needed.

Flow-rate thresholds are set at various levels in unregulated rivers depending on the river system and the location of the entitlement on it. WAL holders have a specific maximum daily volume allowed or possibly a maximum storage volume limit⁹. In some systems there are multiple thresholds on an individual licence, each threshold specifying a different volume and commencement threshold depending on the levels. Announcements are made daily when an event occurs.

Due to the irregularity of these events, a water shepherding arrangement with sufficient volume could trigger such threshold levels. The arrangements required to then protect this water from extraction would be immense and must necessarily have third party impacts.

Memorandum of Understanding

A MoU was signed between NSW and the Commonwealth Government and has agreed to the following¹⁰:

31. The parties agree that the benefits of investing in water for the environment can only be fully realised if water rights can be used in an optimal way to meet priority needs.

32. To implement the commitment made by their respective water ministers to negotiate a bilateral agreement to ensure that all water for the environment can be protected from access by downstream consumptive users, the Commonwealth and New South Wales agree that:

- a. A joint taskforce comprising officials from NSW and the Commonwealth, funded by the Commonwealth, will develop a draft bilateral agreement for consideration by Ministers by 30 November, which provides for water shepherding in NSW.
- b. The bilateral agreement will establish principles for water shepherding and its implementation including:
 - i. Scope, terms of reference and resourcing for the ongoing work of the joint task force.
 - ii. Provisions for shepherding throughout NSW and from the Queensland border, for environmental water held by the Commonwealth;
- c. The objective of the agreement is to optimise the use of all water for the environment, to provide the capacity to deliver water to high priority environmental assets, and, in the case of in-stream environmental watering, to provide protection for environmental flows to pass through the system as far as transmission losses allow.
- d. NSW undertakes to implement the agreed water shepherding strategy subject to;

⁹ Flood Plain Harvesting Licenses under development by NSW Government.

¹⁰ MoU in relation to water for the environment signed 22 Sept 09 The Honourable Julia Gillard MP (Acting PM at the time) and 23 Sept 09 The Honourable Nathan Rees MP

- i. Commonwealth funding of costs associated with implementation (including costs arising from modelling, monitoring, operational, licensing or compliance issues), in excess of those incurred by NSW in meeting its statutory obligation to manage water in NSW; and implementing existing commitments under the NWI and the Intergovernmental Agreement on Murray-Darling Basin Reform
 - ii. Entitlements and allocations held by water users in NSW will not be enhanced nor diminished as a result of environmental watering actions and shepherding for environmental watering.
- e. In the period before permanent arrangements are agreed:
 - i. NSW will endeavour to shepherd Commonwealth holdings for environmental watering acquired by purchase or investment in infrastructure by the Commonwealth; and
 - ii. The Commonwealth will fund the costs associated with this shepherding (including costs arising from modelling, monitoring, operational, licensing or compliance issues), in excess of those incurred by NSW in meeting its statutory obligations to manage water in NSW; and implementing existing commitments under the NWI and the Intergovernmental Agreement on Murray-Darling Basin Reform.

At the time of writing no bilateral agreements are in place.

Conclusion

We understand that water purchased for the environment needs to be moved to assets which will be identified in the Basin Plan. We cannot agree with arrangements that impact on other entitlement holders and changes the characteristics of a licence.

Any water shepherding arrangements that are applicable only on the basis of whom the holder is, is fundamentally a change in the characteristics. The ACCC Water Trading Rules (draft advice)¹¹ won't allow negative discrimination based on the identity of the entitlement holder, so it would be improper for positive discrimination based on the holder to be mandated.

NSWIC may not oppose shepherding or, more specifically, trade within unregulated and between unregulated and regulated systems, if two preconditions are met:

1. It is available to all holders; and
2. There is no negative impact on any third party.

¹¹ Water trading rules draft advice – <http://www.accc.gov.au/content/index.phtml/itemId/906693>