

# Submission

in response to the

## First Biennial Assessment of the National Water Initiative

prepared by

**Environment Defenders Office (Victoria) Ltd**  
**28 February 2007**

## Introduction

1. This submission is prepared by the Environment Defenders Office (Victoria) Ltd (“EDO”) in response to the call for public submissions for the First Biennial Assessment of the National Water Initiative. Our comments are restricted to the Victorian Government’s implementation of the National Water Initiative (“NWI”) in Victoria.
2. The EDO is a not-for-profit community legal centre specialising in environmental law. We have worked closely with environment groups and particularly Environment Victoria in the area of water law reform and we have been actively involved in preparing submissions and participating in policy and law reform debates with respect to important policy initiatives such as the Victorian Water White Paper “Our Water, Our Future”.
3. Our submission focuses on both *Victoria’s NWI Implementation Plan* and the actual performance of this plan, focusing on:
  - a. Water access entitlements and planning framework.
  - b. Water markets and trading.
  - c. Integrated management of water for environmental and other public benefit outcomes.
  - d. Water resource accounting.
4. While extensive reform of the *Water Act 1989 (Victoria)* (“the Water Act”) have occurred, we consider that some elements of the NWI have not been translated fully into the Victorian legal framework. Even with changes to the legal framework for water planning and management of environmental water, recent actions highlight concerns with respect to the implementation of these changes.

## Planning Frameworks

5. Amendments to the Water Act have established three water planning mechanisms: Sustainable Water Strategies, Long Term Water Resource Assessments and Management Plans for Water Supply Protection Areas. Whether these mechanisms will ultimately meet the commitments contained in the NWI will depend on their implementation. The only experience with

implementation to date is with the first of Sustainable Water Strategy prepared for the Central Region and this is discussed further below.

6. Even without more experience with implementation, however, we consider that there are some issues with respect to the adequacy of the legal frameworks that have been established and these issues are discussed further below.
7. An overriding concern is that the reforms to legislation to introduce planning mechanisms have proceeded at the same time as legislative reforms given statutory recognition to existing bulk entitlements and consumptive rights generally. This means that the use of planning mechanisms to address over allocation is significantly circumscribed as the only options available for returning water stressed river systems is through efficiency gains elsewhere in the system.

### ***Management Plans***

8. Under the Water Act, the Minister must develop management plans for declared Water Supply Protection Areas. Declaration of a Water Supply Protection Area is at the discretion of the Minister and the Water Act does not prescribe environmental conditions that should trigger such a declaration to be made.
9. The composition of consultative committees for the preparation of draft management plans and the review following long term water resource assessments, denies a fair representation of environmental interests. While the Water Act states that all relevant interests are to be fairly represented on the committee, it also requires that half the committee must consist of owners or occupiers of the land. The EDO submits that scientific and ecological interests should be at least equally represented, and that there should be no requirement for half the committee members to be owners or occupiers of the land.

## ***Sustainable water strategies***

10. The Water Act does not prescribe mandatory time frames for the preparation of an initial sustainable water strategy. The *Victorian Implementation Plan* indicates that Strategies will be prepared on a region by region basis over a 10 year period. This time frame is too long and fails to adequately respond to the immediate need to address over allocation of water resources and the needs of stressed river systems.
11. Other issues with the legal framework for Sustainable Water Strategies include:
- a. The Water Act does not specify the area or region that each Sustainable Water Strategy is to cover.
  - b. The Water Act does not prescribe any triggers or mandatory timeframes for the revision of Sustainable Water Strategy other than:
    - i. The Minister must review the sustainable water strategy “at the end of 10 years following the endorsement of the strategy”<sup>1</sup>; or
    - ii. If the findings of a long term water resources assessment “has any impact on the strategy.”<sup>2</sup> It is noted that the first long term water resources assessment will not commence until 2018 and will not be completed until 2021.
12. Despite the intention that the Central Region Sustainable Water Strategy be the basis for water planning for the central region, the Victorian Government subsequently announced their intention to pipe water from the Goulburn-Murray system to Ballarat. This proposal is not included in the Central Region Sustainable Water Strategy. The revised legislation does not require water / river projects to be commissioned in accordance with the management mechanisms under the Water Act. As a result there is no legal requirement for individual projects to be subjected to the legislative requirements and considerations as part of a plan or strategy.

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<sup>1</sup> s221(1)(b) *Water Act 1989 (Victoria)*

<sup>2</sup> s221(1)(a) *Water Act 1989 (Victoria)*

## ***Sustainable Water Strategies in practice - the Central Region Sustainable Water Strategy***

13. The development of the Central Region Sustainable Water Strategy highlights some of the concerns about the implementation of water planning mechanisms. While the process of release of a draft strategy and the invitation of comments was reasonably thorough, the process also raised concerns about the ability of Sustainable Water Strategies as a planning mechanism to address allocation issues and to adequately respond to scientific information about the needs of stressed rivers.
14. For example, the Central Region Sustainable Water Strategy itself acknowledges, the following rivers' environmental flow allocations do not meet the scientifically recommended minimum flow for ecological sustainability:
  - a. Werribee.
  - b. Marabou.
  - c. Maribyrnong.
  - d. Thomas / Macalister.
15. The development of the Central Region Sustainable Water Strategy has been analysed by Environment Victoria in their paper *Managed Decline: The Victorian Government's Commitment to Melbourne's Rivers*. Their assessment raises concerns about the method used to account for the return of water to rivers as nominated in the Strategy.
16. Environment Victoria concluded that the Yarra River will have no net gain for increased flows under the Central Region Sustainable Water Strategy once water is excluded that is already allocated, temporary in nature, forming an existing flow or acquired from another river or aquifer. The increased environmental flows for the Werribee, Marabou, Maribyrnong and Thomson / Macalister Rivers also fall significantly short of the targets outlined in the Central Region Sustainable Water Strategy. It is obviously of concern and inconsistent with the intent of the NWI if water planning mechanisms such as Sustainable Water Strategies in Victoria do not result in a meaningful attempt to address issues of over allocation and the needs of stressed rivers.

## ***Long Term Water Resources Assessments***

17. The Water Act requires that an expert assessment of the State's water resources be made at 15-year intervals to assist in determining whether the risks of long term decline in inflows are to be shared by the EWR and consumptive entitlement holders. While these provisions allow for a degree of flexibility in river management, the time periods must be considered in context of other amendments to the Water Act, including that:
- a. With the exception of the across the board reduction of access to lower reliability sales water, reforms have recognised existing entitlements and have occurred prior to the sustainable water strategies water planning process;
  - b. Any future qualification of these entitlements will only occur after a long term water resource assessment the first of which will not commence until 2018 and will not be completed until 2021.
18. Water Act requires that the Minister must review and determine what action is required to be taken if a long term water assessment indicates a decline in surface water. In doing so the Minister is to have regard to "any relevant social, economic and environmental matters."<sup>3</sup> The legislation does not provide any indication of the weight and priority that should be given to this range of considerations and competing interest. .

## ***The Environmental Water Reserve***

19. Clause 35 of the NWI states that that water that is provided for by the States and territories to meet the environmental outcomes defined within water plans is to be given statutory recognition and have the same degree of security as water access entitlements for consumptive use, and be fully accounted for.
20. Amendments to the Water Act in 2005 introduced mechanisms for the statutory recognition of water set aside for the environment in the form of the Environmental Water Reserve ("EWR"). The EWR is made up of separate elements, the character of which makes it difficult to compare with the nature and security of entitlements of other water users.

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<sup>3</sup> s 22P *The Water Act 1989 (Victoria)*

21. The EWR provides a framework that covers water that has already been set aside for the environment in the form of conditions on consumptive rights (bulk entitlements or extraction licences) or in the form of specific allocations (bulk entitlements allocated for environmental purposes). The EWR is defined by the Water Act to include both water that is specifically set aside for the environment in environmental entitlements and water that is provided to the environment as a result of conditions imposed on licenses and bulk entitlements.
  
22. The allocation of additional water to the EWR is subject to the limitations of Sustainable Water Strategies outlined above. The legislative reforms do not of themselves secure any additional water for the environment. For example, the Act does not require water not allocated to consumptive uses to be treated as part of the EWR, but rather leaves it available to be dealt with by the ministerial discretion granted by the Water Act.
  
23. The NWI requires that the risks of changes in water shares arising from future changes to the amount of water available for consumption be clearly assigned. Within Victoria, the amount of water available in any particular year is defined by a set of access rules to inflows, storage capacity, release capacity and obligations to provide passing flows and volumetric limits together with rules about how to calculate the seasonal allocations for entitlement holders. These rules are contained in the bulk water entitlements for our regulated systems.
  
24. The detail of the specification of components of the EWR is important in considering the relative security of environmental water versus water for consumptive purposes. For example, in the Goulburn system, the share of the total resource between water users and the environment is based on the past 100 years of stream flow and climate data. However, modelling shows the split may not stay the same under all conditions. For example, if inflows were to undergo a long-term decline of 20%, modelling indicates that the environment's share of the smaller total drops from 43% to 37%. The environment has some minimum releases from storages, which are insensitive to changes in inflows, however much of its water comes as spills from storages, which would be significantly reduced if inflows to storages declined to deal with the effects.

## ***The Environmental Water Reserve in practice***

25. Recent experience with the management of environmental water in the Wimmera River, at Hattah Lakes and in the Goulburn system raise concerns about the security of environmental water allocations and the lack of accountability for the delivery of the public benefits these allocations are intended to provide.

### *Wimmera River*

26. On 13 September 2006 the government announced the cancellation of a planned 3,000 mega litres of environmental flow for the Wimmera River.<sup>4</sup> A press release and Hansard transcript appear to be the only source of publicly accessible information on the halt of the Wimmera River environmental flow. The Minister, in his address to parliament on 13 September 2006<sup>5</sup>, indicated that Wimmera's environmental flow was halted for the purpose of increasing the availability of water for emergencies, specifically fire fighting and algal blooms.
27. The Bulk Entitlement (Wimmera and Glenelg Rivers – Flora and Fauna) Conservation Order 2004<sup>6</sup> conditions only allow for all or part of the Minister for Environment's seasonal allocation to be carried over in limited circumstances none of which correspond with the reasons provided.

### *Hattah Lakes*

28. The Intergovernmental Agreement<sup>7</sup> on addressing water over-allocation and achieving environmental objectives in the Murray-Darling Basin has given rise

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<sup>4</sup> Bardon, Jane "Government Halts Wimmera Environmental Flows", ABC Rural, 13 September 2006

<sup>5</sup> Parliament of Victoria, Legislative Assembly Parliamentary Debates, Questions Without Notice, 13 September 2006, 3250

<sup>6</sup> G24, *Victorian Government Gazette*, 10 June 2004, 1602

<sup>7</sup> Intergovernmental Agreement on Addressing Water Over allocation and Achieving Environmental Objectives in the Murray-Darling Basin

to a number of environmental assessment and management plans governing the Murray-Darling Basin.

29. In accordance with the Water Act, the Murray-Darling Bulk Entitlement states that:

- a. *"Orders for the Murray also constrain the managers of water in that an Authority cannot modify the management of wetlands and waterways, or make water savings unless it has prepared an environmental assessment statement. The statement must be to the satisfaction of the Minister for the Environment."*<sup>8</sup>

30. On 12 November 2006, the Department of Sustainability and Environment ceased the release of the Hattah Lake's environmental flow to "redirect the water flow for human consumption"<sup>9</sup>. The flow was later resumed.

#### *Goulburn River*

31. The Victorian Government's decision to sell 7 gig litres of water to Goulburn irrigators on 16 January 2007<sup>10</sup> including water that had been set aside for environmental flows also raises concerns. However, unlike the cases of the Hattah Lakes and Wimmera River, in this case, the government announced they would sell the environmental flow to irrigators. Consistent with principles contained in the NWI, the sale of environmental water is provided for in the Water Act, however it is not clear whether the sale has occurred pursuant to these provisions and if so whether the criteria that the Act prescribes in respect of such a sale have been met.

32. While there is a lack of clarity about precisely what has happened to environmental water allocations in each of the above instances, it is of concern that apparently secures environmental allocations and plans for those allocations appear to be subject to variation in response political pressure. In our submission, security for environmental allocations in accordance with the principles in the NWI requires not only a legal framework for the entitlement but greater accountability with respect to the management of that entitlement.

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<sup>8</sup> MDBC / The Living Murray, Hattah Lakes - Significant Ecological Asset - Asset Environmental Management Plan for 2005/2006

<sup>9</sup> "Greens Stick to their Gums Over Water", Sunday Age 12 November 2006

<sup>10</sup> "Vic Govt gambles away water-quality insurance policy", Environment Victoria Media Release, January 16 2007

### ***Water Resources Accounting and management of the EWR***

33. The NWI requires that independent and accountable environment water managers are appointed with the appropriate statutory authority and resources to effectively deliver environmental water.
34. The recent amendments to the *Catchment and Land Protection Act 1994 (Victoria)* by the *Water (Governance) Act 2006 (Victoria)*, contemplate Catchment Management Authorities assuming responsibility for the management of the EWR. However specification of the duties and responsibilities of CMAs is to be contained in a “Statement of Obligations” rather than in legislation.
35. The EDO submits that the legal accountability framework for CMAs is not sufficient in meeting the requirements of the NWI, in that:
  - a. There is a lack of accountability mechanisms other than reporting requirements.
  - b. Authorities carry out their own reporting which is not subject to independent review unless specifically requested by the Minister.
  - c. There is no statutory requirement for consultation or an option to seek review of an Authority’s decision.
  - d. Compliance is self regulated.

### ***Trading of environmental water***

36. Clause 35(iii) and 79(i) (e) of the NWI requires the regulatory framework to allow for environmental water to be traded on temporary markets at such time when it is not required to contribute towards achieving environmental outcomes.
37. While the revised legislation provides scope for the trading of environmental water, this scope is restricted, greatly limiting the implementation of NWI water trading requirements, especially in respect to environmental water.
38. The *Implementation Plan* states that Guidelines for the development of Operating Strategies for Environmental Entitlements and for Trading Environmental Entitlements by July 2006. However, it is unclear whether

these guidelines have been created, as they do not appear to be publicly available.

39. Issues arising from the current legal framework include a general lack of accountability for trading of environmental water. Additional limitations that impede the use of trading in environmental water for beneficial outcomes include:
- a. The lack of a ready means for trading between environmental and consumptive entitlements on a permanent or temporary basis and the lack of a framework for trade in derivative rights such as options.
  - b. Restrictions on the holding of water entitlements by non-water users limits the scope for water managers and private initiatives to enter the water market to recover water for the environment.
  - c. Lack of a policy commitment to the use of purchase as a mechanism for recovery of water for the environment, preference typically being given to recovery of water by means of investment in infrastructure efficiency gains.

#### ***Integrated Management for Environmental Water – ground water extraction***

40. The NWI requires that the different types of surface and groundwater systems are recognised and managed. In respect to the current recognition and management of groundwater by Victorian legislation and *Implementation Plan* and other plans and strategies, groundwater systems are still not dealt with in a comprehensive and integrated manner.
41. For example, while the *Central Region Sustainable Water Strategy Action to 2055*, recognises the relationship between ground and surface water and devises implementation strategies, it does so only for proposed and existing groundwater management areas. In respect to unincorporated groundwater areas, a commitment has been undertaken to metre bores in unincorporated areas for over 20 ML per annum.<sup>11</sup>
42. Although bore construction licences must be issued by Southern Rural Water for the construction of a bore in these areas, on enquiry to Southern Rural Water, it was indicated that no licence applications have been rejected. It is also noted that the Water Act does not require water-use licences to be issued

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<sup>11</sup> *Central Region Sustainable water strategy Action to 2055*, Chapter 2

in respect to bore use for stock and domestic purposes. As reported in the Financial Review, the issuing of domestic bore licences is on the increase, up to 40 from 12 in the last annum.<sup>12</sup> Southern Rural Water has indicated these bores are not metered.

43. It is clear from opinions of suburban bore water users reported in the media<sup>13</sup>, that this water is used to water gardens and circumvents water restrictions, with the attitude that it is an infinite source. This ill informed public perception is the result of, and indicative to, the failings of the government itself to adequately manage unincorporated groundwater and fully realise the connection between

### **Conclusion**

44. While Victoria has made significant progress in implementing the requirements of the NWI, reform of the framework for water planning for recognising environmental water allocations has proceeded on the basis of recognition of existing consumptive rights. This has significantly limited the ability of the reforms to address the legacy of over allocation of water resources and the need to return water to stressed rivers.

45. In addition, recent experience raises serious concerns about the security of environmental water allocations in Victoria. Greater attention is required to accountability for the management of environmental water allocations.

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<sup>12</sup> "Where there's a well there's a way", Mathew Dunckley, *Financial Review*, 3 February 2007, pg 6

<sup>13</sup> *ibid* and "Victorian residents start drilling for water", ABC The World Today transcript, 7 February 2007, 12:36 pm

