

Water Management Act 2000 – s 9 and the Water Management Principles

Guidance for the department's staff on s 9(1) of the *Water Management Act 2000* in relation to water sharing plan replacements and amendments.

Introduction

Background and purpose of this document

The *Water Management Act 2000* (the Act) is the key piece of legislation for the management of the state's water resources. The Act provides the legislative framework for the majority of the water management work of the NSW Department of Climate Change, Energy, the Environment and Water (the department).

All functions exercised by persons under the Act attract the duty under s 9(1). That duty requires decision makers to take all reasonable steps to promote the water management principles when exercising statutory functions under the Act.

Making, amending and giving concurrence to Water Sharing Plans (WSPs) are all functions under the Act. This Guidance supports the department's staff in assisting Ministers to discharge their duty under s 9(1) of the Act in relation to these functions. It outlines how the department's staff can consider these requirements when preparing and reviewing WSPs and provides a guide to understanding the water management principles in s 5(2) and s 5(3).

This document provides guidance only. It is not an exhaustive consideration of matters relevant to the exercise of statutory powers to make or amend WSPs, or the duty in s 9(1) and the principles in s 5(2) and s 5(3). Departmental staff need to exercise judgment in assessing what matters are relevant to the water management principles and the weighting exercise which s 9(1)(b) requires.

In addition:

- Water sharing, water management and water planning are highly complex and contested, and each decision is as unique as the water source and environment it relates to. As a result, in applying this guidance, the unique context of each proposed decision and relevant government priorities must be considered.

- The water management principles in the Act reflect separate and sometimes competing considerations. This guidance does not attempt to dictate the ‘right’ balance between competing principles.

Objects and principles of the *Water Management Act 2000*

Objects

The objects of the Act are set out in s 3. The overarching object is to provide for the sustainable and integrated management of water sources in NSW, for the benefit of both present and future generations.

The specific objects are:

- a) to apply the principles of ecologically sustainable development, and
- b) to protect, enhance and restore water sources, their associated ecosystems, ecological processes and biological diversity and their water quality, and
- c) to recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water, including –
 - i. benefits to the environment, and
 - ii. benefits to urban communities, agriculture, fisheries, industry and recreation, and
 - iii. benefits to culture and heritage, and
 - iv. benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water,
- d) to recognise the role of the community, as a partner with government, in resolving issues relating to the management of water sources,
- e) to provide for the orderly, efficient and equitable sharing of water from water sources,
- f) to integrate the management of water sources with the management of other aspects of the environment, including the land, its soil, its native vegetation and its native fauna,
- g) to encourage the sharing of responsibility for the sustainable and efficient use of water between the Government and water users,
- h) to encourage best practice in the management and use of water.

Duty when exercising functions

Section 9(1) of the Act provides:

- 1) It is the duty of all persons exercising functions under this Act
 - a) to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and
 - b) as between the principles for water sharing set out in section 5(3), to give priority to those principles in the order in which they are set out in that subsection.

This duty only applies to persons exercising a function under the Act – this includes the Minister for Water, the Minister for the Environment, and officials who have been conferred with or delegated a function.

In relation to WSPs, the functions of the Minister for Water include making plans (s 41 or s 50), amending or repealing them (s 45), consolidating them (s 45A) and suspending them during severe water shortages (s 49A) or, in the case of plans within the Murray-Darling Basin, during extreme events (s 49B). The department's Water Group develops WSPs, with input from relevant partner agencies, for Ministerial approval.

The functions of the Minister for the Environment include giving concurrence to making (s 41(2) or s50(3)), amending (s 45(3)) and suspending (s 49A(2) / 49B(2)) WSPs.

Water Management Principles

Section 5 of the Act establishes water management principles. The **general principles** (section 5(2)) are as follows:

- a) water sources, floodplains and dependent ecosystems (including groundwater and wetlands) should be protected and restored and, where possible, land should not be degraded, and
- b) habitats, animals and plants that benefit from water or are potentially affected by managed activities should be protected and (in the case of habitats) restored, and
- c) the water quality of all water sources should be protected and, wherever possible, enhanced, and
- d) the cumulative impacts of water management licences and approvals and other activities on water sources and their dependent ecosystems, should be considered and minimised, and

- e) geographical and other features of Aboriginal significance should be protected, and
- f) geographical and other features of major cultural, heritage or spiritual significance should be protected, and
- g) the social and economic benefits to the community should be maximised, and
- h) the principles of adaptive management should be applied, which should be responsive to monitoring and improvements in understanding of ecological water requirements.

There are also specific principles that relate to water sharing (s 5(3)). The water sharing principles (section 5(3)) are:

- a) sharing of water from a water source must protect the water source and its dependent ecosystems, and
- b) sharing of water from a water source must protect basic landholder rights, and
- c) sharing or extraction of water under any other right must not prejudice the principles set out in paragraphs (a) and (b).

General requirements applying to administrative decision making under the Act

When Ministers exercise a function under the Act they must:

- a) consider all mandatory relevant considerations with respect to the exercise of a particular function (in any order). A mandatory relevant consideration is any matter which the Act expressly or impliedly requires the Minister to consider; and
- b) make a decision which is not legally unreasonable or irrational and which otherwise complies with the requirements of administrative law.

In addition, the Ministers:

- a) must not have regard to any matter which the statute expressly or impliedly prohibits them from considering (referred to as an “irrelevant consideration”)
- b) may take into account any other matters which they consider to be relevant. That is, any matter which is not a mandatory “relevant consideration” or an “irrelevant consideration” is ordinarily a matter which the Minister is permitted, but not required, to take into account in making a decision.

Decision-making in relation to water sharing

When a decision is made in relation to water sharing, as is the case with the making or amendment of a WSP or concurrence to a WSP or WSP amendment, in addition to the usual requirements which apply to decision making, s 9(1) also requires Ministers to:

- a) take all reasonable steps to exercise their functions in accordance with, and so as to promote, the water management principles (that is, all the principles in s 5(2), the principles in s 5(3), and those in the balance of s 5, to the extent relevant); and
- b) as between the principles set out in s 5(3), give priority to those principles (that is, assign relative weight to them) in the order in which they appear.

When doing so, it should be noted that, although s 5(3)(c) is referred to as a ‘principle’, it is a provision which is in its own terms concerned with the weighting of different priorities. It is best understood as indicating that the activity referred to in s 5(3)(c) (being the sharing or extraction of water under rights other than basic landholder rights) must not prejudice, and must be given lesser weight, than the principles in s 5(3)(a) and (b).

To the extent that principles in s 5(2) overlap with those in s 5(3), those overlapping aspects of the s 5(2) principles should be prioritised in accordance with the order of the s 5(3) principles with which they overlap.

Decision making processes in the Act must be observed, but do not dictate a particular decision

Lastly, and importantly, s 9(1) is directed to the decision-making process, and neither s 9(1), nor the water management principles in s 5, mandate that any particular outcome must be achieved as a result of exercising the functions under the Act. In particular, the weight given to any particular principle is a matter for the decision-maker’s discretion, although as between the principles in s 5(3) (and overlapping aspects of the principles in s 5(2)), more weight must be given to s 5(3)(a) than s 5(3)(b).

However, outcomes do of course matter and it is possible that a decision could be challenged on the basis that it can be inferred from the outcome that the Minister did not (or could not have) properly applied the process required by s 9(1). Section 9(1)(b) is intended to provide ‘guardrails’ in relation to water sharing decisions by skewing the relative weight which each Minister must give to the relevant considerations before them (in relation to a water sharing decision) with respect to the principles in s 5(3)(a) and (b). In particular, s 5(3) principles must be weighted in the order they are set out in that subsection. However, any particular decision would not be deemed invalid because of

any environmental outcome, but because the decision was not made in accordance with requirements of the Act.

Role of the department's staff

The department's staff have an important role in assisting Ministers to properly exercise their statutory functions by:

- gathering and considering the information that is relevant to the exercise of the duty in s 9 (discussed further below)
- ensuring that proposed WSPs satisfy the minimum requirements of the Act (see for example Div 2 of Part 3, Ch 2)
- briefing Ministers with reasoned recommendations that demonstrate how the recommended decision-making process complies with the requirements of the Act, including by informing Ministers how relevant water management principles have been taken into account and weighted in relation to each other
- ensuring that any briefing note regarding a WSP decision outlines a decision which is not legally unreasonable or irrational and otherwise complies with the requirements of administrative law.

It is important that any briefing note in support of a water sharing decision:

- a) identifies the mandatory relevant considerations the Ministers must consider, and
- b) provides reasoning and evidence, including specifying any information gaps, as to how those considerations may be weighted by the Ministers, particularly in relation to the section 5(3) principles.

Guidance on interpreting and applying the water management principles

The water management principles in sections 5(2) and 5(3) (which are the principles which will ordinarily be relevant to decisions concerning water sharing plans) can be loosely grouped into the following categories:

- environmental considerations
- water quality
- basic landholder rights
- cultural considerations
- social and economic considerations

- adaptive management

The guidance below provides an outline of the matters which may be relevant to the above categories of principles.

Applying these principles

All the principles set out in sections 5(2) and 5(3) must be considered in a water sharing plan decision.

Importantly, the Ministers are required to “give priority” to the principle in s 5(3)(a) over the principle in s 5(3)(b), which relates to protection of basic landholder rights. In addition, the water management principles set out in each of the subsections of s 5 are not mutually exclusive; that is, the principles in s 5(3) overlap with some of the principles in s 5(2). Where the s 5(2) and s 5(3) principles overlap, then the aspects of the s 5(2) principles that overlap with the s 5(3) principles will need to be prioritised in the same order set out in s 5(3). However, the Ministers can decide how they wish to prioritise any aspect of the s 5(2) principles that do not overlap with the s 5(3) principles.

In practice this means that the principles in s 5(3)(a) and overlapping aspects of s 5(2) principles should be given more weight than the principle in s 5(3)(b).

Environmental considerations

Relevant environmental principles

Water sharing principle

5(3)(a) Sharing of water from a water source must protect the water source and its dependent ecosystems

General principles

5(2)(a) Water sources, floodplains and dependent ecosystems (including groundwater and wetlands) should be protected and restored and, where possible, land should not be degraded

5(2)(b) Habitats, animals and plants that benefit from water or are potentially affected by managed activities should be protected and (in the case of habitats) restored

5(2)(d) The cumulative impacts of water management licences and approvals and other activities on water sources and their dependent ecosystems, should be considered and minimised

Note:

5(2)(c) – water quality and 5(2)(h) – adaptive management also overlap, to an extent, with 5(3)(a) but are covered in separate guidance sections.

Understanding these environmental principles

The above principles overlap to some extent but also contain separate and distinct considerations which should be reflected in any record of a decision regarding water sharing.

Examples of the concepts and outcomes that these principles reflect include:

- Maintaining the integrity of water sources to derive environmental and human benefits into the future. Ensuring the longevity and integrity of water sources for current and future generations also requires protecting their underlying ecosystem functions and water quality. This recognises that healthy water sources and dependent ecosystems provide ecosystem services, and if they deteriorate, so do the benefits they can provide.
- Measures to ensure the water and habitat requirements of water-dependant plant and animal populations are met to support their long-term survival and viability. This includes preventing over-extraction, reducing hydrologic stress, preventing physical damage to rivers, wetlands, floodplain habitats and aquifers.
- Selecting appropriate protective measures commensurate with the condition and environmental values of the specific water source and its dependent ecosystems.

Applying these environmental principles

What it means to ‘protect’ a water source or habitats, animals and plants will depend in part on the particular factual context. By way of general guidance, it may include taking reasonable measures to:

- prevent and/or mitigate prolonged cease-to-flow periods in rivers. While some rivers naturally cease to flow from time to time, especially during drought, the duration of cease-to-flow events is often prolonged by extractive water take in upstream water sources. This is detrimental to native aquatic biota and downstream water users
- ensure adequate flow variability over time, supporting a range of flow types (baseflows, freshes and overbank flows), and avoiding extended periods of constant flows or inundation, or extreme variability. These conditions can damage riverbanks through erosion and disrupt ecological functions in rivers and wetlands
- maintain adequate flow connectivity along rivers (longitudinal connectivity) and between river channels, adjacent wetlands and floodplains (lateral connectivity) and aquifers
- prevent excessive extraction that depletes aquifers over the long term.

Actions to restore water sources, floodplains and dependent ecosystems (s 5(2)(a)) and habitats (s 5(2)(b)) would seek to improve the health or condition of target values. Such actions should consider current state, key threatening processes and water needs of the target ecosystem or habitat.

For s 5(2)(d), “cumulative impacts” refers to the accumulated effects of water management licences and approvals and other activities over time. “Activities” is not defined in the Act but should be interpreted to include all other types of activities regulated by the Act.

Water quality

Relevant water quality principle

General principle

5(2)(c) the water quality of all water sources should be protected and, wherever possible, enhanced

Note:

There may be some overlap between this principle and the principle in s 5(3)(a) – sharing of water from a water source must protect the water source and its dependent ecosystems. The principle in s 5(3)(a) has been considered above.

Understanding this water quality principle

Protecting water quality is essential to sustaining the environmental, social, cultural and economic values that depend on healthy water systems. Clean water supports ecosystem functions and environmental assets, while also underpinning human health and wellbeing by providing safe drinking water and enabling recreation. Economically, industries such as agriculture, tourism, and fisheries depend on good water quality to operate effectively and sustainably, and water quality holds deep cultural significance for Aboriginal people.

Water quality issues can arise from multiple sources, some of which are outside the scope of WSPs, including land clearing, soil disturbance, sewage discharge, industrial and mining operations, agricultural runoff, river regulation and climate factors.

Applying this water quality principle

The Ministers must consider the principle in s 5(2)(c). Water quality can be protected in an ongoing, sustainable way through appropriate water sharing rules as well as an integrated approach to catchment management.

By way of general guidance, to address this principle, staff should, as far as practicable, identify:

- areas where water quality is likely to be of concern, based on monitoring data and/or critical incidents (such as mass fish deaths)
- opportunities to improve water quality through improvements to flow-based access rules, system operation rules, water quality allowances and prohibiting groundwater extraction near water quality threats such as contaminated sites, acid sulphate soils or saltwater interfaces.

Basic landholder rights

Relevant basic landholder rights principle

Water sharing principle

5(3)(b) Sharing of water from a water source must protect basic landholder rights

Note:

There may be some overlap of this principle with principle 5(2)(g) - the social and economic benefits to the community should be maximised.

Understanding this basic landholder rights principle

The Act permits water to be taken without a water licence or approval under ‘basic landholder rights’. There are three types of basic landholder rights:

- domestic and stock rights, which allow water to be taken and used for domestic consumption and non-intensive stock watering
- harvestable rights, which allow landholders to capture and store a proportion of rainfall runoff from their property
- native title rights, which allow native title holders to take and use water as specified in the native title determination.

Applying this basic landholder rights principle

When making a WSP, as between the principles set out in s 5(3), Ministers are required to give priority to those principles (that is, to assign relative weight to them) in the order in which they appear in s 5(3). This means that the relative weight the Minister must give to the protection of basic landholder rights is less than they must give to the principle in s 5(3)(a) of protecting the water source and its dependent ecosystems.

By way of general guidance, to address this principle, the department's staff should, as far as practicable:

- prepare and analyse estimates of water requirements to meet basic landholder rights
- review available flow data and hydrologic modelling to identify potential threats to the availability of water for basic landholder rights
- in regulated WSPs, consider operational rules such as minimum daily flows, end-of-system flows and replenishment flows which ensure the river is not “turned off” between water orders.

Cultural considerations

Relevant cultural principles

General principles

5(2)(e) Geographical and other features of Aboriginal significance should be protected

5(2)(f) Geographical and other features of major cultural, heritage or spiritual significance should be protected

Note:

There is a degree of overlap between these principles and s 5(2)(g) – concerning social and economic benefits to the community – in that these principles identify particular matters of significance which may be valued by, and bring benefits to, Aboriginal and other communities. Section 5(2)(g) is addressed below.

Understanding these cultural principles

First Nations peoples hold deep cultural, spiritual, and historical connections with Country. Water is essential to maintain this ongoing connection and to support cultural activities and the spiritual, emotional and economic wellbeing of First Nation peoples.

It is also important to preserve other features that hold cultural, historical, or spiritual value for local communities. This may include historical landmarks and heritage-listed sites.

Applying these cultural principles

The Ministers must consider the principles in s 5(2)(e) and s 5(2)(f). By way of general guidance, to address these principles, the department's staff should, as far as practicable:

- understand how WSP rules may affect cultural water use and protection of significant features (including any features identified in Long Term Water Plans or Cultural Watering Plans)
- proactively engage with First Nations communities to incorporate cultural knowledge and perspectives into WSPs
- seek to understand if any geographical or other features of major cultural, heritage or spiritual significance are affected by a WSP and if so, what steps can be taken to protect them.

Social and economic considerations

Relevant social and economic principles

General principle

5(2)(g) The social and economic benefits to the community should be maximised

Note:

There may be some overlap with the principle in s 5(3)(b) – sharing of water from a water source must protect basic landholder rights. The principle in s 5(3)(b) is considered above.

Understanding this social and economic principle

Water is the lifeblood of communities across NSW and the industries that sustain them. It plays a critical role in supporting urban, regional and rural populations and underpinning economic activity across multiple industry sectors including agriculture, tourism, mining, energy, food processing, and manufacturing.

The NSW 2040 Economic Blueprint outlines a vision for a thriving, innovative economy, and recognises secure and sustainable water supplies as essential to achieving this growth. With the state's economy projected to reach approximately \$2 trillion by 2040, two-thirds of which will come from Greater Sydney, water must continue to underpin both urban development and regional prosperity.

In regional NSW, water-dependent industries are major contributors to employment and economic stability. These industries rely not only on access to water but also on confidence in the systems that govern its availability and use.

Water sharing rules can have significant social and economic implications for communities, by determining access to water for domestic use, health and hygiene, agriculture, industry, recreation, and cultural activities.

Securing town water supply is a strategic priority for NSW.

Applying this social and economic principle

The Ministers must consider the principle in s 5(2)(g). By way of general guidance, to address this principle, the department's staff should, as far as practicable:

- identify social and economic values specific to the area of interest to fully understand the dependence communities and industries have on access to water and the impacts of potential changes to that access
- collaborate with state agencies and stakeholder organisations to collate relevant water use information and understand current and projected community and industry practices and needs relating to water access and use
- engage with subject matter experts to develop and refine multiple and collective options for consideration in developing water sharing arrangements that support maximising social and economic benefits
- assess proposed water sharing arrangements to ensure they address the driver of the risk being managed, identify concerns expressed by stakeholders, and include qualitative and quantitative assessment of both positive and negative social and economic impacts of proposed changes
- determine what change/suite of changes to water sharing arrangements optimises social and economic benefits, in the knowledge that community and industry may need time to adapt appropriately.

Adaptive management

Relevant adaptive management principle

General principle

5(2)(h) The principles of adaptive management should be applied, which should be responsive to monitoring and improvements in understanding of ecological water requirements.

Note:

There may be some overlap between this principle and the principle in s 5(3)(a) – sharing of water from a water source must protect the water source and its dependent ecosystems. The principle in s 5(3)(a) has been considered above.

Understanding this adaptive management principle

Adaptive management refers to a systematic approach for improving water management by learning from outcomes. It involves a cycle of planning, implementing, monitoring, evaluating, and adjusting strategies based on what is learned.

Applying this adaptive management principle

The Ministers must consider the principle in s 5(2)(g). By way of general guidance, to address this principle, the department's staff should, as far as practicable:

- review the best available data and science on adaptive management and apply it to the area covered by the proposed water sharing plan
- consider rules or amendment provisions that allow adjustments to WSPs within the 10-year life cycle.